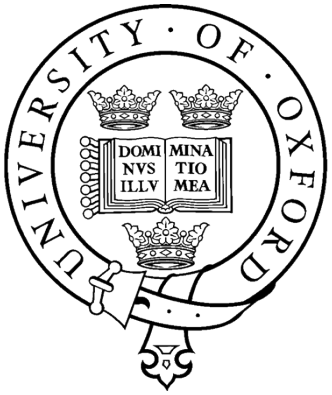
# The Architecture of Rights

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**A thesis submitted for the degree of**
**Doctor of Philosophy in Law**
**Michaelmas 2015**

# ABSTRACT

This thesis concerns the various concepts of rights and philosophical accounts of them. Chapter 1 addresses some methodological issues affecting analytic legal philosophy and the philosophy of rights. Chapter 2 distinguishes between two kinds of philosophical accounts of rights: models and theories. *Models* outline the 'conceptually basic' types of rights, their differences, and their relationships with other kinds of 'normative positions' (e.g., duties, liabilities, etc.). *Theories* of rights serve two roles: first, to posit a supposed ultimate purpose for all rights; second, to provide criteria for determining what counts as 'a right' in the first place. The chapter also criticises both monistic models (ones positing only a single basic kind) for being under-inclusive and a subset of pluralistic ones (those positing several basic kinds) as over-inclusive.

Chapter 3 clarifies the concepts of rights exercise, enforcement, remedying, and vindication. Chapter 4 explains the Interest-Will Theories of rights debate, while Chapter 5 argues that its constituents are irredeemably flawed, unnecessary, and under-inclusive. Chapter 6 further analyses the concept of rights enforceability, showing why legal rights are not invariably enforceable by legal powers. It then explains why wholly unenforceable legal rights nonetheless constitute 'imperfect' or defective cases. Chapter 7 argues there are more ways to enforce legal rights than just via *powers*, elucidating two such modes: legal rights can generally be claimed or invoked using legal *liberties* in private and social circumstances. While Chapter 8 shows why it might not always be possible to make liberty-based claims or invocations of right, it also provides reasons for thinking that legal rights that cannot be enforced in these ways are also imperfect.

# ACKNOWLEDGEMENTS

This thesis was borne out of my deep puzzlement over the – often contradictory or contrary – claims of 'fundamental', 'human', or 'basic' rights that inundate this age's legal and political discourses. Is this nothing more than 'metaphysic sophistry', as Edmund Burke would say? This led me to more basic questions. What is 'a right'? What makes something a bona fide instance? What, if anything, makes rights distinctive?

I turned to the philosophy of rights for illumination. This is a rich body of literature on the (contested) concept(s) of 'a right', some related 'normative positions' (e.g., duties, liabilities, etc.), and their role in helping to structure our legal, moral, and political worlds. Like many before me, it was initially thought that this area of philosophy might prove that form informed substance; that, somehow, the structure of the concept(s) might itself delimit what can be made into rights. Alas, this is not so.

This thesis aims to contribute to, and advance, the philosophy of rights. The field is beholden not only to analytic legal philosophy and 'meta-philosophy', but also to the scholarship of extremely clever jurists and lawyers who have noted important conceptual and verbal distinctions over the centuries. It is an honour to provide a link, howsoever small, in this great chain.

The work would have been impossible without the support of a great many people. Thanks are first and foremost due to my family: Dr Seymour and Rochelle Frydrych, and my siblings Dr Paul, Karen, and Eric. My friends also went above and beyond the call of duty. I am particularly indebted to Hamish Bridges, Jonathan Ward, Jacques Schumacher, Mikolaj Barczentewicz, and Leah Trueblood for reading and editing portions of the thesis. Dr Pavlos Eleftheriadis, my DPhil supervisor, steered me in the right direction on more than one occasion, and the Law Faculty's Jurisprudence Discussion Group proved to be a wonderful source of friendship, intellectual stimulation, and critical feedback.

Thanks also to Professor PMS Hacker for opening my mind to Wittgenstein and for reading and discussing the thesis' methodology chapter. His lectures and conversations improved my understanding of what philosophy can accomplish, which in turn led to my thinking about whether there can even be any philosophical 'theories' of rights of note. Professor John Gardner opened my eyes to the problem of Sanction Theories of law, which helped reorient my thinking about rights (particularly vis-à-vis the use of the 'method of hypothetical cases'). Professors John Finnis and Tony Honoré were also very kind to indulge me in discussions about their decades-old work on rights.

It is a strange person who would seek out a thesis such as this to read in the Bodleian library. If you have any questions, feel free to message me by whatever the dominant means of letter transmission happens to be at the time you read this (email, post, etc.). If I still live it would be a pleasure to try to answer your query.

David Frydrych

דוד בן שמחה הכהן

## Tables of Statutes & Constitutional Clauses and Cases

### Statutes & Constitutional Clauses



### Cases

# Chapter 1: Down the Methodological Rabbit Hole

## § I. Introduction

This thesis concerns the concept(s) of 'a right'. It analyses different kinds of philosophical accounts of rights ('models' in Chapter 2 and 'theories' in Chapters 4 and 5), along with the concepts of rights exercise, enforcement, remedying, and vindication. There is a long tradition of philosophising about rights. Its connections to the philosophy of law and other areas of philosophy, however, have largely been neglected.[1] This chapter therefore addresses certain methodological issues that help shape, drive, and plague legal philosophy (and thus the philosophy of rights). While legal philosophers have been paying greater attention to these sorts of concerns lately, the task of even merely elucidating them remains incomplete. This chapter aims to bring to the forefront some interrelated (and equally important) problems that have either gone unaddressed, or received far less coverage thus far – especially their role *within* issues that have already been addressed. It aims to do so without delving too deep into the doctrinal commitments of particular legal theories, and without pretending that philosophy can be reduced to a determinable or enumerable set of procedures.

The chapter proceeds as follows. Section II introduces certain concepts and philosophical techniques: conceptual analysis, conceptual clarification, 'the method of hypothetical cases', and analytic definitions. Section III addresses some difficulties regarding these techniques. D concepts bear 'necessary' features? Even if they do, are the tools analytic philosophers use to identify them reliable? What is a valid counterexample's effect on a view about a concept, a theory, a proposition, or a rule, etc.? Philosophers seem to lack a shared paradigm governing the treatment of cases *qua* counterexamples: whether and when they

[1] Andrew Halpin, *Rights and Law: Analysis and Theory* (Hart Publishing 1997) at 4.

count as exception-carvers, delimiters, or falsifiers (of propositions, rules, and/or theories, and views about particular concepts/conceptions).

Continuing on with the issue of how to treat cases, Section IV presents a positive methodological claim: legal philosophers use 'central' cases in two ways, not one. However, it suggests that the basis for establishing any such hierarchy of cases is under-determined. Section V then addresses 'meta-theoretical' desiderata (i.e., norms by which to construct, evaluate, and compare both theories and 'rationally reconstructed'/'clarified' concepts), questioning how useful their invocation by legal philosophers to date has really been – for *legal* philosophical purposes at any rate. Such desiderata have been utilised in the context of a debate between Legal Positivists and 'Normativist' (i.e., Interpretivist and Natural Law) in their debate over whether concept selection and (re)formation is a wholly 'normative' – in the sense of morally or politically evaluative – affair. Section VI provides some reasons for doubting that that it is so, and also challenges the soundness of certain 'Normativist' methodological practices. Section VII then presents the Socratic paradox of inquiry as it applies to rights. Two examples show how relying selective criteria for determining what counts as 'a right' might skew a philosophical account of rights.

Section VIII then presents some rudimentary claims about larger methodological matters. It addresses the indispensability of 'intuition pumping', and ordinary or technical linguistic usages, writings, and practices for philosophising – despite the lack of agreement amongst philosophers about how to 'clarify' concepts, and even if 'intuitions' are an abysmal resource. The section also offers the beginnings of a defence of the notion that concepts possess 'necessary' features. All of these may be requisite for the philosophy of rights.

## § II. Concepts, Conceptual Analysis, and Conceptual Clarification

There are basically five main schools in contemporary analytic legal philosophy, each admitting of its own variants: Interpretivism, Socio-Legal Pluralism, Legal Positivism, Naturalism, and Natural Law. For this chapter's purposes, the first and fifth will be grouped under the common heading of 'Normativism'. This thesis is not the place to comprehensively explain each school, but some basic notions will be outlined below.

The schools all face the following methodological issues. First, what is the subject matter of legal philosophical inquiry: (A) things/phenomena; (B) concepts of those things; or (C) both the concepts and the things? Second, when asking questions such as 'what is the concept of a right?' what is being assessed: (A) a single concept; (B) different conceptions of a concept, (C) distinct, but related concepts; or (D) mere homonyms? However, moreover, can we tell? Third, no matter what their credo (Positivist, Interpretivist, etc.), legal philosophers tend to make claims about (there being) 'necessary' or 'essential' features of either things or concepts. Do concepts or things bear necessary features, though?[2] (If there are such features, moreover, are those the only ones legal philosophy should focus on?)[3]

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[2] The terms 'essential' and 'necessary' will be used interchangeably here. However, some scholars treat essential properties as a subset of necessary ones that are specific or unique to a particular concept. See Dennis Patterson, 'Alexy on Necessity in Law and Morals' (2012) 25 Ratio Juris 47, 52 n. 8. Historically, essential or accidental properties were predicated of things, not concepts. Brian Bix, 'Raz on Necessity' (2003) 22 Law and Philosophy 537, 541 n 17. In contemporary metaphysics, something's being 'necessary' means that it invariably obtains, it 'exists in all possible worlds'. Its non-existence, in other words, is deemed to be inconceivable.

By contrast, many legal philosophers hold that the concepts in their area of inquiry (law, courts, rights, etc.) are historically or culturally contingent constructs, ones that can evolve over time. So to deem a feature of a legal concept as being 'necessary', as opposed to 'contingent', is to say that it is indispensable to a historically contingent concept. In other words, it is essential to the concept, even though the concept is itself inessential, as it may be tied to a particular community and/or era. *Id*. at 549. The idea of contingent-concepts-bearing-necessary-features will be addressed in greater detail in § VIII.

[3] See Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) at 17-19 ["Dickson (2001)"]; Michael Giudice, 'Analytic Jurisprudence and Contingency', in Maksymilian Del Mar (ed) *New Waves in Philosophy of Law* (Palgrave MacMillan 2011); (on the theoretical worth of conceptually contingent aspects of law); Frederick Schauer, 'On the Nature of the Nature of Law' (2012) 98 Archiv. für Rechts- und Sozialphilosophie 457 (on the worth of 'generics' and the statistically significant, as not all philosophising, or even most general jurisprudential work, concerns the search for a concept's necessary features).

Fourth, if legal philosophers are primarily dealing with a concept(ion), *whose* are they assessing?

It will prove helpful to understand – very roughly – how many contemporary philosophers distinguish between a phenomenon, a concept, and a term, phrase, or word. A *thing* (or, what philosophers often incorrectly treat as a synonym, a *phenomenon*) is a person, place, thing, or state of affairs. The concept of '*a concept*' is contested. The dominant philosophical view construes it to be a mental representation (of some thing, say), which involves beliefs and propositional attitudes, and which has an internal structure containing more basic representational elements. On that view, moreover, a concept can also be a cluster of beliefs constituting something. For example, there are concepts of things that do not exist, such as unicorns and witches.[4] A *word* is a symbol used in a language by which to express a concept.[5] There may be more than one word available by which to express a single concept, however. For example, 'You can't do that, it's against the law' and 'You can't do that, the legislature has prohibited it' appear to express the same concept.[6]

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[4] See Stephen Laurence and Eric Margolis, 'Concepts', Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/concepts/#ConConAna Accessed 22 December 2015. The view of concepts as beliefs generates an obvious regress problem, as the constituent 'representations' are themselves in need of explanation. *Id*.

[5] Can we have concepts without word-referents? This matters if you believe that philosophical analyses can apply to cultures or peoples beyond your own. Just because I use the term 'a right' and you use the term *Subjektive Recht* it does not follow that we are necessarily using the identical concept. Moreover, just because a community lacks a given word, it does not follow that they lack a particular concept. Take 'dimensionality' for example. A given tribal community may lack the words for 'height', 'length', etc. However, since the community appreciates that its water source is a two-hour's walk away, and that it takes about ten bear-hugs to climb a tree to get to its fruit, do the community members not have the relevant concepts of dimensions? See, e.g. Richard Dagger, 'Rights', in Terence Ball et al (eds) *Political Innovation and Conceptual Change* (CUP 1989) at 296-8.

[6] Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) at 123 ["Leiter (2007)"]. This fact might suffice to show that certain views about conceptual analysis are erroneous. For example, Andrei Marmor claims that all the meanings of a word exhaust the relevant concept. Andrei Marmor, 'Farewell to Conceptual Analysis (in Jurisprudence)', in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) at 210-1. This is false if different words, terms, or phrases refer to the same concept, e.g., if the words 'legislature' and 'law' do not

A few philosophers carve a Concept-Conception distinction. A *concept* is said to refer to a 'thin' idea or an entire field of enquiry (e.g. the concept of justice), while a *conception* refers to particular viewpoints about that concept.[7] For example, in a tradition tracing from (at least) Jeremy Bentham to Wesley Hohfeld and beyond, philosophers and jurists have argued about whether the term 'a right' refers to different concepts. Hohfeld, for example, notes at least five: claims, privileges/liberties, powers, immunities, and 'complexes' (larger constructs composed of any number of tokens of the first four more basic types).[8] There are also various *conceptions* of the kind of right that correlates with a duty ("RCTD"). Hohfeld's 'claim', for example, differs somewhat from HLA Hart's right-correlative-to-an-obligation and Joseph Raz's conception of a right.[9]

Whether understood as presenting conceptions of a concept, different concepts, or various accounts of the same concept, it is often claimed that philosophising involves

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have identical meanings, but can refer to the same concept (of law).

[7] Many philosophers deny that there are such things as different conceptions of a concept, thinking instead that people merely hold different beliefs about a concept. Andrew Halpin suggests the Concept-Conception distinction is misleading because there need not be 'a' concept to which the various conceptions are supposed to refer. Halpin, *supra* note 1 at 11.

[8] Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L.J. 16. Cf. Roscoe Pound, 'Legal Rights', in *Jurisprudence* Vol IV (West Pub Co. 1959).

[9] See Chapter 2's Appendix 2. Philosophers also debate whether RCTDs (my acronym aside) must always correlate with duties. They also dispute whether liberties, powers, and immunities are properly identified as 'rights' at all. There are also various *conceptions* of claims, liberties, powers, etc., be they deemed basic kinds of 'rights' or no. Some endorse the idea of *unilateral* liberties: you can have a liberty to do φ, but may lack the liberty not to do it. Others reject that notion because, for them, a true liberty must be *bilateral,* i.e., one must be free to do φ *and* not to do φ. Fourth, and independently of the third dispute, some philosophers hold that real liberties must be protected, at least indirectly (by another party's duty, say). Others disagree, holding instead that one has a bona fide liberty only when it is an express, special grant from some person or authority. Still other philosophers, going the other way, think a real liberty is simply marked by the absence of duties requiring one to act otherwise; for them, a bona fide liberty neither requires indirect or direct protection, nor express permission.

There is also a debate about the nature of normative powers. Do they only *alter* normative positions, or can some *preserve* the status quo? Can there be 'illegal' legal powers: powers by which to break the law? Concerning immunities, are only advantageous ones 'rights'? Are only enforceable ones 'rights'? Are they merely passive positions (marking another party's lack of power), or do they entail something more?

'conceptual clarification'. Philosophy either helps us better understand concepts, or the things/phenomena (if any) the concepts are concepts of. As words and/or concepts admit of ambiguity, vagueness, etc., many philosophers believe they can tidy up the messiness by either rendering a concept's features more perspicuous (so that the concept might be better understood), or by *replacing* the concept with a more precise one.[10] Others can then employ the philosophically refurbished concept in their philosophical, scientific, or social scientific work.[11] (Many philosophers treat 'ordinary' or 'folk' linguistic usages, patterns, or understandings as the data from which to undertake conceptual analyses.[12] Sometimes, though, the data set is restricted to technical discourses, e.g., lawyers' talk for the purposes of a legal theory).[13]

Philosophers nevertheless disagree about how to undertake this clarificatory work. One 'set' of techniques for doing so is called Conceptual Analysis. On the idea that many, if not all, concepts have internal structures, this form of analysis often explores and explains a concept via its more basic components. In other words, you decompose a concept into its

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10 E.g., Frank Jackson, 'The Role of Conceptual Analysis', in *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Clarendon Press 2000) at 38, 46-7 (certain 'intuitions' might have to be 'massaged' in order to make 'sensible adjustments' to a 'folk' concept); Natalie Stoljar, 'What Do We Want Law to Be? Philosophical Analysis and the Concept of Law', in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) at 237, citing Carnap and Quine on 'explicative definitions', which 'make more exact a vague or not quite exact concept used in every day life… or rather of replacing it by a newly constructed, more exact concept' (Rudolph Carnap, *Meaning and Necessity: A Study in Semantics and Modal Logic* (Chicago University Press 1956) at 7-8), or 'improve upon the defiendum by refining or supplementing its meaning' (WVO Quine, 'Main Trends in Recent Philosophy: Two Dogmas of Empiricism' (1951) 60 The Philosophical Rev. 20, 25).

11 E.g., Leiter (2007), *supra* note 6 at 134. But see *infra* note 50 and the accompanying text in the body for reasons why scholars like Raz and Dickson *might* oppose the 'replacement' option.

12 Jackson, *supra* note 10. E.g., HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) at 3, 240 (about what any educated man would be able to identify vis-à-vis the salient features of legal systems). Others reject this approach for certain sorts of concepts (e.g., for 'natural kind' concepts. See, Stoljar, *supra* note 10 at 235-6.

13 E.g., Hohfeld, *supra* note 8.

constitutive parts until you are left with more (if not irreducibly) basic concepts.[14]

Conceptual Analysis is said to admit of immodest and modest versions. The immodest version purports to be able to tell us something about the very things our concepts are concepts of. The modest version, by contrast, merely aims to elucidate a concept *qua* concept, i.e., its structure and which cases it covers. It does not pretend to describe 'the world' itself.[15] In other words, whether a concept 'tracks' a real world thing is not something a modest analysis could demonstrate.

Conceptual Analysis is used to distinguish what is purportedly necessary to a concept from what is merely contingently associated with it. Prominent ways to 'test' such matters are by presenting actual or hypothetical examples or cases.[16] If you want to know whether feature φ is essential to the concept of *X*, then just imagine a plausible case of *X* that lacks the candidate feature.[17] Philosophers commonly profess to rely on their 'intuitions' about what constitutes a hypothetical case of *X* or not.

For example, arguing against a long-standing belief amongst legal philosophers that law is necessarily coercive, Joseph Raz provides a purported counterexample: the law of a community of angels. Angels, Raz suggests, would need laws to coordinate and structure their social order. However, as they are highly virtuous beings, their legal system would not

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14 '[C]onceptual analysis is the very business of addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary'. Jackson, *supra* note 10 at 28.

15 For the Modest-Immodest distinction see Jackson, *supra* note 10 at 42.

16 The two options may or may not constitute distinct techniques. On the latter, at any rate, see Chris Daly, *An Introduction to Philosophical Methods* (Broadview Press 2010) at 48-9 ('the method of hypothetical cases'). Cf. Jackson, *supra* note 10 at 28-9, 35-6 ('the method of possible cases').

17 Leiter (2007), *supra* note 6 at 184: '[T]he two distinctive, interlocking methods of English-speaking philosophy in the twentieth century—namely, analysis of concepts via appeals to intuitions (the two interacting when, per Frank Jackson's formulation, we appeal to intuitions about possible cases to determine the extension of our concepts)'. Jackson has written the most famous apology for Conceptual Analysis to date.

require coercive measures to establish conformity with given laws or for the system as a whole to be effective. This seems to be a case of law without coercion. Coercion, Raz concludes, is therefore not a necessary feature of 'our' concept of law; conceptually, it is only contingently related to law, albeit present in most or all *human* legal systems.[18]

Philosophers sometimes levy *stipulative* definitions: rules for the usage of a word, along lines the philosopher designs. Such stipulations aim to help elucidate (by suggesting particular usages), not to police word usage per se.[19] Being nonetheless concerned with *word* usage, these definitions do not (and need not aim to) include all of a *concept's* relevant features.

There is, however, another kind of definition that analytic philosophers sometimes employ with greater ambitions in mind. *Philosophical* or '*analytic*' definitions aim to specify a set of necessary and sufficient conditions for the application of a concept (as opposed to a word).[20] These are often characterised as defining a concept's intension and extension. Do they exhaust all the relevant criteria for defining a concept, though? Furthermore, do analytic definitions suffice for *identificatory* purposes: locating instances of things/phenomena the concept represents? Some philosophers seem to suggest as much.

> Although sufficient conditions, necessary conditions, etc., are sometimes called "criteria"… the sense of 'criterion' in which an analytic definition provides a criterion for something's being the sort of thing to which a term applies is a very strong one: (a) the "criteria" I am speaking of are necessary and sufficient conditions of something's being an A; and (b) by means of them people *can and do determine* that something is an A.[21]

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18 Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) at 156-61.

19 See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) at 41 ["Raz (2009a)"]; Leiter (2007), *supra* note 6 at 123.

20 See Laurence and Margolis, *supra* note 4.

21 Hilary Putnam, 'The Analytic and the Synthetic', in *Mind, Language, and Reality: Philosophical Papers Volume 2* (CUP 1979) at 67.

## § III. Some Difficulties

Methodological disputes in legal philosophy partly reflect the fact that there is no agreement about what concepts are, what kinds of features they admit of ('necessary' ones, for example), or how to determine what those features are.[22] For example, philosophers continue make claims about concepts' necessary features, without having definitively established that essentialness is a genuine quality of certain features of concepts.[23] (One might think it odd to perpetuate dogged disputes about whether concepts can or cannot have necessary features given the lack of clarity about what concepts even are).

Twentieth century developments in philosophy seemed to undermine the notion of concepts bearing necessary features, and, consequently, the soundness of the very idea of an analytic definition. Perhaps the most important such development is what many philosophers take WVO Quine's purported evisceration of the Analytic-Synthetic distinction to entail. Quine argues that there are no analytic sentences: ones that are true simply by virtue of their meaning (the paradigmatic example being 'all bachelors are unmarried'). This, he thinks, is because all statements are answerable to experience and every concept is subject to empirical revision.[24] Many philosophers take Quine's argument to entail that concepts do not have 'necessary' or 'essential' features. Instead, there are simply beliefs that we are more or less willing to abandon at any given juncture.[25] If this is correct, then claims of being able to

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[22] There has, of course, never been agreement about whether there is 'a' philosophical method, or set of methods. Michael Huemer, 'The Failure of Analysis and the Nature of Concepts', in Chris Daly (ed) *The Palgrave Handbook of Philosophical Methods* (Palgrave MacMillan 2015) at 52.

[23] Brian Tamanaha, 'The Mounting Challenge to Assertions About "The Nature of Law"', available at http://juris.jotwell.com/the-mounting-challenge-to-assertions-about-the-nature-of-law/ accessed 26 December 2015.

[24] See Quine, *supra* note 10; Leiter (2007), *supra* note 6 at 144.

[25] Leiter (2007), *supra* note 6 at 144. 'Although Quine's seminal attack on the analytic-synthetic distinction occasionally gets a polite nod from contemporary philosophers, it is less often that theorists take

sieve the conceptually necessary from the conceptually contingent are spurious.

Socio-Legal Pluralists and Naturalists use this to critique both conceptual analysis and analytic legal philosophy generally; one cannot purport to describe the essential features of 'law' or 'a right' if no concept bears such features.[26] Instead, Socio-Legal Pluralists say, law is whatever we attach the label to.[27]

Even if concepts (can) bear necessary features, the techniques used for sieving the necessary features from the rest are suspect. Philosophers often claim to rely on their intuitions in order to determine a concept's extension.[28] This sometimes involves the 'method of hypothetical cases', exemplified above by Raz's Angels case. If philosophers really must employ their intuitions though, then their analyses may be completely flawed for having utilised unreliable sources.

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seriously its upshot: namely, that the claims of conceptual analysis are *always* vulnerable to the demands of *a posteriori* theory construction'. *Id.* at 133-4. Quine's attack might be taken less seriously because there are reasons for thinking that it either applies to a narrow category of concerns, or fails altogether. See, e.g., H.P. Grice & Peter Strawson, 'In Defence of a Dogma' (1956) 65 The Philosophical Rev. 141; PMS Hacker, 'Passing by the Naturalistic Turn: On Quine's cul-de-sac', in *Wittgenstein: Comparisons and Context* (OUP 2013).

[26] Even so, Naturalists admit that some modicum of conceptual analysis is indispensable for research purposes. They simply deny the extent of its explanatory power. Any such analysis, they think, is just a small precursor before undertaking empirical queries to understand what the subjects in question 'really' are. See Leiter (2007), *supra* note 6 at 45-6, 196-7.

[27] See, e.g., Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) at 193 ["Tamanaha (2001)"], who is to be distinguished from other Legal Pluralists by his conventionalism, anti-essentialism, and rejection of efforts to levy definitions of legal concepts. *Id* at 166-8, 171, 197, 201. (Anti-essentialists deny that concepts bear necessary features or that they can be defined in terms of necessary and sufficient conditions).

[28] It is de rigueur for philosophers to refer to such matters in terms of 'intuitions'. However, it is debatable whether what they are really referring to are instead deep-seated beliefs or judgements. PMS Hacker, for example, upbraids the habit of referring to these considerations in terms of intuitions. He thinks intuitions are mere hunches, which are neither necessary nor desirable for philosophising. Hacker thinks we instead clarify a concept, expressed by means of a word (the usage of which we as language users have relatively mastered), by examining its uses to make explicit its combinatorial possibilities, its entailments and incompatibilities, the presuppositions of its use, its purposes, etc. Interview with Peter Hacker, Emeritus Professor of Philosophy, University of Oxford at his home (Oxford 7 March 2016). (The potential problem of relying on *one* word for understanding a concept, however, has been suggested above).

> We can, to be sure, test our intuitions about possible cases to fix the concept of "space" or the concept of "representational content," but since such intuitions are hostage to parochial bias, lack of empirical knowledge, and all variety of selection effects, there is no reason to think such intuitions and their deliverances deserve *epistemic weight*.[29]

Another problem is that if you only look to ordinary or technical word usage in order to run a conceptual analysis, all you might produce is an 'ethnographic lexicography' – as opposed to an explanation of a universally held concept (which may not even exist).[30] Even if this kind of inquiry is of some value, there are therefore reasons to doubt whether a conceptual analysis of linguistic practices is the optimal route for reaping philosophical fruit.[31]

The ethnographical lexicography issue flags a related concern. Philosophers often

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[29] Leiter (2007), *supra* note 6 at 184 (internal citations omitted). Here is the oft-quoted Gilbert Harmon on this matter:

> When Quine, Putnam, Winograd, and a host of others raised objections to the analytic–synthetic distinction, they did not mention controversial philosophical analyses. When problems were raised about particular conceptual claims, they were problems about the examples that had been offered as seemingly clear cases of a priori truth—the principles of Euclidean geometry, the law of excluded middle, 'Cats are animals', 'Unmarried adult male humans are bachelors', 'Women are female', and 'Red is a colour'. Physics leads to the rejection of Euclidean geometry and at least considers rejecting the law of excluded middle. We can imagine discovering that cats are not animals but are radio controlled robots from Mars. Speakers do not consider the Pope a bachelor. People will not apply the term 'bachelor' to a man who lives with the same woman over a long enough period of time even if they are not married. Society pages in newspapers will identify as eligible 'bachelors' men who are in the process of being divorced but are still married. The Olympic Committee may have rejected certain women as sufficiently female on the basis of their chromosomes… Just as a certain flavour is really detected by smell rather than taste, we can imagine that the colour red might be detected aurally rather than by sight.

Gilbert Harmon, 'Doubts About Conceptual Analysis', in *Reasoning, Meaning, and Mind* (OUP 1999) at 140 (internal citations omitted).

[30] See, e.g., John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) at 426 ["Finnis (2011)"]; Leiter (2007), *supra* note 6 at 196-7. Cf. Ian Farrell, 'H.L.A. Hart and the Methodology of Jurisprudence' (2006) 84 Texas L. Rev. 983, 999-1003, who argues persuasively that 'modest' conceptual analysis is not mere lexicography and that it has elucidatory power over (at least) 'hermeneutic' concepts.

[31] 'But if we are skeptical about the Hart/Austin view, then the rationale for "looking at words" is less clear. Analyzing law-talk *may* be instrumental to the goal of understanding the real world. There is no particular reason, though, to think it is the only or even the best instrument. Yet it is the one legal philosophers, at least, continue to claim, distinctively, as their own'. Leiter (2007), *supra* note 6 at 124.

present analyses of 'our' concept of *X*, 'the' concept of *X*, the 'Western' concept of *X*, the concept of *X* of the Early Modern Period, etc., as if those delimiting terms necessarily reflect singular ideas. It seems inadequate to baldly claim to be analysing, as is sometimes done, 'our' concept of law. Is the concept jurisdictionally delimited, regionally so, civilizational, or just individualistic? How can it be established that it is either a concept with a given linguistic-temporal boundary, or instead one that has obtained across different eras (centuries? millennia?), peoples, and/or cultures, even if modified slightly?[32]

Philosophers like to believe they are particularly adept at re-crafting concepts. True or not, are such projects worth undertaking – especially if the reformed product does not track the usual ways people actually employ the (unreconstructed) concept? On the other hand, if having 'clarified' concepts is desirable, why are *philosophers* needed to do the work? Could others not undertake the task: sociologists, anthropologists, etc.?

Seemingly like everyone else, philosophers lack a shared paradigm governing how they should treat a counterexample's impact. Some believe that counterexamples are valuable because they can be used to examine a concept's extension, and because they can serve as (at least *prima facie*) reasons for disbelieving claims of certain features being 'necessary' to a concept. Conceptual Analysts, particularly, take either a single or some unspecified number of counterexamples as being sufficient to falsify a theory, rule, or proposition. ('All *X* are *Y*. Here is an example of an *X* that is not a *Y*. Thus, the first proposition is falsified'). Other philosophers think counterexamples merely circumscribe or delimit a theory, or mark exceptions to a rule. Still others are not bothered by counterexamples at all.

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[32] See, e.g., Nick Barber on inconclusive 'common' understandings. Nick Barber, 'The Significance of the Common Understanding in Legal Theory' (2015) 35 OJLS 799, 812-6.

The practice of conceptual clarification, intuition pumping, and employing ordinary and technical linguistic data generates at least two other concerns. For one thing, a conceptual clarification may, (mis-)shape or distort what researchers get out of their queries. For example, Matthew Kramer argues in favour of restricting the concept of 'a right' to a Hohfeldian claim.[33] As Kramer admits that Hohfeld's conception is itself a 'clarification' or 'correction' of ordinary and lawyerly discourse, however, why believe we can get to the truth of the matter about rights by restricting our focus to it? Bald faith in empirical work is no escape from the difficulties regarding how best to determine what a concept really is, let alone how it should be clarified.

There also seems to be a difference between what many conceptual analysts purport to do and what they actually do. Particularly, determining that a candidate case of *X* fails to actually constitute a genuine instance of *X* for lacking feature ψ seems to be a matter of judgement, but not a deductive one.

> On the classical theory of concepts, we decide whether to apply a concept to an object by comparing the object's properties with the properties listed in the concept's definition. But philosophical practice suggests the reverse: we intuitively judge whether a concept applies to an object, independent of any definition, and we evaluate a definition by how well it fits with the correct usage of the concept.[34]

For example, Raz's argument that the society of angels has 'law' reflects his judgement that the example really constitutes a hypothetical case of law, and not of something else. Others disagree, and therefore deny that the Angels case constitutes a bona

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[33] See, e.g., Chapter 2 § III.1.

[34] Huemer, *supra* note 22 at 53. Cf. Dan Priel, 'Jurisprudence and Necessity' (2007) 20 Can. J. L. & Jurisprudence 173, 187 (Conceptual analysts claim to start with 'pre-theoretical' samples of law, and then develop a theory that tries to show what the necessary and important features these samples (and all other instances) have. However, conceptual analysis lacks the means by which to resolve disputes about what counts as law in the first place, at a pre-theoretical level).

fide counterexample to the view the law is necessarily coercive.[35] Conceptual analysis alone probably cannot resolve such disputes (aka 'clashes of intuitions'). Nonetheless, for better or worse, such judgements seem to be philosophical bedrock.

Even anti-essentialists struggle with determining how to screen data and determine what constitutes part of a concept. Socio-Legal pluralists reject (most of) analytic legal philosophy's essentialism. However, their accounts are over-inclusive in terms of what counts as genuine instances of the phenomena they investigate. As mentioned above, they hold that law is whatever we attach the label to.[36] This cannot be correct. When we talk about 'the law of jungle' regarding wild animals, no one really thinks the animals have a legal system in the sense of having consciously organised, norm-governed behaviour. Similarly, the fundamental laws of physics are ideas that can be revised or rejected, but not 'repealed' or deemed unjust. The electromagnetic force cannot be deemed a tool of oppression (unless one believes the universe to be an intentionally-designed and controlled system…).

Now, imagine a small group of individuals gathering to create a new organisation. They choose a king, who, all the participants claim, reigns over them by divine right. The king rules by decree. His word, they all say, is law. He claims the authority to be able to execute any of his subjects at his pleasure. Any insult, real or perceived, moreover, made by any subject of the realm to any other, can be met by a challenge to a duel to the death. The group in question is a bunch of nine-year-old Canadian children who have created an after-

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35 E.g., Kenneth Himma, 'Law's Claim of Legitimate Authority', in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to the* Concept of Law (OUP 2001) at 308. While I only wish to flag the difficulties in establishing something as an instance of a case and the lack of shared criteria for doing so, there are nevertheless other grounds for thinking that Raz's Angels argument is not a genuine counterexample. For example, in the Christian narrative God punished Satan by expelling him from Heaven… (coercive liability for rule violation).

36 Tamanaha (2001), *supra* note 27.

school club. They claim for themselves their own system of law. But it is not law. It is not a competing legal order with that of the Canadian legal system. It is just a children's game. If you asked them, they might readily say that theirs is indeed real law. Nevertheless, a scholar who took the children at their word would be making a mistake: failing to make the practical judgement (which need be neither a moral nor political one) that the children are only playing a game.

What is at stake here? There is unclarity about what constitute the real 'objects' of philosophical inquiry, about how things/phenomena or concepts are to be identified, understood and analysed, and how concepts' extensions are to be ascertained. Further, there is a real question about whether conceptual clarification should ever be undertaken, and, if so, whether the existing techniques produce reliable results. Even if they are best suited for the task, do philosophers create distorted versions of what we are trying to understand, leading themselves (and others who might rely upon their work product, for empirical research, say) up the garden path?

## § IV. Central Cases

A **fifth** methodological issue that all the schools of analytic legal philosophy face concerns the Central Case method (aka the paradigm case or focal case method). Despite its ancient provenance[37] is it meritorious? What makes something a central case anyway? By what criteria can we identify or justify something as being a bona fide instance? Furthermore, are such cases always employed for the same ends?

I suggest that there are actually two different philosophical uses of central cases. **Usage Type A** is the well-known one. Certain cases are used for explanatory purposes. As

[37] See Finnis (2011), *supra* note 30 at 9-11, tracing the idea of a 'focal' meaning (central case) back to Aristotle.

Alex Langlinais and Brian Leiter explain:

> A central case analysis of some phenomenon identifies some subset of possible or actual instances of that phenomenon as explanatorily privileged. The members of this subset are the paradigm or central cases of the phenomenon, and they are privileged in two respects. First, the central cases are privileged insofar as a theory of the phenomenon is primarily concerned with explaining the important features of *these* cases. Second, the central cases are explanatorily prior to those instances of the phenomenon that are not members of the set of central cases.[38]

A philosopher deems φ to be a central case of *X*. He or she then compares φ with ψ, a contested case of *X*. Using φ's features as a benchmark, the philosopher can look at the features ψ does or does not possess in order to note the overlap, similarities, or differences in their features.[39] Going further that Langlinais and Leiter, it seems that philosophers additionally use central cases as bases for identifying or *disqualifying* ψ as a genuine case of *X*. In other words, they use φ, a central case, to determine whether ψ really is a token of the type *X*.

**Usage Type B**: Some philosophers present (supposedly) uncontroversial cases of something, understood 'pre-theoretically', to use as benchmarks for evaluating a philosophical account. These cases are treated as though they are part of an adequacy condition: if a philosophical theory cannot account for them, then that is a reason for deeming it to be a failure. Those who present such cases would not accept the idea that they,

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[38] Alex Langlinais and Brian Leiter, 'The Methodology of Legal Philosophy' at 16, available at <http://chicagounbound.uchicago.edu/public_law_and_legal_theory/398/> Accessed 1 January 2016 (emphasis added).

[39] See Michael Bayles, *Hart's Legal Philosophy: An Examination* (Kluwer Academic Publishers 1992) at 13. For example, HLA Hart's exposition of 'the' concept of law in his book *The Concept of Law* is mostly that of the 'modern municipal' legal system. Part of his reason for doing so is because his aim is to explain the everyman's concept of law – at least for (English?) peoples' views circa 1961. Hart then uses the municipal system *qua* central case to compare with peripheral cases, such as international law. Hart, *supra* note 12 at 3, 17, 81, 279-80, and chapter ten. Cf. Finnis (2011), *supra* note 30 at 10-1.

unlike other counterexamples perhaps, merely count as *exceptions* to the theory; for they believe that such cases suffice to *falsify* it.

The difference, then, between the two types of central case usage rests in the *Usage Type A*'s treating a case as a tool for explaining others (and for determining whether the others really are genuine tokens of a type) versus the *Usage Type B*'s determining (or assuming) φ to be an *incontestably* genuine token of a type and therefore treating its inclusion as part of an adequacy condition for a theory or account of a concept.

Here are some examples of *Usage Type B*. In response to Raz's thesis that law claims supremacy over all other normative systems governing or affected by those subject to it, Brian Tamanaha presents the medieval European legal situation as a (set of) counterexample(s):

> …Raz's strictures would force the conclusion that there were no legal systems throughout much of Europe during the medieval period. During this period several recognized bodies of law coexisted—including ecclesiastical, feudal, merchant, manorial, royal, and municipal—which did not typically claim to regulate all types of behaviour, and did not claim supremacy over all other normative systems.[40]

Regardless of whether his claim about the medieval legal situation is correct, Tamanaha's cases are presented not merely as exceptions to Raz's thesis; they purport to falsify it.

Here is a second example. *Pace* the Will Theory of rights, Neil MacCormick raises the cases of children's and mentally incompetent persons' legal rights.[41] The Will Theory is not merely deemed to be under-inclusive for (supposedly) excluding such cases, but therefore to be false. MacCormick's argument is not simply a morally or politically

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[40] Tamanaha (2001), *supra* note 27 at 139. For Raz's thesis, see Raz (2009a), *supra* note 19 at 117-21.

[41] Neil MacCormick, 'Children's Rights: A Test Case for Theories of Rights', in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982); Neil MacCormick, 'Rights in Legislation', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, (Clarendon Press 1977). See also Chapter 5 § V.1.

evaluative judgement of the consequences of the Will Theory's exclusion of certain sorts of agents from rights-bearing status. He is also claiming that it is an *analytic* failing to be unable to account for such cases. (Whether or not the Will Theory can actually account for them is irrelevant for our purposes in this chapter. What matters are rather how and to what ends MacCormick *presents* these cases).

One might challenge the idea that this second type is really a matter of the central case method. What makes it so, rather than, say, something fitting *in between* central cases and other sorts that count as exceptions to a rule or thesis but which are not weighty enough to falsify them? Once again, how should we account for the seeming hierarchy, or hierarchies, of case usage?

Without purporting to present a comprehensive explanation, one reason for deeming this kind of usage to be a matter of 'central' cases is the instances' purported indispensability to an account – this, regardless of whether there actually is (scholarly) concurrence about its centrality. A philosopher could treat one case as being indispensible to a theory and a second case as being genuine-but-dispensable.

Of course, not all (purported/candidate) counterexamples are presented as though they are central cases. Here is an example. Arguing against Raz's thesis that law *necessarily* claims moral legitimacy, Matthew Kramer presents an analysis of a hypothetical wicked legal system, arguing that the particularly heinous regime need not even feign belief in the morality of their laws, or of a given law.[42] While he deems this case to be sufficient evidence

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[42] Matthew Kramer, 'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties' (1999) 109 Ethics 375; Cf. Matthew Kramer, 'Legal and Moral Obligation', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2007) at 186.

to falsify Raz's 'necessity' claim, Kramer might very well deny that his imaginary regime represents a central case of a legal system.

Philosophers seem to intuit their way to a hierarchy of cases based upon how it important a case is deemed to be to a concept, theory, practice, etc., and how weighty a role it can serve *qua* counterexample (i.e., as an exception-carver, delimiter, or falsifier). This is why, for example, some scholars (e.g., Tamanaha on medieval European legal systems, MacCormick on children's rights, etc.) would not accept that their counterexamples merely carve exceptions or circumscribe rather than falsify. Whatever the most apt label(s) turns out to be for such (range of) cases, it is important to point out the very existence and practice of using cases for such purposes.[43]

Both Positivists and Normativists employ the central case method(s). With the notable exception of Finnis (i.e., his account of the central case of the internal point of view), however, many philosophers do so without really explaining or justifying their selection, i.e., what makes theirs a 'central' case, let alone try to establish the technique's validity.[44] Socio-Legal Pluralists, by contrast, reject the method, claiming that it is in fact essentialist.[45] The use of such cases also gives rise to another methodological puzzle: why think that a

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[43] The central case method(s) is not, or at least it need not be, 'essentialist'. A central case can contain purportedly important features, but they need not obtain in every instance. For example, Tony Honoré presents 'the' central case of ownership: eleven standard instances, or features, of ownership in a modern liberal legal order. Still, he does not insist either that every such instance must obtain in every case of something owned, or that all such instances must obtain in every such legal order. Anthony Honoré, 'Ownership', in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (OUP 1961). The eleven standard incidents are: 1, a right to possess; 2, a right to use; 3, a right to manage; 4, a right to the income of the thing; 5, a right to the capital; 6, a right to security; 7, an incident of transmissibility; 8, an incident of absence of term; 9, a duty [to prevent] harm; 10, a liability to execution; 11, an incident of residuarity.

[44] See, Finnis (2011), *supra* note 30 at 429-31. In person, he reaffirmed that the selection process of central cases is a wholly normative affair. Meeting with John Finnis, Emeritus Professor, University of Oxford Faculty of Law (Oxford 12 February 2014).

[45] Tamanaha (2001), *supra* note 27 at 149-151. Tamanaha also specifically rejects Hart's identification of municipal law as *the* central case of law. *Id*.

counterexample evidences something's bearing exceptions or being outright false, rather than the counterexample constituting a 'degenerate', 'imperfect', or merely peripheral case?

## § V. Desiderata, Standards, and Metrics

Brian Leiter and Julie Dickson suggest that 'meta-theoretical' (aka 'epistemic') desiderata, usually found in the philosophy of science, should be (and are) employed in all areas of philosophy. These desiderata (which are norms) are tools for: theory construction; evaluating a theory's worthiness for adoption; and for comparing rival theories.[46] They include:

> ***Simplicity***: We prefer simpler explanations to more complex ones, *all else being equal* (i.e., without cost to *other* theoretical desiderata).
>
> ***Consilience***: We prefer more *comprehensive* explanations – explanations that make sense of more different kinds of things – to explanations that seem too narrowly tailored to one kind of datum.
>
> ***Conservatism***: We prefer explanations that leave more of our other well confirmed beliefs and theories intact to those that do not, *all else being equal* (i.e., without cost to *other* theoretical desiderata).[47]

Wayne Sumner provides standards for assessing philosophically constructed conceptions, which he presents with theories of rights in mind:

> ***Extensional adequacy***: a conception of a concept is extensionally adequate when it includes every item which seems pre-analytically to be an instance of the concept and excludes every item which does not.
>
> ***Theoretical adequacy***: comparing the merits of two conceptions… If one of these maps (of the theoretical terrain) identifies more significant theoretical boundaries than the other, and if it seems advisable to use the concept… to mark these boundaries, then we will have good reason for preferring the conception which yields that map.[48]

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[46] Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76 U. Chicago L. Rev. 1215 [Hereinafter "Leiter (2009"]; Dickson (2001), *supra* note 3 at 32.

[47] Leiter (2009), *supra* note 46 at 1239. Dickson's list of such desiderata includes: simplicity, clarity, elegance, comprehensiveness, and coherence. Dickson (2001), *supra* note 3 at 32-3.

[48] L. Wayne Sumner, *The Moral Foundations of Rights* (Clarendon Press 1987) at 49-50, 96-7. Sumner's examples of such theoretical boundaries for philosophical accounts of rights include the ideas of protecting

As mentioned above, many legal philosophers take the ordinary understandings of concepts, or of linguistic practices, as an indispensable starting point for theorisation. However, they also sometimes employ it as a metric by which to evaluate an account's soundness, e.g., asking how intelligible the theory is to those who use such concepts, and how widely it diverges from their beliefs.[49] Raz and Dickson additionally believe that people use the concept of law to help them understand themselves. Hence, for them, a criterion of explanatory adequacy for legal theories is whether they pick out a concept's important features, which are required for capturing (and advancing) the way in which people understand themselves.[50]

Sean Coyle posits that a philosophical account must demonstrate conformity with 'received' understandings of our concepts, but nevertheless claims that:

> We are, of course, permitted to abandon that received understanding in favour of a modification of our concepts, but any such modification would have a profound impact upon our ordinary discourse about rights. Whether such a departure is justified therefore depends upon two things: (a) whether such talk is coherent; and (b) whether the departure significantly enriches our talk of rights, or enhances our existing understandings…[51]

Matthew Kramer provides some evaluative criteria for assessing a model of rights' merits. He thinks we must: ask how useful and powerful its axioms are, and if they tally with some basic features of law and legal theory, morality, and moral theory; if it is 'highly

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autonomy and of protecting welfare. He thinks that the Interest Theory of rights fails show the 'internal connections' between the idea of rights and the ideas of autonomy, self-determination, and freedom, and consequently endorses the Will Theory for doing that work. *Id.* at 97.

[49] Barber, *supra* note 32 at 806.

[50] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994, Revised edn) at 237; Dickson (2001), *supra* note 3 at 48, 59.

[51] Sean Coyle, 'Are There Necessary Truths About Rights?' (2002) 15 Can. J. L. & Jurisprudence 21, 27, 33.

illuminating' and 'serviceable'; assess its definitions for their heuristic strength, adaptability, and usefulness.[52]

Leif Wenar also provides some guidelines about what constitutes a good rights analysis:

> A good analysis will capture all the rights-assertions that we make— not only within morality and law, for example, but within sports and games and etiquette. A good analysis will also reveal why certain rights seem so vital, by locating their logic in our lives. In short, a good analysis will make sense of all the ways we speak of rights, and show why rights are so salient in our intellections and our self-conceptions. A good analysis will then be useful for normative theory: by showing what rights *are*, it will show how to prove what rights *there are* within the different domains (what moral rights there are, what legal rights there are, and so on).[53]

**§ V.1 Difficulties in Application**

These all seem like helpful and sound guidelines or metrics. Unfortunately, determining what counts as the successful application or utilisation of any such desideratum, or combination thereof, is unclear. How a *legal* theory can meet any such desideratum, and how they can be quantified, is left wholly unexplained. This is not simply a matter of being unable to show whether theory *A* or *B* better meets desideratum φ. Even if it could be shown that theory *A* better meets $D_{\varphi}$ than theory *B*, if *B* better meets $D_{\psi}$ than *A* does, which of the two desiderata is weightier for the overall comparative evaluation, $D_{\varphi}$ or $D_{\psi}$?[54] This is not to claim the set of tasks' impossibility, i.e., that shared metrics and paradigms for establishing how to convincingly meet these candidate criteria and desiderata could never, even in principle,

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[52] Matthew Kramer, 'Rights Without Trimmings" in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 23, 35.

[53] Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202, 202.

[54] This problem will be fleshed out in terms of the theories of rights in Chapter 5 § III.

obtain. It is merely to note that they have not yet even been attempted.[55]

Just like the issues surrounding counterexamples and central cases, the reasonable employment of such desiderata seems – inescapably – to be a matter of having to make (scholarly) judgements. Indeed, the whole process of theorisation involves a great many more judgement calls than could easily be enumerated here. As Andrew Halpin puts it:

> [I]n too many ways the judgement of the theorist rather than the imperative of methodology will be a determining factor, in shaping what feature of the subject matter is regarded as worthy of theoretical inquiry, or in shaping the theoretical construct that is regarded as offering greatest illumination on the subject matter as the theorist perceives it. Even at the low level methodology of metatheoretical precepts there remains room for the theorist's judgement to influence the impact those precepts will have upon the construction of theory. And in recognizing technical semantic or philosophically sophisticated analytical approaches, the pervasive influence of the theorist's judgement is still to be found: in selecting a particular type of semantics; or in discerning an essential property and elaborating its quality in the tension between its recognition and the basis for its selection. Even where the apparent strictures of methodology are the strongest, in directing the theorist to one side or another of the normative/descriptive divide, we have seen that the particular position adopted here is influenced by the choice of the theorist over how to focus on the subject matter of the theory.[56]

## § VI. Concept Formation and Selection: a Wholly Normative Affair?

A **sixth** methodological dispute amongst analytic legal philosophers is whether they must make normative judgements when forming or selecting concepts. Is it possible to provide a philosophical explanation or clarification of *X* that describes or interprets it without engaging in normative judgements – 'normative' in the sense of being morally or politically evaluative – about (i) what *X* is, or (ii) its value, worth, or goodness?

Now, no legal philosopher thinks data can just be identified and described 'as is'.

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[55] Moreover, the mere invocation of these desiderata is no evidence that the process of forming either a theory or its constituent concepts is devoid of morally or politically charged evaluation. Of course, mentioning this point alone is no proof to the contrary either.

[56] See Andrew Halpin, 'Methodology' in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2008) at 617.

Philosophers *judge* what count as such and how to interpret them. Those who come closest to the 'as is' view, though, Legal Positivists – or, at least contemporary ones – claim only to defend the following proposition: the law[57] is determinable simply by looking at its social sources, without needing to assess its merits.[58] However, Positivism is also committed to the idea that one can come to know, analyse, and present an account of *X*, without adjudging *X* to be morally good or bad, valuable or valueless. It additionally seems to assume that the 'folk' concept or 'common understanding' of *X* (e.g., HLA Hart's explication of the educated man's understanding of what law is) is discernible without morally evaluating it.[59]

*Pace* Positivists, Normativists (i.e., Interpretivists and Natural Lawyers) adjudge it impossible to know what *X* is without making 'normative' – again, in the sense of being morally or politically evaluative – judgements about what it is. These include assessments of *X*'s point or purpose. To their minds, there are no 'anormative' concepts in legal philosophy: every concept that germane to legal theory is inseparably entwined with, and shaped by, evaluative features and judgements about its nature. Hence, the process of determining a concept's content is contours is an inherently moral/political enterprise.[60]

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[57] Legal philosophers often distinguish between law and the law. 'Law' is a general concept, while 'the law' refers to a particular system and its rules. (This is not the same thing as, or an instance of, the Concept-Conception distinction).

[58] Raz (2009a), *supra* note 19 at 47-8; John Gardner, 'Legal Positivism: 5 ½ myths', in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012).

[59] Positivists also used to hold that one must first know what *X* is *before* one can evaluate it ('for how can you know whether it is good or bad if you do not even know what it is?'). However, that may no longer be the case. Instead, some contemporary Positivists seem to believe that coming to know what *X* is and evaluating it are two distinct, but potentially concurrent, inquiries. See, e.g., Julie Dickson, 'Law and Its Theory', in John Keown and Robert George (eds) *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) at 364-6. For the idea that Positivists offer interpretations of law, not unqualified descriptions (i.e., accounts constructed without having made an evaluation of any variety, let alone just moral and political ones) of it, see Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) at 60 ["Raz (2009b)"]; Gardner, *supra* note 58 at 28, 28 n 16; Dickson (2001), *supra* note 3 at chapter two.

[60] They also think it is merely trivially true that laws are posited. E.g., John Finnis, 'Law and How I Truly Ought to Decide' (2003) 48 American J Jurisprudence 107, 128-9.

Normativists nevertheless disagree amongst themselves about why this must be so. Ronald Dworkin offers his own account, called Constructive Interpretation: provide an account of *X* that fits most of the facts of a practice and shows it in its best light vis-à-vis its point or purpose.[61] There are three stages to Constructive Interpretation. The first involves information collection, which Dworkin calls the 'pre-interpretive' data. However, even (some of) the pre-interpretive data must be interpreted, as it were.[62] Rather than presenting a mere propaedeutic to undertake research in this fashion, Dworkin seems to suggest that Constructive Interpretation is what all social (including legal) theorists are really doing, regardless of how they otherwise conceive of, or characterise, their work.

John Finnis, a natural lawyer, presents an alternative Normativist methodology. He does not think legal theorists must present their subject matter in its best light. Instead, only the right sort of person, one with the appropriate sort of mindset, can properly undertake social theorising. Finnis endorses – to some extent – (Legal Positivist) HLA Hart's claim that a legal theorist must utilise a given community's or system members' 'internal point of view' in order to better understand its norms.[63] Without it, a theorist cannot understand or explain how the people use rules to praise and blame each other, critical features of how such norms

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61 Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) at 47-53, 65-8, 90. While Dworkin speaks in terms of 'practices' and 'rules and standards' of a normative domain or legal system, or tokens of a type (e.g., the text of *Moby Dick* being identified and distinguished from the text of other novels), his main example is really a *concept* (of courtesy). *Id*. at 65-8.

62 *Id*. at 65-6. The other two are the Interpretive and Post-Interpretive stages. *Id.* at 66-8. Dworkin elsewhere suggests that all views of rights are predicated upon a *theory* of rights. Ronald Dworkin, 'A Reply By Ronald Dworkin', in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Rowman & Allenhead 1983) at 251-2, 289-90. While he advances neither the Interest nor Will Theories of rights, what it means for a view of rights to be predicated on a "theory" cannot simply be answered in terms of someone's (e.g., Dworkin's Hercules) interpretation of his or her particular system of law. (Still, Dworkin's view here is consistent with the idea that there is no purely "pre-interpretive" data sans interpretation in the first stage of a constructive interpretation).

63 See Hart, *supra* note 12 at 56-7; Finnis (2011), *supra* note 30 at 12-3.

shape their lives. (Without such information, in other words, a theory would be under-inclusive and explanatorily inadequate). Finnis goes farther, though, because he believes there is an indispensable *central case* of the internal point of view: that of the practically wise person, the *spoudaios*.[64] Only such a character can (A) see law's point (which is to solve coordination problems and create institutional structures that allow for certain basic goods to come about that otherwise would not);[65] and (B) only he or she can see how all other, less practically-oriented agents internalise (or fail to, or reject) the relevant norms and utilise them. (By contrast, other kinds of agents cannot fully grasp the practically wise person's viewpoint).[66] What is often missed in discussions of Finnis' work is that, not only does the *spoudaios* select data and shape a theory based on that central case point of view, but he or she also *shapes the very concepts* employed in the account based on that privileged point of view.[67]

The challenge Normativists raise to Legal Positivists is whether (legal philosophical) concepts/conceptions can either be formed or selected without making morally or politically

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64 Finnis (2011), *supra* note 30 at 14-9.

65 *Id.* at 85-90, 245-50, 351-2.

66 *Id.* at 15 n 37.

67 Chapter one Section I of *Natural Law and Natural Rights* is titled 'The Formation of Concepts For Descriptive Social Science'. In it Finnis says:

> So when we say that descriptive theorists (whose purposes are not practical) must proceed, in their indispensable selection *and* formation of concepts, by adopting a practical point of view, we mean that they must assess importance or significance in similarities and differences within their subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject-matter… [T]he evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order… But when all due emphasis has been given to the differences of objective and method between practical philosophy and descriptive social science, the methodological problems of concept-formation as we have traced it in this chapter… *Id.* at 12, 16, 17-18 (emphasis added).

However, Finnis does not appear to employ such methodology when later endorsing Hohfeld's concepts/conceptions of rights and other normative positions wholesale. *Id.* at 198-205. At least, no such justification is offered.

charged evaluations. Their debate with Positivists about concept selection, and about whether the law is determinable without making value judgements – be it in terms of a constructively interpreted account, or via the purported central case of the internal point of view – has dominated analytic legal philosophy for the last forty years. Again, equally important, yet seemingly neglected by commentators, is the issue of what role morally or politically evaluative judgements play in the very *formation* of theorists' conceptions (the products of their 'conceptual clarification').

**§ VI.1 Pace the Normativists**

This chapter is not the place to offer a full-blown rebuttal to Normativists about the concept formation and selection processes, or about which viewpoint to adopt *qua* social theorist. Still, there are a few points worth mentioning. First, while Normativists go too far, both Dworkin and Finnis offer convincing reasons why some sort of interpretation is involved in both the selection and very formation of concepts for philosophical accounts.[68] Their critiques of Legal Positivism's problems establishing the moral-political neutrality of concept formation, selection, and understanding, have, in the least, not been completely rebutted.

Positivists do offer the following rejoinder. It is true that some modicum of evaluation is needed to determine what count as the data, to determine how concepts are to be clarified, etc. Still, this can be done without assessing the moral or political worth or goodness of those features. Philosophers' evaluations here are 'normative' – just not in the sense of being morally or politically evaluative: their evaluations simply concern 'meta-theoretical' desiderata. Thus, it seems possible to be able to interpret a concept without

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[68] Contemporary Positivists agree. See, *supra* note 59.

making moral judgements about its worth, goodness, or point.[69]

As the section on such meta-theoretical desiderata argued, however, baldly appealing to them as a counter to Normativists about the kind of normativity that must play a role in concept formation and selection for the purposes of legal theory is inadequate. Positivists must more work to make the case that these sorts of normative judgements (i.e., those concerning meta-theoretical desiderata) alone suffice to engage in legal theorising.

Although underdeveloped, there is merit in the Positivists' rebuttal. They must (and, I think, can) show that the selection and employment of such desiderata are devoid of morally or politically evaluative judgments. For even if philosophers are biased about how they shape or select their conceptions or definitions, there is no good reason to think those biases *must* either be formed by, or reflect, moral or political convictions. For example, defending the idea that a duty is a weighty reason rather than an exclusionary one need not be for moral or political reasons. In doing so, you may be correct or mistaken, but you might have decided thus *simply* because you believe (rightly or wrongly) that there is no such thing as exclusionary reasons.

Furthermore, there is no need to employ Constructive Interpretation or a central case of the internal point of view. *Pace* Dworkin, legal philosophers need not look at anything in its best light, let alone present it as such – especially if they deny it has one.[70] How, moreover, could that approach even work with regards to the selection and interpretation of 'pre-theoretical' data unless one had already undertaken the other interpretive stages? While

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[69] Dickson (2001), *supra* note 3 at chapter three.

[70] Jules Coleman shows that Dworkin fallaciously argues that, because criterial semantics is a non-option, constructive interpretation is the only alternative (for there are other alternatives). Jules Coleman, 'Methodology', in J Coleman and S Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) at 316.

Dworkin notes that the data of the pre-interpretive stage itself requires interpretation (and therefore does not really view his three stages as actually being 'stages' that follow a fixed sequence), his proffered method for doing so itself seems to *preclude* constructing that data in its best light.[71] For example, fully understanding the concept of a duty's weightiness does not require that it be presented in its best light.

*Pace* Finnis, there is no need to employ the (purported) central case of the internal point of view. One reason is because law may not be the exclusive, let alone the best, means for providing the relevant coordination schemes for generating the basic goods. An anarcho-capitalist would deny this, at any rate. To hold otherwise (i.e., that law in its best cases does so) is therefore to beg the question, methodologically. In response, Finnis might say that even if there are alternative (and sounder) means for generating such schemes or procuring such goods, if we want a philosophical account of *law*, then this is how we must approach the subject. This is false because it presumes a core teleological function that law may not have.[72] For example, fully understanding the concept of a duty's weightiness requires neither that it be seen from the perspective of, nor delineated by, the practically wise person (*spoudaios*). Would Finnis really need to say that we need the central case of a duty to decide one way or the other?

Furthermore, in attempting to defend Finnis' view, George Duke has instead

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[71] 'I enclose "preinterpretive" in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels. But a very great degree of consensus is needed—perhaps an interpretive community is usefully defined as requiring consensus at this stage—if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument'. Dworkin, *supra* note 61 at 66.

[72] Even if you disagree, note that Finnis' is an essentialist claim about what the paradigm case of law does. Additionally, to clarify, I do not oppose functionalist analyses. Again, Chapter 6 will present one about unenforceable legal rights constituting 'degenerate' cases. Still, this does not take us all the way to *ultimate* functions or purposes per the theories of rights (to be explained in Chapter 4), which law or rights might not have.

somewhat undermined it.[73] Duke notes that it is the *Sophos* who reasons from first principles, not the practically minded *spoudaios* (or *phronemos*). If so, then how could the *spoudaios* be the appropriate person to do the work of concept formation and selection, rather than the *sophos*?

## § VII. The Socratic Paradox of Inquiry and Rights

A further set of interrelated methodological issues is as follows. What count as data for a legal philosophical account? Further, what criteria or tests can be used to determine whether something really is a token of some type? Do such criteria also serve as identificatory tools for gleaning instances from data sets? What are these tests or criteria constructed out of, what validates them, and why adopt a given candidate test/set of criteria over another?

Apropos to this thesis, what counts as 'a right'? What criteria should be employed to determine what counts as such in a given data set, say a particular legal system? Should we look to existing linguistic usages or practices? *Iteration A*: Should we look at 'ordinary' language? If so, how should one account for the errors or misattributions, if any, made by ordinary speakers? *Iteration B*: should we focus exclusively on technical legal usage as employed by judges, legislators, lawyers, and the like? *Iteration C*: should we mostly look at existing philosophical usage: the work of moral, legal, and political philosophical writings?[74] Should we use some combination of these options? How should the different data points be weighed relative to each other? Are some more important than others? For example, should lawyerly talk of rights be weighed more heavily than that of moral philosophers', of legal

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[73] George Duke, 'The Aristotelian *Spoudaios* as Ethical Exemplar in Finnis' Natural Law Theory'. (2013) 58(2) American J of Jurisprudence 183, 189.

[74] See, e.g., Joseph Raz, *The Morality of Freedom* (OUP 1986) at 165-7. Is that approach not circular, as it were, though? What if all previous philosophers diverge widely from ordinary or technical usage? What if they are all wrong?

philosophers' more than moral ones, etc.?

These questions are, in certain ways, inseparable from ones about how we choose (and shape, if needs be) a concept, or concepts, of 'a right', and how we are to assess competing claims about there being only one or multiple concepts of rights. Here are two complementary cases, which help flesh out these issues.

**Two Cases**

**Case I: The Genealogy of Rights**. Historians debate about the origins of the concept of 'a right'.[75] They provide competing answers to the following. Question 1: when did the idea of 'a right' come about and who first thought of it? Question 2: were older concepts transmogrified into concepts of rights? Question 3: were medieval and early modern users of the terms 'a right' or '*ius*' employing the same concepts as people today? Question 4: on what bases are Questions 1-3 to be answered?

Historians generally focus on two candidate periods for the origin: medieval European canon law and Roman law.[76] Their debate concerns the (evolving) meanings of certain terms and concepts for ancient and medieval jurists, theologians, and philosophers, e.g., *libertatis, potestas, actio, ius/iure*, and *dominium*. When did *ius* or *potestas* come to mean 'a right'? When did *ius* come to mean a 'power'? When did the concept of a 'subjective right' come about?

The historians are open about their identificatory criteria. For example, Michel Villey

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[75] Their target actually seems to waiver amongst: (A) '*a* right', (B) *natural* rights, (C) *ius naturale*, (D) *subjective* rights, (E) *positive legal* (F) *positive moral* rights, (G) *active* rights, and (H) the *identification* of certain positions (liberty, power) with *ius*.

[76] For the idea that the Romans had an idea, but not the term, for human rights, see Anthony Honoré, *Ulpian Pioneer of Human Rights* (2nd edn, OUP 2002) at 76-93. However, he also suggested to me that the Roman *actio* is the concept of a right. Interview with Tony Honoré, Emeritus Regius Professor of Civil Law, University of Oxford at his home (Oxford 30 April 2014).

identifies William of Ockham as the originator of the 'modern' idea of a right. Villey claims this on the (contestable) basis that it was Ockham who first advanced the concept of a 'subjective' normative property (e.g., of *X* belonging to someone), one that is an *active power*, in contrast to the idea of 'objective' right (i.e., action *X* being the right thing to do).[77]

Richard Tuck attacks Villey's thesis. Tuck employs (twentieth century legal philosopher) HLA Hart's philosophical account of a private law right in order to assess medieval legal and moral writings (his data set). Tuck credits the Bolognese glossator Accursius and his followers as the real originators of the 'basic concept' of 'active' rights in the thirteenth century. The post-Accursians, Tuck further claims, gave *ius* an active sense (e.g., a *ius* to demand something), and expanded the sense of *dominium* to cover all *iura*.[78] Tuck nevertheless seems to identify Jean Gerson as the true progenitor of a full-blown version of the 'modern' concept in the fourteenth century. This, on the basis that Gerson defined *ius* as a subjectively held *active faculty or power*, correlating with another party's duty, which affords the *ius*-holder a *modicum of choice* over that duty's fulfilment, and which applied – for the first time, claims Tuck – to the moral domain.[79]

Bizarrely, both Villey and Tuck acknowledge that there are 'passive' right antecedents found in the twelfth century Glossators of the Decretum. Nevertheless, both

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77 On Villey's views, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press 1997) at 19-30; Richard Tuck, *Natural Rights Theories: Their Origins and Development* (CUP 1979) at 22. See Chapter 3 § II for a fuller explanation of the Active-Passive distinction. Basically, an 'active' right is one which the holder can use to do something, while a 'passive' right marks the holder as being entitled to another party's (e.g., a duty-bearer's) action, forbearance, or incompetency to act.

78 Tuck, *supra* note 77 at 16-7.

79 *Id.* at 6-7, 24-27. Tuck baldly asserts that the meaning of a term such as 'a right' is 'theory-dependent' (not in the technical sense to be described in Chapter 2). *Id*. at 2. *Pace* Villey, Tuck thinks Ockham merely gave *dominium* an active sense, not *ius* (the purportedly more germane concept for our idea of rights), in the form of entitling people to take others to court to prosecute them or defend themselves. *Id*. at 23.

historians intimate that those were not like 'our' contemporary notion of a right. This, based on their similar (if not identical) criteria: a subjective property or quality of the agent, and active power or faculty, affording its holder a modicum of choice, etc.[80] Although Brian Tierney shares many of the same criteria for what counts as a right, he rejects Villey and Tuck's theses. The origins of 'our' concept of a right can be traced, Tierney instead claims, to the above-mentioned twelfth century glossators, who held both passive and active conceptions of rights.[81]

This is not a matter of historians simply borrowing philosophical terminology in order to window dress their works. The tools by which these historians undertook their queries, their adoption of (let alone questionable deployment of) certain criteria requires far greater justification than they offer. Are they simply adopting modern conceptions – using identificatory criteria predicated upon modern biases or conceptions – to understand medieval texts? Why rely on those criteria? How do they know that they are dealing with one and the same concept, or even related ones? Why, for example, is a power 'a right' (for us, or certain medieval people), let alone *the* (paradigmatic) modern concept of a right? Is the whole debate a question begging exercise, one with participants talking past one another, given the lack of (wholly) shared criteria for what they are looking for and what counts as a successful find?

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[80] *Id.* at 13-15. See also Tierney, *supra* note 77 at 20 for Villey's meta-philosophical/historical reasons for rejecting the Glossators as the concept's originators (i.e., there was no predicate metaphysical paradigm shift during their era, which Villey thinks is a sine qua non for there to be any real change in legal, moral, and political thought).

[81] Tierney, *supra* note 77 at 36, 55-68. Tierney repeatedly suggests he is looking for a concept resembling the modern one, which involves words like choice, freedom, power, faculty, an area of liberty in which an individual is free to act and control, etc. Like Tuck, he too treats HLA Hart's model of a right as *the* modern concept (*Id.* at 48-50, 54, 66, 68) despite proffering a caveat about concepts from different eras not likely having the same range of meanings (*Id.* at 18 and n 22). Like Villey and Tuck, then, Tierney essentially views the modern concept of 'a right' as a kind of power. *Id.* at 16 ('To the modern jurist a right is a power…').

**Case II: The Interest-Will Theories debate**. Some, but not all, parts of the historians' various criteria comes from a long-standing philosophical debate about what makes something 'a right' and whether all rights serve some singular ultimate purpose. Two candidates, the Interest and Will Theories, offer competing answers. Each provides its own criteria for determining what counts as 'a right'.

Each is actually a family of theories. Some versions of the Interest Theory hold that there is but one conceptually basic kind of right: an entitlement to someone else's duty-bound action or forbearance. That correlative duty, borne by a second party, either *protects* the underlying interest reflected in the right, or the duty is itself *justified by* the right's existence. Other versions of the Interest Theory hold instead that liberties, powers, immunities, and complexes (combinations of the more basic kinds: claims, powers, liberties, etc.) also count as 'rights', so long as they *normally or generally benefit* the holders, or *protect some interest* of theirs. Will Theories, by contrast, generally posit that rights contain an entitlement to someone else's correlative duty *combined with* enforcement and/or waiver powers vis-à-vis that duty. For Will Theories, rights effectuate or protect their holders' will, and accordingly afford the right-holders' some sort of special status.

Yet where do each theory's candidate criteria come from? Upon what are they constituted? If theorists are levying *analytic* definitions, upon what are these predicated? Since they aim to proffer *the* fundamental criteria, how can the theories provide such divergent candidates? Is the underlying data so confusing or contested? Are certain theorists marred by political or other sorts prejudices? If, moreover, Interest and Will Theorists employ clashing criteria, how could their debate reasonably be resolved? On what bases are they to be evaluated? (These issues will be addressed in Chapter 5).

## § VIII. Some Rudimentary Remarks

The issues addressed in this chapter being of such far-reaching implications for all areas of philosophy, the reader will hopefully forgive the following rudimentary effort to address some of the grander matters that are at stake. Let us begin with whether concepts (can) bear essential features. Even an anti-essentialist can believe that, whatever their cultural, linguistic, or temporal reach, concepts have boundaries.[82] This is evidenced by the fact that concepts have correct or incorrect applications: ducks are not legal rights; fusion-producing stars are not types of fruit. While concepts may evolve over time with use, a critical mass of changes actually generates new concepts (these either replace the old ones, or just exist along side them).[83]

Further, the idea of a concept bearing necessary features, ones that mark the concept's boundaries, is not incredible. These may simply be part of the criteria for a concept's use or application.[84] This, in turn, *may* simply be a function of grammar or picturing the world.

> [W]hile internal properties and relations appear to be essential properties and relations of their bearers, the hardest of the hard as it were, they are actually no more than shadows of logico-grammatical relationships of implication, exclusion, compatibility and incompatibility between concepts (techniques of using words) and between propositions (what is said by the use of a sentence)… Necessary propositions exhibit neither factual or super-factual ('metaphysical') nor ideational (psychological) truths, but rather *conceptual* connections. They *determine* concepts and transitions from one concept to another. Internal properties and relations are shadows cast by grammar upon the world.[85]

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82 See Huemer, *supra* note 22 at 58-9 on conceptualization as boundary drawing.

83 See, e.g., Raz (2009b), *supra* note 59 at 70.

84 Brian Bix, 'Ideals, Practices, and Concepts in Legal Theory', in Jordi Ferrer Beltrán et al (eds) *Neutrality and Theory of Law* (Springer 2012) at 35 ('"essential" and "necessary" properties here refer to nothing more ambitious than the criteria our concept sets for the category in question').

85 G.P Baker and P.MS. Hacker, *Wittgenstein: Rules Grammar and Necessity* (2nd extensively revised edn, Wiley Blackwell 2014) at 246-7, internal citations omitted. The authors are discussing 'necessary propositions', rather than necessary features of concepts. However, in discussion, Hacker agrees that the point

For example, the former in each pairing above (of ducks and rights, stars and fruit) is excludable from the set of things constituting the latter. At a certain point, substantial changes to the criteria mean that one is simply thinking about a different (perhaps new) concept. At least some concepts are therefore historically and/or culturally contingent.

Analytic legal philosophers provide the beginnings of a plausible argument that, just because 'our' concepts are culturally, linguistically, or temporally (e.g., epochally) delimited, it does not follow they lack essential elements.[86] Whatever one makes of Quine's attack on (a version of) analyticity, one can happily admit that a concept's features are indeed subject to empirical revision (*and* subsequent conceptual analyses), and that a conceptual analysis merely provides a time-slice view of it.[87]

Philosophers have nonetheless yet to successfully explain *who* count as the relevant 'our' when referring to 'our concepts'. The idea of a contingent-concepts-bearing-necessary-features is therefore only the beginnings of an answer to anti-essentialist challenges because it remains unclear how to delimit its 'spatial' or temporal extensions. Without this information, it seems impossible to be able to identify what a conceptual clarification or analysis actually applies to. Furthermore, conceptual analysts must provide greater

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applies equally to concepts' features. Interview with Peter Hacker, Emeritus Professor of Philosophy, University of Oxford at his home (Oxford 7 March 2016).

[86] See, e.g., Jules Coleman, 'Incorporation, Conventionality, and the Practical Difference Thesis' (1998) 4 Legal Theory 381, 393 n 24; Raz (2009b), *supra* note 59 at 27-46, 70-1. Raz also thinks we can use our concepts to understand other cultures' or language users' concepts via a comparison of similarities and differences. *Id*.

[87] Michael Giudice argues that Quine's argument is off the mark when used as a critique of conceptual analysis, because necessity and analyticity are different. Conceptual analysis tests intuitions by the use of (hypothetical and/or real-world) cases to look for necessary propositions of a concept, not analytic concepts or propositions. Propositions that are essential to a concept do not necessarily bear meanings that would be inconceivable otherwise. E.g., when certain conceptual analysts posit that law is not necessarily coercive, they are not claiming that it is inconceivable that law is or could be inherently coercive. Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Elgar 2015) at 9-10, 90-109.

justification for believing that only necessary features really mark a concept's boundaries (*a fortiori* if people believe they are dealing with a *contested* concept).

Demarcating or delimiting the relevant concept and set of concept possessors, I think, simply involves making judgement calls – howsoever ill informed. There seems to be no reason why this must be a *moral* judgement, though. While 'meta-theoretical' desiderata might help determine whose beliefs ought to figure in one's theorising, aside from seeking out existing empirical work on the matter (which will *also* ultimately rely on some such judgement), it seems that the best one can do at this stage is make certain assumptions about what it is that a given group of people's concept is, which can then be tested against experience and criticism.

Appealing to ordinary or technical linguistic usage can also be attractive because it allows for a common set of facts, i.e., the 'ordinary understanding' *to be* part of the phenomenon to be explained.[88] (Whether conceptual analysis of 'folk' usage should be employed for *all* concepts is also beyond this thesis' scope). However, not all such data (e.g., everything called 'law') is relevant, let alone dispositive, for philosophical accounts. Some balance must therefore be struck in terms of the weight afforded to linguistic data. Once again, this is ultimately a matter of philosophers having to make judgement calls.

**The Value of Counterexamples, Real and Imagined**

What counts as a counterexample and what does it do and entail? Does it show that an account of *X*: is wholly mistaken; is under-inclusive but salvageable; or that it is instead

[88] Leif Wenar, 'The Analysis of Rights', in Matthew Kramer et al (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (OUP 2008) at 252. This approach's attractiveness will be come apparent in Chapter 5 when elucidating how rights theorists debate what counts as genuine instances of rights in data sets based, not upon ordinary usage, but rather their preferred (yet clashing) fundamental criteria. On the other hand, is linguistic usage merely evidence of the thing to be explained: the concept or nature of 'a right'? In other words, are scholars like Wenar confusing the *explanandum* with the evidence for it?

faced with a *prima facie* challenge but otherwise unaffected by the counterexample's existence? If a counterexample can falsify philosophical accounts, then when does it generate mere exceptions to a rule or proposition, and when does it instead suffice to falsify? If more than one counterexample is needed to do the falsifying, then how many are needed? What is the threshold, and what are the criteria? Aside from (purportedly) marking an account's purported extensional inadequacy, do counterexamples also point to the fact or possibility that there is, or can be, some deeper explanation than that proffered?

There seems to be no shared paradigm governing whether a single counterexample alone can falsify an account, or how many counterexamples suffice in the aggregate (if any) to do the falsifying. Even so, counterexamples have philosophical value because they an help one examine a concept's extension and may serve as prima facie reasons for disbelieving claims about certain features being essential to a concept.

Presenting real and hypothetical counterexamples does not end the story, though. Simply cleaving away the contingent from the supposedly essential does not tell you enough about the concept being analysed, let alone all that is important to it, even when there is agreement about cases. Having shown that feature φ is inessential to the concept of *X* (via a counterexample case of *X* lacking φ) does not entail that φ's presence or absence is inconsequential; its absence *may* mark the fact that the case in question is an 'imperfect' or 'defective' one, which analyses of this sort alone can neither establish nor confirm.[89]

## § IX. Conclusion

This chapter outlined some methodological issues driving and affecting (legal) philosophy. Determining what concepts are, their extensions, and whether they admit of essential

[89] For examples, see Chapter 6 § IV regarding unenforceable legal rights and Chapter 8 § III for unclaimable or uninvocable ones.

features, remain open questions. These issues affect others. If concepts do bear essential features, are sound methods by which to identify them? Are concept formation and selection inherently morally or politically evaluative enterprises? Are there any genuine central cases? (The chapter argues that there are two types of central case usage). How best can we determine what counts as a token of a type? While the discipline's very cogency depends on there being convincing answers to these issues, to date there are none. Though this need not lead to quietism or a moratorium on legal philosophising, scholars must endeavour to provide methodological grounds and solutions.

This chapter offered only some modest suggestions. First, despite being poor tools, there seems to be no viable alternative to employing 'intuitions' and linguistic data for philosophical accounts of normative constructs. Even Normativist (morally/politically evaluative) and Naturalist accounts must rely on them to some extent. Second, at least to date, appeals to 'meta-theoretical' desiderata have largely been fruitless for legal philosophy. This is because there are no established means for weighing the various desiderata relative to each other, or for demonstrating that one account meets any such desideratum better than its rival. Third, Normativist methodological claims regarding the need to employ either Constructive Interpretation or the perspective of the *spoudaios* are under-motivated. In other words, the dominant reasons for holding that philosophical accounts of legal concepts must be morally or politically evaluative are shown to be unconvincing. Fourth, and regarding all three previous points, legal philosophising ultimately rests on having to make (scholarly) judgements, the nature of which require far more investigation.

# Chapter 2: Rights Modelling

## § I. Introduction

This chapter has four aims. First it explains and distinguishes between two different kinds of philosophical accounts of the 'formal' features of rights: models and theories. *Models* explain whether there are different conceptually basic types of 'a right' and how rights and other kinds of normative positions (e.g., duties, liabilities etc.) relate to one another.[1] *Theories* explain what singular, ultimate purpose all rights serve: some value, goal, activity, or state of affairs that all rights supposedly protect or promote. Second, Section III argues that Monistic rights models (ones positing only a single basic type of right) are under-inclusive. They wrongly exclude and cannot explain relevant data, i.e., ordinary and legal linguistic practices. In doing so, the chapter does not defend a particular Pluralistic model; demonstrate how many different basic types of rights there are; or advance particular conceptions of those basic normative positions. It merely aims to show that Monistic models are under-motivated and flawed. The third aim is to show that certain Pluralistic models are over-inclusive in terms of what they count as 'rights'. Fourth, Section IV begins to touch upon, but does not provide, criteria for determining what counts as 'a right'. Two candidate factors will be addressed.

## § II. Models vs. Theories of Rights

Philosophers (and some lawyers) have long been aware that there are different senses of the term 'a right' abounding in legal, moral, and political practices and discourse. In an effort to

A version of this chapter will be published as 'Rights Modelling' (Feb 2017) 30(1) Canadian Journal of Law and Jurisprudence 125. Reprinted with permission.

[1] The philosophical literature often refers to rights and related concepts as 'normative positions'. This suggests peoples' and institutions' identities and/or statuses fall within a normative system or domain (a legal system, a corporation, etc.). It is also a slightly controversial term, as some philosophers deny that some such positions (e.g., liberties and powers) constitute norms on the grounds that they do not guide or regulate behaviour. See, e.g., Carl Wellman, *Real Rights* (OUP 1995) at 8 ["Wellman (1995)"].

make sense of this diversity, they have developed two different kinds of accounts of the 'formal' features of rights: models and theories. A *model* provides a typology of conceptually basic or fundamental rights and shows if and how they can be combined into larger constructs, 'complexes'. ('Basic' and 'fundamental' here mean being relatively simple conceptually, rather than marking a judgement about which rights are morally or politically essential for persons, justice, a political order, etc.). It is not within a model's purview to explain whether rights ought to exist, or if they all serve some singular, ultimate purpose (the latter is the purview of *theories*, which will be explained below). Most lawyers and the general public have nevertheless ignored such philosophical distinctions and elucidations, and continue to speak as if 'a right' was a univocal term.

There are several models of rights. This chapter's Appendix 2 provides a sample list and elucidates certain ones' features. The most prominent are those of Wesley Newcomb Hohfeld, Immanuel Kant, HLA Hart, and Joseph Raz. Some models also admit of their own set of scholarly interpretations and suggested modifications (i.e., there can be different iterations of a model).

Rights models can be divided into Monistic and Pluralistic varieties. Pluralistic models identify different basic types of normative positions as 'rights' and hold that each is irreducible to the other types.[2] The most famous proponent of rights diversity is Hohfeld. His model, the 'schema of jural relations', contains eight normative positions. The schema is usually taken to register four distinct senses of 'a right', which refer to four distinct concepts:

[2] A popular idea in analytic philosophy is that concepts are (often) complex and decomposable into more basic ones. I take no stance on whether this is true of most concepts. I simply employ the phrase "conceptually basic" as a useful term of art and a description of certain concepts in rights models. Again, some models explain many legal and moral rights in terms of 'complexes': composites of the model's more basic concepts, e.g., a claim + a power + a liberty, etc.

claims, liberties, powers, and immunities.[3] Each of these four correlates with one (only one, and always the same one) of what I shall call, for want of a better term, four 'ligations': a duty, 'no-right', liability, and disability.[4] Despite deeming 'a claim' to be the *stricto sensu* case of 'a right', Hohfeld holds that all of his basic normative positions are indefinable.[5] Instead, each is to be comprehended through it relationships with its specific correlative and 'opposite' (logical contradictory) position, all within a scheme of two matrices that are presented in the second Appendix.

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[3] Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L.J. 16 ["Hohfeld, *FLC #1*"]; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions As Applied In Judicial Reasoning' (1917) 26 Yale L. J. 710 ["Hohfeld, *FLC #2*"]. Hohfeld used the term 'privilege' rather than 'liberty', but it has become commonplace (for better or ill) to use 'liberty' instead.

[4] The term 'ligation' comes from Albert Kocourek, 'Wanted: Phrase for Legal Capabilities and Restraints' (1923) 9 ABA J 25, 26. Years before Hohfeld, John Salmond posited four basic kinds of rights and four correlative positions for each. The general term for the four kinds of rights, popularised and modified by Hohfeld, is also 'rights'. Moreover, complexes (aggregations of the different kinds into one larger unified construct) are also called 'rights'. While Salmond noted the lack of a generic term for the other four correlative positions (duty, liability, etc.) he failed to coin one. John Salmond, *Jurisprudence, or The Theory of the Law* (1st edn, Stevens & Haynes 1902) at 195. While there is no common term, 'ligation' is the least bad option. Kocourek was an Imperatival (if not also a Sanction) Theorist, holding that all laws must be based upon commands (and perhaps also enforceable, and thus that all ligations must be subject to sanctions for non-conformity). My usage of 'ligation' excises that element: not all ligations are obligations, let alone ones predicated upon commands or subject to sanction for non-conformity. Pavlos Eleftheriadis calls those four 'legal negations'. Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) at 123. However, this seems to miss the positions' affirmative qualities, e.g., the requirement to act in a duty, to have one's position changed in a liability, etc. The same problem applies to Pierre Schlag's distinction between 'entitlements' and 'disablements'. Pierre Schlag, 'How to Do Things with Hohfeld' (2015) 78 Law & Contemporary Problems 185, 188. Other scholars divide Hohfeld's eight terms into four 'advantages' and four 'burdens', but Hohfeld himself shows why many liabilities are desirable and even sometimes advantageous. See Hohfeld, *FLC #1, supra* note 3 at 54 n 90. The same might be said for the other three kinds of ligations.

[5] Hohfeld, *FLC #1*, *supra* note 3 at 36. In fact, Hohfeld did define his terms.

> A right is one's affirmative claim against another, and a privilege [liberty] is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation. *Id*. at 55.

Section III touches upon the confusion generated by Hohfeld's contradictory remarks about his concept of 'a claim'; particularly whether, as shall be explained there, it is an 'active' or 'passive' kind of normative position.

There is also a long philosophical history of those who attribute a 'strict sense' of the word 'right' or phrase 'a right'. Grotius, for example, did so in the seventeenth century for his notion of a right as a kind of normative power. Hugo Grotius, I *De Jure Belli ac Pacis* (1625) at 1.5. English and German nineteenth century pluralist modellers in turn distinguished amongst the different basic normative positions they adjudged to be 'rights' (e.g., a claim, a liberty, a power, etc.) by deeming one to be the strict sense thereof. See Roscoe Pound, 'Rights', in IV *Jurisprudence* (West Publishing Co 1959) ["Pound (1959)"]; Salmond, *supra* note 4 at 219-36. Perhaps some did so based on *per genus et differentiam* definitions, treating their candidate strict senses of 'a right' as the basis for understanding the rest.

By contrast, Monistic models hold that there is only one basic kind of right. Almost all modern Monists deem that one right to be a normative position that correlates with a duty.[6] For Monists, it is inappropriate to count other basic normative positions, such as liberties, powers, or immunities, as 'rights'. To clarify, Monists of course agree that those others constitute bona fide normative positions in law, morality, etc. They simply deny that liberties, powers, etc., count as 'rights'. There are, moreover, monistic *interpretations* of pluralistic models, whereby one position is deemed to be 'a right' while the rest are re-characterised as something else.

Wayne Sumner provides a helpful typology of how rights models differ from one another.

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[6] Modellers, both pluralistic and monistic, present various conceptions of (the kind of) a right that correlates with a duty. See this chapter's Appendix 2 for further explication. The differences amongst these conceptions are not as great as sometimes made out to be, though. Space does not allow for a full explication of all their similarities and differences, but here are some poignant ones. First, despite my 'RCTD' label, some modellers deny that rights always have correlatives on the grounds that a right is conceptually, and even sometimes temporally, prior to duties. (These modellers nonetheless believe that duties can always be affixed to such rights). See, e.g., Henry Terry, *Some Leading Principles of Anglo-American Law Expounded with a View Towards its Arrangement and Codification* (T & J W Johnson & Co 1884) at 93; Neil MacCormick 'Rights in Legislation', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, (Clarendon Press 1977). Second, rights are sometimes treated as reasons rather than as normative positions. E.g., Joseph Raz, 'The Nature of Rights', in *The Morality of Freedom* (OUP 1986) ["Raz (1986)"]. Third and fourth, it is debated whether certain such conceptions, like a Hohfeldian claim, are able to account for *prima facie* rights and duties and the qualities of 'force' or 'weight'. Michael Steven Green and blog commentators, 'Why No Deontic Logic?' (Prawfsblawg 12 October 2007) <http://prawfsblawg.blogs.com/prawfsblawg/2007/10/why-no-deontic-.html> Accessed September 1 2015. Fifth, some scholars argue that rights are not claims, but are rather (sometimes) defended by claims. See, e.g., Anthony Honoré, 'Rights of Exclusion and Immunities against Divesting' (1960) 34 Tulane L. Rev. 453, 456-7 ["Honoré (1960)"]. Matthew Kramer successfully shows that Hohfeld's schema is compatible with the first four views. Matthew Kramer, 'Rights Without Trimmings" in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 23-9, 36-49 ["Kramer (1998)"].

Unlike Hohfeld's conceptually basic 'claim', which is probably the most popular conception of a RCTD, HLA Hart's 'right-correlative-to-an-obligation' is actually a composite of powers and liberties: the capacity to enforce or waive a correlative legal duty, which includes legal permissions to undertake either option. HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 180-191 [Hereinafter, "Hart (1982)"]. Joseph Raz's conception of a right is similar to a Hohfeldian claim insofar as it marks its holder as the intended beneficiary of a correlative duty-bearer's action or forbearance, but differs insofar as (a) the right is a reason, predicated upon some interest or other of the holder, which has the qualities of force or weight, and (b) it is *justificatorily* prior to the duty (my right is the reason for your duty). Raz (1986); Joseph Raz, 'Legal Rights', in *Ethics in the Public Domain* (OUP 1994, Revised edn) ["Raz (1994)"].

> Here we can broadly distinguish two hypotheses. [**I]** One is that rights are simple, thus that every right consists of just one position. [**II]** The other is that rights are complex, thus that every right consists of some bundle of different positions. [**III]** These two hypotheses do not exhaust the possibilities; some rights might be simple while others are complex. Further, we can easily distinguish between monistic and pluralistic versions of each hypothesis. [**Ia]** A monistic version of the first hypothesis would hold that every right consists in the same normative position, while [**Ib]** a pluralistic version would allow different rights to consist of different positions (though only one in each case). Likewise, [**IIa]** a monistic version of the second hypothesis would hold that every right consists of the same bundle of positions, while [**IIb]** a pluralistic version would allow different rights to consist of different bundles.[7]

Let us address various interpretations of Hohfeld's model in order to flesh out Sumner's typology. (Presenting some intra-Hohfeldian disagreements also helps give a sense of how diverse scholarly views about a given model can be). Matthew Kramer holds that only one of Hohfeld's basic kinds, a claim, is properly labelled 'a right'. Liberties, powers, and immunities are not rights, even though ordinary and legal parlance often reflects such meanings. Talking about rights as entitlements *to do* things, he especially thinks, is erroneous and unhelpful.[8] Kramer thus represents view **Ia**: a monistic view (only singular claims are rights) where rights are simple (rights are not combinations of different Hohfeldian positions).

Carl Wellman represents a second Hohfeldian view, **IIb**. He believes rights can only be modelled in terms of 'complexes': aggregations of different Hohfeldian basic kinds, not singular instances thereof.[9] In other words, for Wellman, Hohfeldian claims, liberties, powers, and immunities are really only ever features or components of rights, not basic rights

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[7] L. Wayne Sumner, *The Moral Foundations of Rights* (Clarendon Press 1987) at 32-3 (numbering added).

[8] Kramer (1998), *supra* note 6 at 13-14; Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281, 295-9 ["Kramer & Steiner (2007)"].

[9] See, e.g., Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985) ["Wellman (1985)"] at 59-60, 80, 92; Wellman, (1995), *supra* note 1 at 7-8.

themselves – and not all of Hohfeld's kinds must obtain within a given complex.

George Rainbolt's view represents an option Sumner neglects: a pluralistic model allowing for rights to be *either* simples or complexes containing various Hohfeldian kinds. Rainbolt believes that, while Hohfeld's four basic kinds can serve as components of a right complex, some of them additionally suffice to count as an actual right.[10] For example, a liberty can serve as part of a complex, such as the right (liberty) to enter your own land, which is but one part of your property bundle; and a liberty can also be a right on its own, e.g., the right to pick up abandoned money off the street.

Be it monistic or pluralistic, no model is concerned exclusively with rights. Each contains other related or associated basic kinds of normative positions such as duties, liabilities, etc. Generally, models aim to explain the relationships between: (I) the various basic kinds of rights (if indeed the model posits more than one); (II) between rights and other kinds of normative positions (e.g., between a right and a correlative duty); and (III) between those other related kinds of positions (e.g., between a duty and a liability). What makes them 'rights' models, then? Are they not of normative positions? Hohfeld's, for instance, is called the 'schema of jural relations'. Yes, but rights are given a central role in almost every such model.

Additionally, some models are presented as being system or domain specific (i.e., of *legal* rights exclusively, or of *institutional* rights, or of *moral* ones, etc.). Certain modellers profess only to explain the structure of legal rights, say, without addressing moral or other kinds of rights. This can leave the nature of the relationships between legal, moral,

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[10] Specifically, Rainbolt believes that Hohfeldian claims and immunities are rights, while powers and liberties are not. However, he also thinks there are many kinds of rights complexes, including power-rights and liberty-rights, but only so long as a claim or immunity serves as a component. George Rainbolt, *The Concept of Rights* (Springer 2006) at xi-xii, 30-9.

institutional, and other rights open. Other modellers, though, take an explicit stance on that matter. They divide over whether rights are functional or modal kinds. Modalists think there are no significant differences amongst legal, social, and moral rights. For them, legal and moral rights do not do anything differently from one another. The only difference is that they are housed in different domains.[11] Functionalists, by contrast, posit that legal, moral, social, etc., rights differ in structure. They usually assume or argue that legal rights differ from moral or social ones, e.g., they tend to hold that legal rights are always enforceable, while moral rights are not.[12] Though functionalists need not go so far, some additionally believe that, because of these differences, legal, moral, and institutional rights are mere homonyms.

There are reasons to doubt the appropriateness of stipulating domain limitations when providing a model of rights. One is that this might lead to a distorted picture.[13] Second, any such stipulations themselves rely on an underlying commonality in order to mark supposed functional differences. Modellers rely upon the same basic components in order to even express the claimed functional differences (between legal and moral rights, say). Take, for example, a Functionalist version of Hohfeld's schema, which professes to apply only to legal rights and be inapplicable to moral ones. A typical reason why functionalist modellers hold that legal rights differ from moral ones is because they think the former are enforceable complexes (composites, say, of Hohfeldian claims and powers) while the latter are not. Regardless of whether that is true, we already need to know what each basic concept means in order to *establish* that supposed functional difference. You must know what Hohfeldian

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11 See, e.g., Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) at 158-9 ["Raz (2009)"]; Raz (1994), *supra* note 6 at 255-7.

12 E.g., Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 Ethics 21, 23.

13 For example, Raz is concerned by (what he takes to be) a dubious inclination to seek moral and social analogues to legal rights enforcement mechanisms, which may not obtain – even for certain legal rights too. Raz (1994), *supra* note 6 at 255-7.

claims and powers are, in order to understand what it is to have a claim with an associated power (the latter being the mechanism by which to enforce the complex), as opposed to a claim without one, in order to establish the supposed functional difference between legal and moral rights *for that functionalist model*. Hence, despite any professed limited application or range, the model actually relies upon a conceptually more basic toolkit for all normative domains.

In contrast to a model, a rights *theory* aims to explain what ultimate purpose all rights serve, their raison d'être. Rights are said to advance, protect, justify, promote, or serve some ultimate value or activity. Why their *ultimate* purpose? It could be said that both models and theories explain rights' purposes. One could say that the purpose of a power is to modify normative relationships, the purpose of a liberty is to entitle to someone to act, the purpose of an immunity is to prevent changes to one's normative positions, etc. If more than one of those positions count as kinds of rights, then what is their common purpose? If they are all rights then what is it that they all do *qua* rights? This notion of an ultimate purpose, or raison d'être, shall be further explained in Chapters 4 and 5.[14]

Despite recent scholarly efforts to generate alternatives, there are only two candidates: the Interest and Will Theories of rights. Interest Theories hold that rights advance, serve, or protect someone's interests or wellbeing. Will Theories posit that rights

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[14] Although the 'model-theory' characterisation is novel, noting that there are two different sorts of philosophical explanations of rights is not. Instead of 'models' and 'theories', Leif Wenar divides them in terms of 'forms' and 'functions'. Leif Wenar, 'Rights', Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights/ Accessed 1 January 2016 ["Wenar (2015)"]. That distinction is unhelpful because both terms work equally well in either category. For example, one could say it is the function of a power to change parties' normative positions, while it is the function of all rights to protect right-holders' interests. Alon Harel distinguishes two kinds of accounts as governing the 'nature' and 'role' of rights respectively. Alon Harel, 'Theories of Rights', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd. 2007) at 192. This too is unhelpful because either category can be labelled 'role': we could say that each Hohfeldian position serves a distinct role, while the Interest Theory posits that a right's role is to protect some aspect of a right-holder's well-being.

effectuate or protect peoples' abilities to make choices or to vindicate their wills. Theories also aim to do other seemingly crucial work: as shall also be further explained in Chapter 4 they provide competing fundamental criteria for determining which features of a model actually count as 'rights' and which do not (i.e., which should be considered as simply being different sorts of normative positions altogether).

There are, or could be, normative and analytical versions of each model and theory of rights. Normative – in the sense of being morally or politically evaluative – versions concern what rights' structural components *ought* to be (models), or what their raison d'être *should* be (theories). Their analytical analogues aim to explain rights' conceptual features (models), or their ultimate purpose (theories), without engaging in, or relying upon, moral or political evaluations of rights' goodness or worth. It is possible to endorse both analytical and normative versions of a given model or theory. For example, you might think that a Hohfeldian conception of a liberty is correct both on analytical grounds (e.g., because you think it best tracks ordinary and legal usage) and the optimal one for moral or political reasons.

What is the relationship between models and theories? Some models are not based on *theoretical* criteria for determining what counts as 'rights'. For example, Hohfeld's model is often said to be neutral between the Interest and Will Theories.[15] Thus, proponents of either theory are free to employ it to explain and advance their respective theoretical views.[16]

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[15] See e.g., Kramer (1998), *supra* note 6 at 61. *A Debate Over Rights* is the most extensive treatment to date of rights theories. Unfortunately, there is no extensive treatment of the various models. The best option for some introductory treatments are: Nigel Simmonds, *Central Issues In Jurisprudence* (4th edn, Sweet & Maxwell 2013); Wenar (2015), *supra* note 14; Rainbolt, *supra* note 10.

[16] Hohfeld himself probably had no theory of this kind in mind when constructing his schema. See John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) at 202-3, 465 n 32; Kramer (1998), *supra* note 6 at 61 n 23, 62.

Let us style those models constructed without relying on theories 'theory-independent' ones. By contrast, some theorists construct their own models instead of relying on existing ones. As their designs are influenced by 'theoretical' commitments, these will be styled 'theory-driven' models. (Chapter 4 will also explain that there are theory-based interpretations of, and modifications made to, 'theory-independent' models. A theorist might start with a theory-independent model like Hohfeld's and then alter some of its components in order for it to better conform to his or her theoretical views, producing a theory-driven iteration of the model).[17]

Many philosophical accounts of rights are composed of both a theory and model. While it is possible to construct theory-independent models, all theorists either rely upon or create a model. Further, while any scholar's model and theory are conceivably severable, it is possible that there will be information loss were this to be done. Specifically, the motivations behind positing a model's propositions (rather than understanding the propositions themselves) may be indiscernible without appreciating that its designer was heavily influenced by a given theory of rights.

Modellers disagree about what makes something 'a right'. Some rely on a theory to defend their typologies ('theory-driven' ones). Others do not ('theory-independent' ones, such as Hohfeld's). Either way, rights scholars (modellers and theorists) lack both shared criteria and shared paradigms by which to assess each other's identifications. (A big question is whether 'theoretical' criteria indispensable starting points for determining what counts as 'a right' and thus for any sound model. Chapter 5 demonstrates why they are not).

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[17] To clarify, not all modifications made to models are based on 'theoretical' considerations. For example, the intra-Hohfeldian disagreement about whether to use the label 'liberty' or 'privilege' for Hohfeld's basic position, or whether these mark two different concepts, does not rest on theoretical bases.

## § III. Under-Inclusive and Over-inclusive Models

### § III.1 Under-inclusivity: Monistic Modelling

This section aims to show that the reasons offered by Monists for restricting rights to one concept are mistaken and that their methodological priorities are skewed. The purpose here is not to defend either Hohfeldian or competing conceptions of the various normative positions.[18] It is merely to defend the idea that there is more than one basic concept of 'a right'. Particularly, a right correlative to a duty – a 'RCTD' – is not the only one.

One might be tempted to call this effort mere 'intuition pumping'. If one's intuitions suggest otherwise, we are probably at an impasse. But Monistic modellers themselves do *not* oppose rights pluralism based either on mere intuitions or their understandings of ordinary or technical linguistic practices. Instead, their monism is predicated upon various methodological assumptions or preferences, which will be elucidated below. Thus, instead of a mere clash of intuitions, there is real room here for debate about how many basic kinds of rights there are based on what all parties construe the pertinent underlying data to be.

**Tony Honoré**: **Rights are not Claims, Powers, or Liberties**

Tony Honoré levies a series of arguments against Hohfeld's schema.[19] One of them offers a reason against identifying claims, liberties, or powers as rights and for thinking there is but one basic kind of right. 'Ordinary legal usage certainly does treat a right as something different from a claim, power, liberty, etc. or even some aggregate of these'.[20] Rights are instead, he thinks, 'protected' by certain claims. The right is what unifies the various claims (it antedates some of them, and often outlives some of them too) and 'give rise' to certain

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18 Much ink has been spilled trying to show errors in the Hohfeldian versions of a liberty, a power, etc. Even granting that such arguments evidence certain conceptual difficulties for Hohfeldians, they do not *ipso facto* count as good arguments for the view that any and all conceptions of a liberty, a power, etc., do not or cannot constitute distinct kinds of 'rights'.

19 Honoré, (1960), *supra* note 6 at 456.

20 *Id*. Cf. Alan White, 'Rights and Claims' (1982) 1 L. and Philosophy 315, 323-36.

liberties.[21] So, for example, if *A* has a right to £100 from *B*, *B* might transfer that debt to *C* (who now owes £100 to *A*). *A*'s right was protected by a claim against *B*, but post-transfer, the right survives and can be protected by a new claim to the money held against *C*.

Through no great fault of his own, Honoré has been misled by Hohfeld's confusing and self-contradictory remarks about the meaning of a *Hohfeldian* claim. For there are good reasons to think that a Hohfeldian claim is a technical term, one noting a 'passive' normative position.[22] In other words, you do not make claims with Hohfeldian claims. They simply mark one as the intended, inert recipient of another party's (a duty-bearer's) required action or forbearance. Nevertheless, even if one were to adopt the 'active' interpretation, Honoré has not shown why claims – let alone liberties or powers – fail to amount to different kinds of rights, be they non-*stricto sensu* cases or otherwise.

**Joseph Raz**: '**Rights to do' are Really Just Rights Against Interference**

Joseph Raz characterises his account of rights (model-theory combination) as a 'partisan' account of the moral, political, and legal *philosophical discourse*, not an analysis of legal practice or ordinary usage.[23] For Raz, a right is a weighty interest that, perhaps in

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[21] Honoré, (1960), *supra* note 6 at 457.

[22] The difference between 'active' and 'passive' kinds of rights is whether the position entitles its holder to act (an active right), or whether someone else owes the position-holder some action, forbearance from action, or is incompetent to act (a passive right). See, e.g., Salmond, *supra* note 4 at 225.

[23] '[A] philosophical definition of 'a right', like those of coercion, authority, and many other terms, is not an explanation of the ordinary meaning a term. It follows the usage of writers on law, politics and morality who typically use the term to refer to a subclass of all the cases to which it can be applied with linguistic propriety. Philosophical definitions of rights attempt to capture the way the term is used in legal, political and moral writing and discourse. (I refer of course to what philosophers commonly do, whether they know it or not. I do not wish to deny that some understand their enterprise in other ways). They both explain the existing tradition of moral and political debate and declare the author's intention of carrying on the debate within the boundaries of that tradition. At the same time they further that debate by singling out certain features, as traditionally understood, for special attention, on the grounds that they are the features which best explain the role of rights in moral, political, and legal discourse. It follows that while a philosophical definition may well be based on a particular moral or political theory (the theory dictates which features of rights, traditionally understood, best explain their role in political, legal and moral discourse), it should not make that theory the only one which recognizes rights. To do so is to try to win by verbal legislation'. Raz (1986), *supra* note 6 in the article-cum-

combination with other interests, suffices to ground duties in other parties.[24] Despite offering an 'analytic definition' of a right, Raz nevertheless claims it is not designed to handle 'a right to do' locution. Even so, he briefly mentions the ideas of 'liberty-rights' and rights exercise. Nonetheless, reconciling his various remarks on rights suggests he does not really think that there really are rights to do (e.g., liberty-rights) after all. Such cases are instead explainable as follows. The real right is the reason for other parties' non-interference (it is a RCTD), while the liberty to act (which is not a right) is merely the right-against-interference's referent.

> The issue of so-called liberty rights is a complex one… The absence of duty does not amount to a right. A person who says to another 'I have a right to do it' is not saying that he has no duty not to or that it is not wrong to do it. He is claiming that the other has a duty not to interfere'… [a] right to *x* is not the same as to have no duty to *x* or not to *x*.[25]

Raz's point is not merely directed against a certain conception of liberties. For example, some people attack the *Hohfeldian* conception of liberties for marking either (a) the mere absence of a duty or (b) an unenforceable position. For such critics, a genuine liberty must instead either be an express permission (as opposed to the mere absence of a duty), or it

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book-chapter 'The Nature of Rights' at 165-6 (certain internal citations embedded into the quote).

Raz remarks cannot be squared with his presentation of the structure of legal officials' reasoning processes using rights in that chapter's companion paper 'Legal Rights', reprinted in Raz (1994), *supra* note 6. Regardless, Raz does not adhere to his own stated methodology. Those two book chapters, his most important writings on rights, are devoid of citations to moral, political, and legal philosophical works about rights (let alone citations to standard legal texts). Even if he had complied, though, why should moral and political philosophical conceptions of rights predominate over examples of rights found in legal practice? What is the point of modelling rights and theorising about them if not to help explain real world legal, moral, and institutional practices, and lay linguistic usages and practices? Why do those data/explananda not take priority over, say, a possibly obscure and possibly misguided moral philosopher from 1850?

[24] Raz (1986), *supra* note 6 at 166; Raz (1994), *supra* note 6 at 254.

[25] Raz (1994) *supra* note 6 at 275. Cf. Raz (1986), *supra* note 6 at 167; Kramer (1998), *supra* note 6 at 13-4.

must (also) always be protected by another position like a Hohfeldian claim or power.[26] This is not Raz's (only) point. His is rather that the right in question is the entitlement to another's non-interference, and that a related, express permission to act or not is not 'a right'.

*Pace* Raz, there is a long-standing practice in moral, political, and legal philosophical discourse (let alone regular legal discourse and practice) of treating what philosophers and various legal sources (at least a certain subset of) 'liberties' as rights. As this conception of 'a right' abounds in the philosophical literature it cannot be passed over in silence or assumed away. Further, Raz's reduction of 'a right to do *X*' to simply a right against interference by other parties in one's action (excising the entitlement to act oneself) simply begs the question. Why is the relevant liberty to act, which Raz deems to be the right's referent, itself not also a right? Imagine that Bob the law student wants to park his bicycle in front of his university's law building. A staff member approaches Bob, telling him that the bike racks are for the faculty members' exclusive usage. Bob, the budding lawyer, knows better about the relevant regulations. 'I have a right to park here', he says in reply. Bob does not just mean by this that he has a right against the staff member's interference with his parking there. Bob's primary intention is to convey the fact that he is indeed entitled or allowed to undertake the action of parking his bicycle there, let alone that it can be done without interference. For it could otherwise be that he is not entitled to park there at all, free of interference or otherwise.

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[26] E.g., R.E. Robinson et al, 'The Logic of Rights' (1983) 33 U. Toronto L.J. 267, 269: 'No person can be said to have a right to do that which he can always be prevented from doing or forced to do. The mere negation of a duty to do and not to do is a necessary, but not a sufficient, condition of a right to do. The other person must also have a duty not to interference with you in doing it'.

**Neil MacCormick**: **Rights Must Be Rightful**

Neil MacCormick thinks powers ought not to count as rights because their exercise can be valid but wrongful. He therefore seems to suggest that, to be 'a right', even a legal one, a normative position must entail actions that the law (or some other normative system) deems rightful, as opposed to action the law proscribes and affixes civil or criminal liabilities for undertaking.

> For example, *A* having validly contracted to sell a piece of land to *B*, proceeds to convey the same piece of land to *C* under a subsequent contract of sale, *C* acting in good faith and with no notice of *B*'s prior right. Here *A* acts wrongfully towards *B*; but the conveyance, albeit not rightfully executed, is valid and effectual in *C*'s favour. There can be other cases in the sale of goods where a person has a power to transfer property in goods without having the right to sell them, eg, on account of having acquired them by fraud, and thus under voidable title. This sufficiently indicates that powers are not themselves rights, although one can only have a right to exercise a given power provided one has that power, and provided that the exercise in question is not on some ground a wrongful one.[27]

MacCormick's argument is distinct from a seemingly similar view, held by Joseph Raz and Carl Wellman, that certain legally valid but wrongful actions ought not even count as 'powers', let alone as 'rights'.[28] Again, the crux of MacCormick's argument seems to be that, because it involves or entails an action that is not 'rightful', the normative position in question cannot count as 'a right'.

Yet the agent in question, although perhaps criminally and civilly liable to the wronged parties, was able to create legally valid contracts and exchanges. For a Hohfeldian at least, this meets the criterion of being 'a power': being able to intentionally change the parties' normative positions. Further, hardcore Hohfeldians are committed to the Strict Bilateral Thesis: the idea that all legal relations, such that as between claims and duties,

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27 Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2008) at 127.

28 See Raz (1994), *supra* note 6 at 267; Wellman (1985), *supra* note 9 at 44-6, 50, 68-9, 80.

powers and liabilities, etc., only ever obtain between two parties. The hardcore Hohfeldian could therefore hold that *A* (the seller) has a right vis-à-vis *C* (the second purchaser) to make a contract offer despite also bearing a duty to *B* (the first purchaser) not to make such an offer to *C*. The *A-B and A-C* legal relations are distinct. In other words, the hardcore Hohfeldian would posit that we might say *both* that (I) *A* has a right *vis-à-vis C*, *and*, at the same time, (II) *vis-à-vis B*, *A* has no such right (because he or she is duty bound not to act) *vis-à-vis C*.

That seems a bit odd, though. There are two simpler answers. One is that the connection between 'a right' and 'rightfulness' is not always true of legal rights or other legal positions. There can be trivial rights, immoral rights, rights predicated upon governmental corruption, favouritism, etc. Second, even if one treats powers as a type of a right, not all tokens of the type must count as 'rights'. This is a common strategy in the rights literature.[29] If sound, it means that MacCormick's argument does not go far enough in showing that *all* powers should be disqualified from counting as rights. (The demand to show that all tokens of the type are disqualified also hoists MacCormick with his own petard, as it were, for his own argument/bald assertion delimits *rights to exercise* a power to situations wherein uses of the power are not wrongful).

**Kenneth Campbell**: **Rights Must Be Entitlements or Permissions**

For Kenneth Campbell powers and immunities are not rights. This, he claims, is because powers are capacities, not entitlements or permissions.[30] Campbell also argues that certain

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[29] See Eleftheriadis, *supra* note 4 at 7. On only tokens of Hohfeldian claims counting as rights see, e.g., Rowan Cruft, 'Rights: Beyond Interest and Will Theory' (2004) 23 Law and Philosophy 347, 356; Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223, 243-6 ["Wenar (2005)"]. On only token powers counting as rights, see, e.g., Kramer (1998), *supra* note 6 at 103; Finnis, *supra* note 16 at 226-7. On only token immunities counting as rights, see, e.g., Hart (1982), *supra* note 6 at 191.

[30] Kenneth Campbell, 'Book Review of Carl Wellman's *Real Rights* and *The Proliferation of Rights*'

powers can be used to do bad things, e.g., a thief undertaking a dishonest transfer in market overt, thereby committing conversion of goods. Campbell thinks this involves a power. He simply denies that that power counts as a right or that the thief has a *legal right* to act upon such power. 'To be sure, the lawmaker generally confers a right to exercise a power at the same time as granting the power itself. But the two are quite distinct and are related only pragmatically, not conceptually'.[31]

Unlike MacCormick, then, Campbell provides a reason for thinking that all tokens of the type (powers) ought not count as rights: they are capacities, not entitlements or permissions. For as some powers are used to accomplish illegal-yet-legally-valid ends, the power-holder has the capacity to do that which he or she is not entitled to do. The thief is not entitled to sell the stolen goods because he bears a duty not to do so (and could be criminally and civilly liable if he does).

There is a centuries-old debate about the relationship of enforcement powers to the concept of a right. (Chapter 6 § III Argument 4 addresses a few arguments about this issue). One stance, taken by Guido Calabresi and Douglas Melamed, is that there is a conceptual distinction to be had, if not also a historical-temporal one, between the creation of a right and its modes of attempted remedy or vindication.[32] These can be thought of in terms of two stages (be they historical, conceptual, or both). Stage I: create a right. Stage II: design modes

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(2001) 110 (439) Mind 881, 884 ["Campbell (2001)"]. Cf. Kenneth Campbell, 'The Variety of Rights', in Rex Martin and Gerhard Sprenger (eds) *Challenges to Law at the End of the 20th Century: Rights: Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy* (IVR), Bologna, June 16-21, (F Steiner Verlag 1995) at 22. Campbell is probably not a Monist, but just a more restricted pluralist, as he seems to think that both liberties and RCTDs are 'rights'. It is also unclear whether Campbell thinks that an immunity is a marker of another party's incapacity, or something else, and in what sense he thinks that an immunity itself could be 'a capacity'.

31 Campbell (2001), *supra* note 30 at 884.

32 Guido Calabresi & Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard L. Rev. 1089, 1090-1.

of protecting it (e.g., powers to sue). However, it is hard to believe that the legal officials who first created the Market Overt doctrine could even deign to conceive of the matter in terms of bestowing a right to use this power (if indeed lawmakers even thought about such matters in terms of 'rights' and 'powers'). Campbell's is a conceptual point: the initial position (here, the power to contract) is conceptually distinct from the modes of its protection or utilisation (here, the liberties to use those powers). On the contrary, I think the dishonest transfer case is one where there is no distinct conceptual space for officials to design this power's modes of protection or utilisation.

More importantly, Campbell's reliance on a Capacity-Entitlement distinction also fails to show that all tokens of the type should be disqualified from counting as rights. Granted that a power is a capacity, he has not shown: that capacities cannot also be entitlements; why capacities are not rights; and why all rights must be entitlements. Lawyers would be happy to say that we are generally 'entitled' to gift our property to those whom we choose, or that we are 'entitled' to buy a house, or sell it. We are also entitled to enter contracts so long as they are for legal purposes and we are legally competent consenting persons. Campbell would have to provide reasons for thinking that *all* powers (not just some) are not both entitlements and capacities. To do so, it would help if he told us what makes something an entitlement in the first place.

**Matthew Kramer & Hillel Steiner**

Matthew Kramer and Hillel Steiner present the most sophisticated case for delimiting rights to one basic kind, a Hohfeldian claim. They co-authored a paper in order to rebut the works of Gopal Sreenivasan and Leif Wenar, who claim to present alternatives to the Interest and

Will Theories of rights.[33] Kramer and Steiner argue that the others have simply presented versions of the Interest Theory. In so doing, Kramer and Steiner also outline some of their own views about rights, particularly in response to Wenar. To understand their monistic position, though, we must briefly address Wenar's pluralistic view.

Another Hohfeldian, Wenar believes that certain tokens of all of Hohfeld's four basic types (claims, powers, liberties, immunities) count as rights. This is in part because everyday discourse about rights includes what Hohfeldians call powers and liberties. For Wenar, the test of a philosophical account (a model & theory combination) is how well it captures our ordinary understanding of what rights there are.[34] An account that narrowed down the number of kinds of rights would therefore be incorrect as measured against common understanding.[35]

Kramer and Steiner disagree. They provide several arguments aiming to show why the term 'a right' should be restricted to Hohfeldian claims and why we should not abide by Wenar's proposed test.[36] Mostly paraphrased, these are they:

(I) There is not one ordinary understanding of what rights are. There are instead multiple ordinary understandings, which conflict with one another in a number of respects. Hohfeld himself notes that even professional jurists employ the language in confusedly inconsistent ways.[37]

(II) Wenar acknowledges this systematic ambiguity of ordinary usage, but attempts to defuse it via assurances that ordinary rights-talk can be entirely

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33 Cf. Kramer & Steiner (2007), *supra* note 8 at 295-9. See Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 OJLS 257; Wenar (2005), *supra* note 29.

34 Wenar (2005), *supra* note 29 at 238.

35 *Id*. at 243.

36 This seems to diverge from Steiner's earlier views about rights being claims *or* immunities. See, e.g., Hillel Steiner, *An Essay on Rights* (OUP 1994) at 61 n. 9.

37 Kramer & Steiner (2007), *supra* note 8 at 295.

rigorous and error-free, provided speakers understand how assertions of rights map onto the Hohfeldian incidents. Yet Wenar's assurances are uninformative and carry a patently unsatisfied proviso.[38]

(III) Moreover, his proviso can be countered with an alternative one: that ordinary rights talk can be error free so long as speakers restrict the term "rights" to Hohfeldian claims.[39]

(IV) When Hohfeldians frown on the looseness of the terminology of 'rights' in quotidian discourse, they are distancing themselves from the ways in which lay people and professional jurists *do* discuss various legal entitlements.[40]

(V) The indiscriminate use of the term 'right' to cover each of the Hohfeldian entitlements (i.e., claims, powers, liberties, and immunities) is strongly conducive to muddled thinking and argumentation.[41]

(VI) Hohfeldians are not seeking to lay down terminological prescriptions for everyday communications and contexts. Any such prescriptions would be futile and misconceived. Rather, Hohfeldians have striven to devise an intricately precise vocabulary from which philosophical disputes about the basic nature of rights can be conducted rigorously and perspicuously.

> Ordinary usage is an essential point of departure of the development of that specialized philosophical parlance… but it is only an initial point of reference. Some regimentation/purification is inevitable if the requisite degree of precision for philosophical disputation is to be attained.[42]

(VII) The foremost reason for limiting rights to claim-rights (ones accompanied by protective immunities, at any rate) is grounded in the presuppositions of ordinary usage. As Hohfeld's investigations tended to reveal, an assumption ordinarily underlying the invocation of the term 'right' is that the holder of an entitlement denoted by that term is owed a duty with some specified content by somebody else. An assumption to that effect will be fully apt when the entitlement under consideration is a claim-right—since every claim-right is correlative to a duty—but will otherwise be prone to be false.[43]

(VIII) A chief factor behind the tendency of ordinary speakers and professional

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38 *Id.* at 295-6.

39 *Id.* at 296.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 296-7.

> jurists to refer to Hohfeldian powers and liberties as 'rights' is that nearly all such entitlements in any civilized society are accompanied by claim-rights against many forms of interference with the exercise thereof. No liberty or power would ordinarily be designated as a 'right' if it were wholly unaccompanied by claim-rights against interference with the exercise of it. By contrast, a claim-right does not need such supplementation to be ordinarily classifiable as a right. It is itself an instance of legal protection against interference or uncooperativeness, and it is itself thus correctly regarded as a right by ordinary speakers and Hohfeldian theorists alike. When powers and liberties consort with claims that protect the power-holders' and liberty-holders' abilities to exercise their respective entitlements, the presence of those claims is what commonly elicits the application of the term 'rights' to the powers and liberties. Because claims are unique in performing that particular function, the singling out of them as right is hardly an arbitrary stipulation.[44]

Kramer and Steiner agree with Wenar that, in their everyday discourse, people would call (what Hohfeldians style) powers and liberties 'rights'.[45] I, in turn, agree with Kramer and Steiner that Hohfeld's schema of jural relations is a *corrective* to ordinary usage,[46] the latter of which is ambiguous. Hence, one cannot lean too heavily on provisos about ordinary usage per their second argument. That is where I part company with Kramer and Steiner though.

The problem of muddled thinking articulates a worry, but not one so weighty as to warrant restricting term usage to any one basic kind of right. Hohfeld's schema provides

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[44] *Id.* at 297-8. The following portions of the argument were omitted for brevity's sake. 'To be sure, a claim must be accompanied by immunities against most types of divestiture if it is to count as a genuine right at all… However, the lesson to be drawn here is not so much that concomitant immunities against divestiture are necessary for a claim's status as a genuine *right*; instead, the presence of such immunities is necessary for a claim's status as a genuine *entitlement or legal position* of any sort'. *Id*. at 297. Kramer contrasts 'genuine' entitlements with merely 'nominal' ones, which are nevertheless also real positions within a legal system, but it is hard to square these remarks with Kramer's earlier view about claims being 'nominal' if unprotected by powers. Kramer (1998), *supra* note 6 at 8-9, 34, 46, 63-65, 100, 106; Matthew Kramer, 'On the Nature of Legal Rights' (2000) 59 Cambridge L. J. 473, 476-7, 481-2. Perhaps he abandoned it, though. Further, there are good reasons to think this argument reflects Kramer's view and not Steiner's as it is hard to reconcile with latter's Will Theory of rights.

[45] Kramer & Steiner (2007), *supra* note 8 at 295.

[46] See also Kramer (1998), *supra* note 6 at 22-3.

distinct terms to help philosophers and jurists alike avoid ambiguous thinking and argumentation. Further, Hohfeld's adoption of the term 'claim' is itself a form of philosophical correction and clarification, not something that ordinary folk (as opposed, perhaps, to lawyers) would always recognise as being identical to 'a right' easily.

It is not enough to note that Kramer and Steiner harbour divergent methodological aims from Wenar and myself. There is also something mistaken about their stated aims and priorities. Instead of coming up with an account of rights that *balances* (i) an effort to best track the data of ordinary and technical (e.g., legal) usage and (ii) meet the stated desiderata of a precise vocabulary that helps avoid muddled thinking in philosophical discussions of rights, Kramer and Steiner simply concern themselves with the latter. Even if their preferred interpretation of Hohfeld's model (which treats a claim as the exclusive kind of right) achieved that end, it should be deemed woefully under-inclusive and a distortion. Whatever one thinks of the merits of desiring a philosophical model that is tidier and simpler than the real-world concepts (in part because it reduces the number of relevant concepts or their features), Kramer and Steiner's is so much so as to be unrepresentative of that which they wish to model.

Their approach may even defeat the very purpose of having a model of rights altogether *as they themselves construe it*: to help understand the 'nature' of rights. Hohfeld was trying to make sense of rights discourse. One does not make sense of it by denying that much of it is about rights at all, especially when the *explananda* strongly suggests otherwise. Again, Kramer and Steiner even admit that ordinary usage is 'an essential point of departure for the development of [a] specialized philosophical parlance' about rights,[47] and the

[47] Kramer & Steiner (2007), *supra* note 8 at 296.

ordinary users would consider cases of what Hohfeldians call liberties and powers to be 'rights'.

Further, how can we have philosophical disputes about the 'nature' of rights if we only use one *philosophically constructed*, corrective concept, e.g., a Hohfeldian claim? If concepts do indeed have natures (discernible internal structures), and what we want is the nature of rights, why think Hohfeldian claims are going to get us to an adequate understanding thereof? All we will get is the 'nature' of Hohfeldian claims. Is it by approximation or abduction, then, to the nature of 'real-world' rights (or, at least, real-world RCTDs)? If it is, then that approximation is quite off the mark for discounting other concepts that can count as 'rights'.

Additionally, Hohfeld was adamant that his schema was meant to give practical guidance to lawyers and judges, and was not strictly meant for employment in philosophical debate.[48] If philosophical modelling of rights is not aimed to explain real world practices in a way that aims to clarify the concept(s) or practice(s) to the practitioners, and is simply for philosophers for the sake of philosophising, then something has gone awry.

Kramer and Steiner assume a Right-Entitlement distinction, whereby four of Hohfeld's kinds (claims, liberties, powers, and immunities) are entitlements, but not all count as rights. What would they say to someone who believes that all entitlements are rights? The closest they come to a possible response is in their seventh argument: a presupposition that ordinary usage establishes a relationship between rights to duties. Yet Hohfeld's investigations do *not* reveal that most people assume duties to be tethered to rights. He just baldly states it as an assumption. He also fails to explain or justify why claims ought to

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48 Hohfeld, *FLC #1*, *supra* note 3 at 20.

constitute the *stricto sensu* case, save to say that it is *because* they correlate with duties.[49] This is, of course, no answer at all. For why should that correlation make claims the strict sense? His "investigations" in the *Fundamental Legal Conceptions* articles do not show that that assumption is actually held by most people. It might be true, but neither Hohfeld nor Kramer and Steiner even begins to provide evidence for it.

Kramer and Steiner's last argument presumes, rather than demonstrates, why liberties and powers are ordinarily counted as rights (because they are accompanied by claims against interference with their exercise). Counterexamples abound. One was already mentioned in the argument against Raz above vis-à-vis parking a bicycle at a law faculty. Second, Kramer holds that a 'right of action' (i.e., a secondary and tertiary right) is simply a Hohfeldian power.[50] Whether or not that constitutes 'proper' Hohfeldian parlance, it is implausible that, transposing those remarks about rights of action to this new argument, most regular folk and lawyers would construe a right of action to be 'a right' simply because of some direct or indirect protection against non-interference afforded to it by another party's correlative duty (if there is one). (Here, the relevant duty against non-interference would have to be against the secondary/'remedial' right of action itself, not the underlying (primary) right).[51] A right

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[49] *Id*. at 31: 'Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative'. Hohfeld then proceeds to cite three cases as evidence.

[50] Kramer (1998), *supra* note 6 at 34 n 14.

[51] The Primary-Secondary-Tertiary right distinction is commonplace in legal and philosophical discourse. *Primary* rights are substantive entitlements, e.g., a right to free speech or to purchase some land. *Secondary* rights usually authorise their holders to initiate dispute resolution mechanisms (litigation, arbitration, mediation, etc.) when primary rights seem to have been, or are threatened to be, violated (or they authorise holders to waive such processes). However, they can also sometimes be employed outside of such contexts, e.g., as entitling one to undertake self-help remedies. *Tertiary* rights are used to enforce or waive the binding prescriptions or remedies provided by third party dispute resolution mechanisms like courts.

of action would rather seem to count as a right because its holder is entitled to commence legal proceedings, say, against the holder of a primary duty. Lest one think that the concept of 'entitlement' is doing all the work here, the idea can be reiterated without it. Imagine *A* owes *B* money for goods delivered according to a contract. *A* refuses to pay, so *B* commences a lawsuit. Is *B*'s right of action 'a right' to lawyers and ordinary folk because *B* can legally commence institutional proceedings, or is it a right (if at all) because the capacity to do so is protected by *A* or some other party's being duty-bound to refrain from interference with the commencement process? It is possible, but I find it extremely doubtful that most ordinary folks, let alone lawyers, would choose the latter answer.

Kramer and Steiner also beg the question that most people would consider a 'naked' claim (i.e., one unprotected or supported by liberties or power to exercise or enforce it) to be a right.[52] Granted these are in part empirical questions, I nevertheless think that most people believe rights *are* claimable. Whenever I confront people with the idea of a wholly unclaimable or unenforceable right people deem it to be no right at all. Even those scholars who believe that such cases exist tend to mark them off as being either exceptional, or as constituting 'imperfect', 'nominal', or 'degenerate' cases of rights.[53] Lay people and scholars may be mistaken about the matter (while those select scholars who note the existence of 'naked' RCTDs, on the other hand, may be correct). Even so, Kramer and Steiner's *own*

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[52] In explicating Jeremy Bentham's account of liberties, HLA Hart notes the former's Vested/Naked liberties distinction. 'Vested' liberties are those that, however weakly, are directly or indirectly protected by at least some legal RCTDs. For example, one has the liberties to eat or not eat, to stand or sit down, to go inside one's house or out. These are "liberty-rights" because they are protected, e.g., it is an offence for others to use violence to prevent one for so acting. 'Naked' liberties, by contrast, are not protected by RCTDs. Hart (1982), *supra* note 6 at 172. See also Chapter 7 § II.

[53] See, e.g., Salmond, *supra* note 4 at 122-3, 129; Raz (1994), *supra* note 6 at 256-7; Rex Martin, *A System of Rights* (Clarendon Press 1993) at 82-3; Kramer (1998) and (2000), *supra* my footnote 44. See also Chapter 6 § IV for an expansive treatment of this issue.

view being based on an appeal to ordinary linguistic usage for the basic unique function of eliciting the application of the term 'a right' is open to empirical challenge, if it is not just false.

Further, Kramer and Steiner overemphasise the direct or indirect security afforded to an entitlement by duties and immunities as a criterion for rights status. (This is ironic given Kramer's Interest Theory-based opposition to the Will Theory idea that 'a right' is a complex containing a Hohfeldian claim combined with at least one Hohfeldian enforcement power). There are cases of liberties (entitlements to act) that were previously forbidden. As examples, the Charter of the Forest granted certain English people rights to hunt and gather; the English Parliament granted itself freedom of speech, etc. It is not that people were insecure in their entitlements or capacities to do such things before; they were not allowed to do (duty-bound not to do) them at all![54]

Kramer and Steiner could offer the following rebuttal. In terms of conceptual resources, it makes sense to focus on Hohfeldian claims. 'Liberties' and 'powers' are established terms, which we can distinguish from rights. Change the label (from 'claim') to just 'a right' and abandon the predicate '*stricto sensu*' if you like, a claim nevertheless serves a distinct job from the other Hohfeldian positions. ('Immunities' might also be a bad label, but it serves a different role from the other three, and not one that would intuitively be considered the paradigmatic usage of legal rights).

In response, a Hohfeldian claim is a technical term, one with which ordinary speakers may not be familiar (if not also professional jurists). It is also a poor label, since it is

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[54] For a different set of responses to Kramer & Steiner's arguments, see Leif Wenar 'The Analysis of Rights' in Matthew Kramer et al (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (OUP 2008).

ambiguous between 'active' and 'passive' conceptions. More importantly, the possible rebuttal takes the philosophical literature for granted as having a greater foothold in ordinary and technical (e.g., legal) discourse than it does. In 1915 Roscoe Pound lauded the addition of 'power' as a distinct label from a right correlative to a duty as a great *jurisprudential* contribution.[55] Has it caught on en masse with judges and lawyers? Have they ceased to use the language of 'a right' to buy or sell property, and restricted their vocabulary to that of 'powers'? No. *Should* they, on the idea that a different technical term is available? Howsoever one chooses to answer that question, it will not change the fact that most if not all of the agents in question (and other ordinary folk) do continue to think and talk of such normative positions in terms of rights. And it is that fact that a philosophical account of rights must take seriously.

**§ III.2 Over-Inclusivity: 'Ligation-Rights'**

The last section showed why certain philosophers provide under-inclusive rights models based on unwarranted assumptions or methodological commitments. This section shows the opposite: other philosophers present over-inclusive models by treating some or all ligations as 'rights'. Their general argument is as follows. Ligations are indispensable for structuring our social, legal, moral, and political relations. We need duties and liabilities in order to even have contracts, property, etc. It is thus *desirable* and *advantageous* to be able to be a duty-bearer in many cases, for example. Therefore, it seems fit to deem (at least some) ligations to be basic kinds of rights: duty-rights, liability-rights, etc.

The idea is not completely far-fetched. Ligations are often thought to serve as part of either rights complexes, or, at least, as part of complex legal relations. For example, Tony

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[55] Roscoe Pound, 'Legal Rights' (1915) 26 Int. J. Ethics 92 at 95 ('Rights in this sense, or powers, as we are now coming to call them…') ["Pound (1915)"].

Honoré's model of ownership (i.e., property bundle of sticks) includes ligations as some of its eleven incidents.[56] The idea of a ligation-right goes farther, though, by making the ligation the defining feature of the right complex.

For example, Carl Wellman reports that HLA Hart suggested to him the idea of a Hohfeldian liability-right. Hart's examples were the legal right to inherit property and a right to be given something.[57] Yet Hart's own *theory* of private law rights requires that they afford their holders some modicum of control in terms of self-enforcement capacities.[58] Liabilities, however, cannot be self-controlled in these fashions. Hart's *model* of a private law right, moreover, construes rights as powers, or, more accurately, as liberty-powers.[59] How, then, could liabilities count as rights per Hart's own criteria?

Wellman might claim to be able to bypass Hart's difficulty. On Wellman's model, a right is always a complex containing various Hohfeldian tokens.[60] Complexes, he thinks, have 'core' and 'peripheral'/'ancillary' components.[61] For example, if *A* and *B* enter a contract for widgets, *A*'s right against *B* is a complex containing a Hohfeldian claim correlating to *B*'s duty to pay that forms the core, with enforcement powers (and perhaps other positions) constituting ancillary positions for that claim. Moreover, on Wellman's *theory* of rights all rights afford their holders 'dominion' in a potential conflict with other

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56 Anthony Honoré, 'Ownership', in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (OUP 1961). His standard incidents are: 1, a right to possess; 2, a right to use; 3, a right to manage; 4, a right to the income of the thing; 5, a right to the capital; 6, a right to security; 7, an incident of transmissibility; 8, an incident of absence of term; 9, a duty [to prevent] harm; 10, a liability to execution; 11, an incident of residuarity.

57 Wellman (1985), *supra* note 9 at 86.

58 Hart (1982), *supra* note 6 at 183-5.

59 *Id*.

60 Wellman (1985), *supra* note 9 at 92.

61 *Id*. at 81-94.

parties, even if the right cannot be personally controlled/enforced.[62]

Scholars have shown that Wellman's suggested tools for determining what constitutes a complex's core are wanting.[63] Even so, one could try to show how certain normative positions are dependent upon others within a complex. To give an example of the problem of identifying 'cores' of complexes, there is a famous American case about the rights of African Americans to sit on juries.[64] A state law barring them from jury selection was said to violate the Fourteenth Amendment. Is the right to sit on a jury *primarily* about (that which makes it 'a right') the Hohfeldian liability, i.e., changing one's status from non-participant to that of a candidate juror in a particular jury pool; the duty to attend the court and participate in the jury pool and *qua* juror if selected; a liberty to serve; the power to effectuate one's status as a (potential) juror once selected if people try to interfere with one's serving; or something else?

Wellman's example of a liability-right is the right to be married. Certain people are, of course, legally eligible to marry. Wellman identifies this eligibility with a Hohfeldian liability (susceptibility to having one's legal relations changed), which in turn forms the core of the right to marry.

> [T]he eligible couple have legal dominion concerning its enjoyment. Thus, they acquire this legal liability to be married only if they first freely consent to be married to each other; no minister or magistrate has the legal power to marry reluctant

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62 *Id*. at 54, 95.

63 E.g., Campbell (2001), *supra* note 30; Rainbolt, *supra* note 10 at 105-9, 242. They also show why Wellman's concept of 'dominion' is underdeveloped. Wellman suggests there are two aspects for identifying the core. Aspect 1: look at the language of legal rights and interpret its meaning (plain meaning, legislative intent, etc.). Aspect 2: look at the matter through the lens of an actual or hypothetical confrontation between two parties under the law. Identify and define the way in which the law might favour a party alleging some right in the face of the contending party. Wellman (1985), *supra* note 9 at 89-90. There are also two stipulated limiting conditions: 1, the core must be a legal advantage. 2, it must be the sort of legal advantage whereby *X* can have 'dominion'. *Id.* at 85.

64 *Strauder v. West Virginia*, (1880) 100 U.S. 303.

> couples dragged in off the streets, or even out of the bedrooms. And presumably the couple retain the legal power to withdraw their consent at any time during the marriage ceremony before the declaration has been completed. And individuals have the legal power to take legal action… to establish their liability to be married or their lack of it.[65]

Whatever one thinks of Wellman's theoretical 'Dominion' criterion for identifying something as 'a right', his example of a right complex with a liability at its core fails to meet it. It instead suggests that the work of establishing dominion is accomplished by the complex's liberties, powers, and immunities. Further, a liability does the opposite of establishing a right-holder's dominion over others: it merely marks its bearer's susceptibility to another party's capacity to change the liability-bearer's normative position(s). In other words, if Wellman's Dominion theory of rights relies either on the would-be marrying parties' effectuating choices regarding consent, or their power to establish their status as marriageable, then dominion cannot be explained in terms of a liability. On the other hand, if the right to marry has a Hohfeldian liability as its core *because* of the dominion that a liability purportedly affords, then Wellman's answer is either circular or incomplete. Moreover, he believes that the 'core' defines the entire right complex. To be sure, eligibility is a *sine qua non* for being able to marry. Even so, there is a difference between having a legal status and *the right to* (gaining and/or maintaining) that status. Nor must those rights/positions form part of a complex. Perhaps only Hegelians, for example, would say that there is a right to being liable to being sentenced for one's crimes. But even they might dispute that a Hohfeldian liability forms the core of that right.

To return to Wellman's marriage case, for example, an oft-neglected feature of Hohfeldian and other conceptions of powers is that they change *both* the power-holders and

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[65] Wellman (1985), *supra* note 9 at 89.

other parties' normative positions. A third party (a government official, a religious figure, etc.) is usually required in order to marry people. Yet the marrying couple must be competent and eligible to trigger that process. As Wellman notes, (at least in many modern societies) one cannot be compelled to marry. Thus, one must make oneself susceptible to a legal official's marriage ceremony. This requires the power to make oneself liable, which correlates with the official's liability to having a duty created in him or herself to use his or her legal power to marry the couple. There is no marriage without eligibility. But the eligibility is itself partially established through a *sui generis* change in one's own position: by applying to the state, say, to get a marriage certificate, a ceremony, etc. Thus, it seems that the power to get married is even more basic to 'a right *to* marry' than the liability (if eligibility is indeed to be identified exclusively with that type of Hohfeldan position) to be married by an official.

George Rainbolt, another ligation-right proponent, believes that all four types of Hohfeldian ligations can form the core of rights complexes so long as each includes a claim and/or an immunity.[66] Rainbolt's *theory* of a right is that it justifiably affixes a normative constraint upon others.[67] Of Hohfeld's four basic kinds, however, only a claim or an immunity can normatively constrain another party. Hence any right complex must contain a token instance of at least one of those two basic positions.[68]

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66 Rainbolt (2006), *supra* note 10 at 34-9.

67 *Id*. at xi, xiii, 118.

68 *Id.* at 25, 30. The constraining can be seen via the correlative positions. A duty binds its bearer to act and thus restricts his or her options for action, while a Hohfeldian disability marks one as incompetent to change parties' relations. But there is a difference between being obligated (not) to act in certain ways and being disempowered to so act. One may act despite being normatively disempowered to do so. The act may be 'wrongful', but it is not constraining. For example, a legislature may pass laws that are ultra vires their constitutional competencies; a person may create a will that is not witnessed by the relevant number of parties. The effect is either that the procedures are legally ineffectual, or that they have changed parties' statuses

How could any ligation-right complex be squared with Rainbolt's own criteria, though? How could a duty or liability really constitute kinds of rights if, according to Rainbolt, what makes the complex 'a right' is either a constitutive claim or immunity, which does the requisite constraining? The ligation-right idea cannot be squared with Rainbolt's *model* of rights (rights are claims, immunities, or complexes containing them) and *theory* of rights (rights impose normative constraints upon other parties). His rejection, moreover, of the notion of complexes having a core for being difficult to identify is belied by his own belief that a claim and/or immunity must form that core.

Rainbolt also seems to misidentify what counts as the core of such complexes. Take his example of the so-called duty-right to vote.[69] In certain countries, such as Australia, there is a duty to vote. That duty qualifies or shapes the right to vote (eliminating the freedom not to participate). Still, *pace* Rainbolt, that duty is not itself a right, let alone the core of one. If anything, the core of the right to vote is either the legal capacity to vote, or the holder's authorisation/permission to undertake the relevant actions that constitute voting. As another example, if there is a 'right to make contracts' (and thus to be eligible to bear contractual duties) it does not follow that *A*'s contractual duty to pay *B* is a right, or forms part of a right complex.

The idea of a ligation-right is dubious. We have rights as persons to enter into social, legal, and political relations (contracts, citizenship, etc.). These may correlate with other people's duties not to deprive us of our personhood, e.g., to enslave us, to denigrate our social status or reputation, etc. It may be a good thing to have the duties that come with

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(citizens, beneficiaries, etc.) in legally-illegal ways. Either way, *pace* Rainbolt, disabilities are not normative constraints per se and hence immunities do not normative constrain. For further elucidation and criticism of Rainbolt's view, see Chapter 4 § III.

69 *Id*. at 35.

citizenship and contracts, but that alone does not make them rights. Nonetheless, the idea of a ligation-right cannot be squared with any of its advocates' *own* criteria for what counts as 'a right'. This is not to deny that ligations cannot form parts of either right complexes or other larger legal constructs (such as property). It is simply to note that neither are these, in themselves, basic kinds of rights, and nor do they constitute the 'core' of right complexes in which they may form parts.

## § IV. Some Brief Remarks on Two Candidate Criteria for Rights

The chapter has indirectly addressed some candidate factors that might fit within philosophical criteria for what counts as 'a right'. Some of these include the ideas of rights as being: entitlements; advantages; norms; capacities; the bases for imposing normative constraints on others; etc. Rights are also sometimes said to possess the qualities of weight, (peremptory) force, or trumping power. Chapter 4 will address the Interest and Will Theories' competing criteria for determining what rights are. These include the ideas of: rights being powers; generators of spheres of liberty for the right-holder; protecting/advancing the holder's or class of agents' interests or wellbeing; etc.

Let us briefly address two 'non-theoretical' candidate considerations. First, it has long been suggested that rights are advantages bestowed upon their holders.[70] Not only is the sense in which rights are advantages debated, however, these days it is usually also coupled with a caveat that they are only *normally*, *standardly*, or *typically* advantageous to either the holder, or to the class of persons to which the right-holder belongs.[71] This is because having

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[70] See, e.g., Salmond, *supra* note 4 at 190-1; Hohfeld, *FLC #1*, *supra* note 3 at 38; Hohfeld, *FLC #2*, *supra* note 3 at 717; Hart (1982), *supra* note 6 at 191 (we only call immunities 'rights' when they protect against adverse changes, not advantageous ones).

[71] MacCormick (1977), *supra* note 6 at 202; Sumner, *supra* note 7 at 32; Kramer & Steiner (2007), *supra* note 8 at 290.

a right can actually prove to be disadvantageous in some situations, e.g., having the right to inherit a money-pit. On the other hand, as discussed above, some scholars run amok with the idea of rights as advantages (despite advancing the caveat themselves),[72] treating any normative position that bestows some sort of advantage upon its holder as 'a right' – including ligations.

It nevertheless seems reasonable to think that rights typically are advantageous normative positions. It is unclear what good that observation or intuition does towards helping craft identificatory criteria, at least for an analytic definition, however. By itself, the concept of an advantage does not seem to work as a sufficient criterion because not all normative (legal, moral, social, etc.) advantages are rights. As shall be discussed in greater detail in Chapter 5 § IV.3, the nineteenth century scholar Rudolph von Jhering presents the following example. A domestic manufacturer, through political or financial pressure, or corruption, gains the government's favour. He convinces it to pass a law imposing tariffs on certain foreign goods that compete with his own. The domestic manufacturer has an interest in the new law being enforced (indeed, it was grounded in his interests), which also directly benefits him – and intentionally so, in a sense. The tariff harms his foreign competitors and bestows upon him an advantage. According to von Jhering, the law bestows upon the manufacturer an advantage, but not necessarily 'a right'.[73]

A second candidate consideration is of rights as entitlements. As partially demonstrated above, rights scholars generally do not explain what 'an entitlement' is. They disagree about what counts as types of entitlements (such as Campbell's denial that powers

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[72] E.g., Wellman (1985), *supra* note 9 at 25-7.

[73] Rudolph von Jhering, III *Der Geist des Romischen Rechts auf den verschidenn Stufen seiner Entwicklung* at 351-3 (1924 edn), *cited in* Hart (1982), *supra* note 6 at 180.

and immunities are examples), and about the relationship of rights to entitlements (are all entitlements rights, or only some, and on what bases?). Some hold that entitlements are the key to understanding rights: rights are best explained positively as entitlements to do, have, enjoy, or have done, and not negatively as something against others, or as something one ought to have.[74] Others think the notion of an entitlement is too 'thin' or too 'imprecise' to serve as the fundamental criterion for rights,[75] or that it provides no deeper explanation of rights *qua* explanans.[76] Until a better account of entitlements is worked out, its candidacy *qua* potential criterion for determining what counts as 'a right' must not be assumed.

## § V. Conclusion

Philosophers and others have long been aware of different senses of 'a right' abounding in ordinary, legal, philosophical, and political discourses. They try to make sense of this diversity by constructing different kinds of accounts, models and theories, which explain the structure of these different senses and to explain their (supposed) underlying unity. Modellers can be divided into Monists and Pluralists. Pluralists think the term 'a right' refers to distinct concepts and that it is apt to style each of these basic kinds of normative positions as 'a right'. By contrast, Monists either believe that there really is only one basic kind of right, or at least that the term 'a right' ought to be reserved for just one concept.

This chapter aimed to undermine the motivations for monistic models. It criticised Monists on their own terms; particularly, their assumptions and methodological

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74 E.g., HJ McCloskey, 'Rights—Some Conceptual Issues' (1976) 54 Australasian J of Philosophy 99.

75 E.g., Lars Lindahl, 'Stig Kanger's Theory of Rights', in Ghita Holmström-Hintikka et al (eds.) II *Collected Papers of Stig Kanger with Essays on His Life and Work* (Kluwer Academic Publishers 2001) at 162-3.

76 'Entitlement analyses hold that rights are entitlements; duties, powers, and so far are various ways of protecting entitlements. A difficulty with such views is becoming clear what an entitlement is as distinct from its various protections'. Michael Bayles, *Hart's Legal Philosophy: An Examination* (Kluwer Academic Publishers 1992) at 141-2.

commitments, and showed that their delimitation efforts are unmotivated and unsound. However, a more positive defence of Pluralistic modelling is also feasible. It seems perfectly reasonable to believe that the phrase 'a right to do' (e.g., a right to speak) reflects one or more additional basic kinds of rights, and that in law, the abilities to buy and sell property, and to solicit people for contracts, constitute 'central cases' of rights. Such rights cannot simply be identified with RCTDs – at least if the latter are understood as 'passive' rights. Monistic models are therefore explanatorily inadequate for excluding these central cases.

While Monists provide under-inclusive models, other scholars are over-inclusive as to what counts as 'a right'. These modellers treat duties, liabilities, and the like ('ligations', for want of a better generic term) as rights too. This chapter showed that these other scholars could not square the idea of 'ligation-rights' with their *own* stated methodological commitments about models and theories of rights.

## Appendix 1. The Concept(s) of Correlativity

There is a quagmire in rights literature: the concept(s) of correlativity. No existing rights model, as far as I am aware, wholly disavows it – though modellers dispute their meanings. There are at least three disagreements manifest in the philosophical literature on rights regarding how best to understand correlativity.

The first is whether the existence of rights always entails the existence of duties *and* vice versa. Very few scholars actually subscribe to that view.[77] Most happily admit that some duties do not correlate with rights (e.g., duties to oneself, absolute duties, etc.). They endorse the narrower proposition that all rights correlate with duties but not vice versa. Hence, the set of all duties is larger than the set of duties that correlate with rights.

The second disagreement is about the conceptual or semantic meaning of the pair of correlative terms: is it (A) an 'identity' or symmetry of two concepts, or (B) a relationship of non-identical concepts? View A is sometimes characterised as one of 'logical equivalency'. Basically, it holds that any information about one normative position in a correlative pair may be gleaned from the perspective of the second position. For example, it is often said that a Hohfeldian claim is nothing but a duty seen from the right-holder's perspective, that the tethered normative positions are but 'two sides of the same coin',[78] or are mirror images of one another.[79] Let us style this the 'Symmetry View' of correlativity. By contrast, View B

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[77] See, e.g., Kramer (1998), *supra* note 6 at 58-9, may be an exception. Rejecting the idea of absolute duties, he suggests that all troublesome cases, wherein a duty-bearer is discernible but an individual correlative right-holder is hard to find, can actually be explained in terms of a *collective* right held by the state or the community.

[78] E.g., Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) at 148-9.

[79] Such scholars generally see rights and duties as mere (inseparable) parts of a jural relationship, describing the matter in terms of signifying different aspects of that notion. See, e.g., Hohfeld *FLC #2*, *supra* note 3 at 719, 749-50. Kramer (1998), *supra* note 6 at 24, 33, 39. Kramer defines Hohfeldian correlation as a logical tie of mutual entailment. *Id*. at 43.

holds that the correlative normative positions are asymmetrical. Each bears distinct features.[80] For simplicity's sake, this will be called the 'Asymmetrical View' of Correlativity.

A third disagreement is between what has been styled existential and justificational correlativity. *Existential* correlativity holds that both normative positions in a correlative pair must invariably co-obtain. *Justificational* correlativity, by contrast, holds that one position justifies the other's existence, e.g., my right is the reason for your duty. Justificational correlativity may obtain with or without existential correlativity. For example, MacCormick thinks rights can be temporally prior to duties.[81] Kramer nonetheless shows that existential and justificational correlativity are wholly compatible.[82] One can, but need not, consistently hold that both forms of correlativity obtain. The scholarly disagreement, then, takes the following form: whether (I) there are rights lacking correlative ligations (but which might nevertheless later justify the imposition of correlative positions on others) and (II) whether justificational correlativity is true, must always be the case, and is necessary for a rights model.

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[80] E.g., Wellman (1985), *supra* note 9 at 57 on 'weak' vs. 'strong' versions of correlativity. For the best explanations of Views A and B as interpretations of 'correlativity', see A.R. Anderson, 'Logic, Norms, and Roles' (1962) 4 Ratio 36; Frederick Fitch, 'A Revision of Hohfeld's Theory of Legal Concepts' (1967) 39-40 *Logique et Analyse* 269; Philip Mullock, 'The Hohfeldian No-Right: a Logical Analysis' (1970) 56 Archiv Für Rechts–und Sozialphilosophie 265.

[81] MacCormick (1977), *supra* note 6 at 200.

[82] See Kramer (1998), *supra* note 6 at 38-44.

## Appendix 2. A Sample List of Rights Models

*These are only partial presentations of each model, focusing mostly on its constitutive normative positions*.

**Jeremy Bentham (1782)**[83]

**A Right**: when the law imposes on one party an *extra-regarding* duty to provide a service to a second party[84] where the law intends for that latter party to benefit (where the act has been calculated, by the lawmaker who designs the duty, to benefit the right-holder).[85]

Type I: *Negative* services

Type II: *Positive* services.[86]

**Liberty**: the mere absence of duty. A right of exemption from dominion.[87]

**Power**: [88]

Type I: Power of ***Contrectation***: a normative capacity to physically handle objects (including humans *qua* bodies). 'The right of performing acts of an intransitive nature, the work of law'.[89]

Type II: Power of ***Imperation***: a normative capacity to control a rational being's active faculties.[90]

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[83] Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed by Philip Schofield (Clarendon Press 2010). This preliminary presentation mostly follows HLA Hart (1982), *supra* note 6 (particularly the chapters 'Legal Duty and Obligation, 'Legal Rights', and 'Legal Powers'), but see also Lars Lindahl, *Position and Change: A Study in Law and Logic* (D Reidel 1977) at 198-203. Even so, more work must be done to elaborate Bentham's model.

[84] Bentham, *supra* note 83 at 79-80. Take away the notion of punishment and you deprive the words duty, right, power, etc., of all meaning. *Id* at 145.

[85] *Id.* at 300. 'The notion of command leads to that of duty: that of duty to that of right: and that of right to that of power'. *Id.* at 317. 'If it be any other part [who will benefit from the compelled action], then is it a duty owing to some other party: and then that other party has at any rate a right: a right to have this duty performed: perhaps also a *power*: a power to compel the performance of such duty'. *Id.* at 317. 'Right is either naked or armed with power'. *Id.* at 317 n . 'Wherein consists the exercise of such a right? In the demanding of the services only, or in the demanding and receiving them accordingly?' *Id.* at 300 n 2.

[86] *Id.* at 80, 301. Both are '*enforced* services'. Hart (1982), *supra* note 6 at 168.

[87] Bentham, *supra* note 83 at 150 (in the footnote that commences on 148), 75-6

[88] Every power is a right, but not every right is a power. *Id.* Powers can be 'corroborated' (i.e., protected by some other normative position, e.g., by a correlative duty), or 'uncorroborated' (i.e., not so protected). *Id.* at 314.

[89] *Id.* at 79 n "a", 149 n. Aka 'autocheiristic' power. *Id.* at 103 n 1.

[90] *Id.* at 42 n "b". Hart on Bentham's imperation power: 'a power to procure persons to act in conformity with a command or prohibition by providing motives influencing their will, and it does so in either of two main ways: by threatening punishment if the act is not done or by offering reward if it is done'. Hart 1982, *supra* note 6 at 200-1. Hart is probably correct to identify Bentham's contrectation and imperation powers as being what usually are called 'liberties' or 'permissions'. Hart 1982, *supra* note 6 at 197, 200.

**Immanuel Kant (1797)**[91]

***Rechtanspruch***: coercive powers vis-à-vis another person's duty.

**Alois von Brinz (1857)**[92]

***Rechte***: a legal permission, a legal ability, or a combination thereof.[93]

***Dürfen*** (*licere*): legal permission. (***Befugniss*** is also identified with *licere*).[94]

***Können*** (*posse*, *potestas*): legal ability/capacity.[95]

Brinz also mentions ***Anspruch*** (a claim) as *rechte*, and as a basis of a *klagrecht* (right/cause of action.[96]

**William Markby (1871)**[97]

Three senses of 'a right' (of which the first is intimated to be the most appropriate):

**Right**: the correlative of a duty, which is invariably enforceable.[98]

**Faculty/Power**: [undefined]. Two types: 'of doing' and 'of not doing'.[99]

**Liberty**: freedom from all kinds of duty.[100]

**Immunity and Privilege**: [both undefined].[101]

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91 '[I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.' Immanuel Kant, *Metaphysics of Morals* (Mary Gregor tr, CUP 1996) at 6:231, pg 25. 'Right and authorization to use coercion therefore mean one and the same thing'. *Id.* at 6:232, pg 26. Kant calls this the 'strict' or 'narrow' sense of a right, but notes that people also think of a right in a 'wider' sense, of which there are two true or alleged' kinds: *equity* (right without coercion) and *right of necessity* (coercion without a right). *Id*. at 6:232-35, pages 25-8.

92 Alois von Brinz, *Lehrbuch der Pandekten,* 1rst ed (Deichert 1857).

93 *Id.* at 49-50 (§ 23).

94 *Id.*

95 *Id.*

96 *Id.* at 52 (§ 24). Compare JS Mill: 'When we call anything a person's right, we mean that he has a *valid claim* on society to protect him in the possession of it, either by the force of law, or by that of education and opinion'. John Stuart Mill, *Utilitarianism* (Parker, Son, and Bourn 1863) at 78 [emphasis added].

German jurists in the second half of the nineteenth century debated the relationships amongst: (i) *recht*, *anspruch*, and a right/cause of action (sometimes distinguished by the terms *klag* or *klagrecht*) and (ii) 'the' German concept of a cause of action to the Roman *actio*. See, e.g., Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (Julius Buddeus 1867) at 81, 89-93 (§ 37 n 1, §§ 43-44).

97 William Markby, *Elements of Law: Considered with Reference to Principles of General Jurisprudence* (Clarendon Press 1871) at 49-57.

98 *Id.* at 50.

99 *Id*.

100 *Id.* at 51.

101 *Id.* at 57.

**Duty**: the necessity that persons (to whom a legal command is addressed) are under to obey (that law).[102]

Type I: *Relative*: correlates with a right.

Type II: *Absolute*: does not correlate with a right.[103]

**Ernst Bierling (1877-83)**[104]

***Rechtsanspruch*** (legal claim): In its narrower meaning, it is an imperatival address to a correlative duty-bearer. However, the concept of a liberty to demand [*Forderndürfen*] is insufficient to explain the concept of *anspruch*; for one may possess the latter without having to make such a demand, and without even being aware that one is a right-holder. The *anspruch*-holder is rather in the special 'constant condition of (a) tacit demand(ing)' [*constanten zustande stillschweigenden Forderns*] of the duty-bearer. That condition in turn enables the holder to (performatively) make a demand.[105]

***Befugniss****:*

Type I: ***Rechtliche Dürfen***: (unrestrained legal liberty): 'simple legal permission'… the content of which is, in essence, purely negative [i.e.,] not being legally forbidden'.[106]

Type II: ***Rechtliche Können***: (legal power): 'legal ability, i.e., the ability, following some provision of positive law, to produce certain legal effects by "acts-in-the-law"'.[107]

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102 *Id.* at 49.

103 *Id.* at 50.

104 Ernst Bierling, *Zur Kritik der Juristischen Grundbegriffe*, vol 2 (Friedrich Andreas Berthes 1877-83) at 32-73.

105 *Id*. at 39-40, 40 n (§ 141). Bierling holds that, of the three concepts expressed in ordinary language by the term 'a right' – *Rechtanspruch*, *Dürfen,* and *Können* – only the first warrants the 'scientific title' of a 'subjective right'. *Id*. at 74 (§ 160).

106 *Id*. at 50 (§ 147), as translated in Lindhal, *supra* note 77 at 196.

107 *Id*. (and *Id*). Roscoe Pound translates Bierling here as: "capacity in pursuance of certain provisions of the positive law, to produce determinate legal consequences through legal transactions". Pound (1915), *supra* note 55 at 111.

Cf. August Thon, who notes four distinct senses of '*subjektiven rechts*' – ***Normenschutz*** (normative protection), ***Anspruch***, ***Befugniss***, and ***Genuss***. August Thon, *Rechtsnorm und Subjecktive Rechts: Untersuchungen zur Allgemeinen Rechtslehre* (Hermann Bohlau 1878) at chapters 5-7. Thon also holds that, of these four concepts, only *anspruch* truly deserves the title of 'a subjective right'. *Id*. at v-vi. Cf. Wilhelm Schuppe, *Der Begriff des subjectiven Rechts* (Wilhelm Koebner 1887).

**Henry Terry (1884)**[108]

| **Jural Correspondents** | Correspondent Right | Permissive Right | Protected Right | Facultative Right |
|---|---|---|---|---|
| | Duty | None | Duty | None |

**Correspondent rights**: the condition of being owed a duty to act or forbear.[109]

**Protected rights**: the condition of being owed a duty to create a state of affairs, or to preserve the status quo. The duty is enforceable at the right-holder's option.[110]

**Permissive**: the condition of not being under a duty.[111]

**Facultative**: powers or capabilities to dispose of rights of other kinds.[112] Two types:
Type I: Powers: privately exercisable without the aid of a court.
Type II: Charges: only executable or enforceable via a judicial proceeding.[113]

**Duty**: three types: Peremptory Duties, Duties of choice, and Duties of Intent.[114]

**John Salmond (1902)**[115]

| **Jural Correlatives** | Right | Liberty | Power | Immunity |
|---|---|---|---|---|
| | Duty | Liability (type I) | Liability (type II) | Disability |
| **Jural Absences** | Right | Liberty | Power | Immunity |
| | Liability (type I) | Duty | Disability | Liability (type II) |

**A Right** (*stricto sensu* case):[116] an interest recognised and protected by a rule of right/legal justice (for *legal* rights, or by the rule of natural justice for *moral* rights) for which a corresponding duty is imposed on one or more other parties.[117]

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108 Terry, *supra* note 6, in the chapter 'Duties and Rights in General'.

109 *Id*. at 87. '[T]he violation of a mere correspondent right does not give a cause of action; for that a violation of a *protected* right is necessary'. *Id*. at 99 (emphasis added).

110 *Id*. at 97.

111 *Ibid*. at 90. Permissive right vs. legal power: One may be under a duty not to do an act without being made legally incapable of doing it. *Id*.

112 *Id*. at 100.

113 *Id*. at 101.

114 *Id*. at 85-7.

115 'Legal Rights' and 'The Kinds of Legal Rights', in Salmond, *supra* note 4. Cf. Anthony Dickey, 'Hohfeld's Debt to Salmond' (1971) 10 U.W. Austl. L. Rev. 59.

116 *Id*. at 231, 234.

117 *Id*. at 219, 220, 221, 223. The power to enforce via instituting legal proceedings is not essential to the conception of a legal right. (Unenforceable legal rights are 'imperfect' cases, though). *Id*. at 223. Nevertheless, 'there can be no right unless there is someone from whom it is claimed…'. *Id*. at 224. 'I enjoy my rights through the control exercised by it over the acts of others on my behalf'. *Id*. at 235.

**A Liberty**: the benefits one derives from the absence of legal duties imposed on oneself.[118] The law allows to one's will a sphere of unrestrained activity.[119]

**A Power**: when the law actively assists me in making my will effective as against others.[120] A power is usually, but not necessarily, combined with a liberty to exercise it. Hence its exercise may be effectual and yet wrongful.[121]

**An Immunity**: the benefit derived from the absence of power in other persons.[122]

**A Duty**: an obligatory act.[123] A duty is the absence of a liberty.[124]

**A Disability**: the absence of a power.[125]

**A Liability**: either the absence of a right or an immunity. It is the correlative either of a liberty or a power vested in some one else.[126]

**William Galbraith Miller (1903)**

Various senses of 'a right':

> 'It is a claim (with a correlative duty?); a power; a faculty; a liberty (with a correlative duty?); an authority; a privilege; a prerogative; and a capacity to act or to possess: dominion, empire, power, authority, immunity, status, or some interest put forward actively if necessary in the form of a case or action at law, and recognized by the state in accordance with right, law, and justice'.[127]

**Hohfeld's Schema of Jural Relations (1913)**[128]

| | | | | |
|---|---|---|---|---|
| **Table of Jural Correlatives** | Claim | Privilege* | Power | Immunity |
| | Duty | No-Right | Liability | Disability |
| **Table of Jural Opposites** | Claim | Privilege | Power | Immunity |
| | No-Right | Duty | Disability | Liability |

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118 *Id*. at 231.

119 *Id*. at 236.

120 *Id*.

121 *Id*. at 234 n 1.

122 *Id*. at 235. 1. Rights (stricto sensu)—what others *must* do for me. 2. Liberties—what I *may* do for myself. 3. Powers—what I *can* do as against others. 4. Immunities—what others *can not* do as against me. *Id*. at 238.

123 *Id*. at 218.

124 *Id*. at 236.

125 *Id*.

126 *Id*.

127 William Galbraith Miller, *The Data of Jurisprudence* (W. Green & Sons 1903); Cf. *Id.* at 138, citing *Quinn v Leathem* (1901) A.C. 495.

128 See Hohfeld, *FLC #1*, *supra* note 3 at 30.

***Five Types of Rights***: claims, liberties, powers, immunities, and complexes

**A Claim/right** (*stricto sensu*): one's affirmative claim against another

**A Privilege [liberty]**: one's freedom from the right or claim of another.

**A Power**: one's affirmative "control" over a given legal relation as against another.

**An Immunity**: one's freedom from the legal power or "control" of another as regards some legal relation.[129]

***Right Complexes***:

E.g.1, Power + liberty

E.g.2, a claim + claim + power + power + liberty

E.g.3, a claim + liberty + power + immunity

***Types of Ligations***: duties, no-rights, liabilities, disabilities (and complexes?)

***Some Hohfeldians' Suggested Modifications***:

*Hohfeld himself preferred the term 'privilege', but this is standardly replaced with 'liberty' in the literature. The differences between a liberty and privilege, say critics, are the mere absence of a duty versus an express permission to act. Hohfeld says that these amount to the same thing.[130]

-Not every one of the four types is a right: only one (e.g., a claim) or some are.

-Not ever token of a type counts as a right, e.g., not all powers are rights.

-Some or all ligations (duties, liabilities, etc.) can also be rights.

-It is disputed whether claims and/or immunities are active or passive positions.

**Roscoe Pound (1915, 1959)**[131]

| **Juristic Conceptions** | Right | Liberty | Power | Privilege | No correlative |
|---|---|---|---|---|---|
| | Duty | No correlative | No correlative | No correlative | Liability |

A legal right (in the 'narrow or strict sense') is a capacity to assert a legally recognized and delimited interest before legal officials (courts, etc.).[132]

Liberty vs. Privilege: liberty is any action that is not prohibited, while privilege is a special exemption from an ordinary legal rule.[133]

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[129] *Id*. at 55. Despite his definitions, the reader is advised to note Hohfeld's inconsistent usage of his conceptions. For example, are liberties and immunities *freedoms from* others' claims or powers, or do they instead mark the other parties' *lack of* claims or powers? So to with a claim: do we claim with a claim, or is it a passive position?

[130] Hohfeld, *FLC #1*, *supra* note 3 at 42 n 59.

[131] See Pound (1915), *supra* note 53; Pound (1959), *supra* note 5, especially at 70-1, 75.

[132] Pound (1915), *supra* note 53 at 93; Pound (1959), *supra* note 5, at 70. Why not define the *stricto sensu* case as 'a claim'? 'If we define [it] in terms of claim, we put in the foreground the idea of interest, whereas we are defining something conferred by law to make the interest effective'. *Id.* at 70.

[133] Pound (1959), *supra* note 5 at 81.

'A right' also refers to a complex conception, or rather a bundle of (the more basic) conceptions.[134]

All of these juristic conceptions of 'a right' contain a capacity for asserting them before courts and administrative agencies.[135]

Hohfeld's no-rights, liabilities, immunities, and disabilities are not genuine legal positions and lack jural significance.[136]

**HLA Hart (1982)**[137]

**Legal Liberty-right**: norms to act protected indirectly by obligations of non-interference.

Two varieties: unilateral and bilateral

*Liberty-rights vs. liberties*: former are 'vested' (protected directly or indirectly by someone else's duty) or 'naked' (unprotected directly or indirectly by a duty).[138]

***Bilateral liberties***: entitled to act AND not to act.

To be a liberty-*right* the position must be protected, directly or indirectly, by duties not to interfere.

***Unilateral liberties***: entitled either to act OR not to act (not both).

To be a liberty-*right* it must be protected, directly or indirectly, by duties not to interfere.

'Naked' (unprotected) unilateral and bilateral liberties do not count as 'rights'.[139]

**A Legal Right-Correlative-To-An-Obligation**

Most private law tokens of the type: a special case of legal power whereby the holder is at liberty to waive, extinguish, to enforce, or leave unenforced another's obligation.[140]

There are other legal and moral tokens of the type that are not liberty-powers. They are instead simply entitlements to a correlative duty-bearer's action or forbearance.

**Legal Power**: 'the act which there is a bilateral liberty to do is an act-in-the-law, just in the sense that it is specifically recognized by the law as having legal effects in *varying* the legal position of various parties and as an appropriate means for varying it'.[141] Powers can also be used to 'preserve' parties' positions.[142]

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134 Pound (1915), *supra* note 53 at 101; Pound (1959), *supra* note 5 at 58.

135 Pound (1959), *supra* note 5 at 71.

136 Pound (1915), *supra* note 53 at 97-8, 100; Pound (1959), *supra* note 5 at 78-81.

137 See Hart (1982), *supra* note 6.

138 *Id*. at 173-4.

139 *Id*.

140 *Id*. at 188.

141 *Id.*

**Legal Immunity**: legal positions that prevent *adverse* changes to its holder's other legal positions. However, immunities that prevent *advantageous* changes do not count as rights.[143]

**Legal Duty**: 'Far better adapted to the legal case is a different, non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have a categorical reason to do but, as the etymology of 'duty' and indeed 'ought' suggests, such statements refer to actions which are due from or owed by the subjects having the duty, in the sense that they may be properly demanded or *exacted* from them. On this footing, to say that an individual has a legal obligation to act in a certain way is to say that such action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action'.[144]

Hart on *Private Law* rights-correlative-to-obligations

Private Law rights-correlative-to-obligations are bilateral liberties, which are actually pairs of powers by which to enforce or waive duties in three stages. The *fullest* measure of control comprises three distinguishable 'elements', i.e., sets of powers (There are 'lesser' measures of control too, as not all rights possess all of the following elements):

**Element I**: the right holder may:

Ia: waive OR

Ib: extinguish the duty OR

Ic: leave it in existence

**Element II**: after (II) breach OR (II′) threatened breach of a duty he may:

IIa: leave it 'unenforced' OR

IIb: may 'enforce' it by suing for compensation, OR

IIc: in certain cases, sue for an injunction OR

IId: in certain cases, sue for a mandatory order

**Element III**: AND he may:

IIIa: waive OR

IIIb: extinguish the obligation to pay compensation to which the breach gives rise

[IIIc: **Hillel Steiner's addition**: seek to enforce the obligation to pay][145]

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142 *Id*. at 184.

143 *Id*. at 191.

144 *Id*. at 159-60 (emphasis added). Cf. *Id.* at 266. See also John Austin: 'Right; —the capacity or power of exacting from another or others acts or forbearances; —is nearest to a true definition'. John Austin, 'Lecture XVI', in *The Province of Jurisprudence Determined*, vol 2, 2nd ed (J. Murray 1863) at 63. Compare also JS Mill: 'It is part of the notion of duty in every one of its forms that a person may rightfully be compelled to fulfil it. Duty is a thing which may be *exacted* from a person, as one exacts a debt. Unless we think it can be exacted from him, we do not call it his duty'. Mill, *supra* note 90 at 71.

145 *Id*. at 183-4; Hillel Steiner, 'Working Rights' in Matthew Kramer (ed) *A Debate Over Rights* (OUP 1998) at 240 and 240 n 14.

**Neil MacCormick (1977, 2008)**[146]

-Rights are 'logically', and sometimes also temporally, prior to duties.[147]

-While liberties, powers, and immunities by which to protect passive rights (to another's duty) are not always available;[148] passive rights without associated enforcement powers are for that reason 'imperfect'.[149]

Conjunction of active and passive rights:

[1] A right-holder with 'full active capacity' [e.g., a rational adult] has the choice to demand or forgo demanding observance by another or others of one's passive rights.

[2] When rights have been infringed, it is normally a matter of free choice whether to demand a remedy from the infringer or to let the matter pass.

[3] If the demand is made and rejected, or ignored, one has the right and power to take legal action before a court, calling for it to impose a suitable legal remedy.[150]

**Joseph Raz's Model of Normative Positions**

**A Right**: reasons that are the sufficient but not necessary grounds of (justify imposing) duties, other positions, and even other rights. Rights are: *justificationally* prior to duties; *existentially* correlative with duties; and *logically* posterior to duties.[151] Rights are typically but not necessarily exercisable (or enforceable) via liberties and powers and protected by immunities, none of which is a right.[152]

**Liberty**:

*Exclusionary permissions*: an entitlement to perform an act even though there are conclusive reasons for one not to perform it, provided one he is

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146 See MacCormick (1977), *supra* note 6; MacCormick (2008), *supra* note 27.

147 MacCormick (1977), *supra* note 6 at 200-1.

148 *Id.* at 205; MacCormick (2008), *supra* note 27 at 129.

149 MacCormick (2008), *supra* note 27 at 129.

150 *Id*. at 129.

151 Raz (1986) *supra* note 6 at 180-81, 196; Raz (1994), *supra* note 6 at 33, 35-36.

152 On rights as reasons, see, e.g., Raz (1986), *supra* note 6 at 169, 181; Raz (1994), *supra* note 6 at 46. On rights as sufficient but not necessary grounds, see, e.g., Raz (1986), *supra* note 6 at 181,183-4, 188, 192, 193, 202; Raz (1994), *supra* note 6 at 31. On rights grounding other normative positions (duties, liberties, etc.), see, e.g., Raz (1986), *supra* note 6 at 167-8, 170-1; Raz (1994), *supra* note 6 at 31, 46, 268. On the existential, justification, and logical relations between rights and duties, see Raz (1986) *supra* note 6 at 170-1, 180-1, 196; Raz (1994), *supra* note 6 at 33, 35-6. On rights being contingently protected by other positions, see Raz (1986) *supra* note 6 at 181; Raz (1994), *supra* note 6 at 256-8, 266-7. On there being but one basic kind of right, see, e.g., Joseph Raz, *Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed (OUP 1980) at 179-81; Raz (1986) *supra* note 6 at 176 (rights are nothing but the grounds of duties), 180, 188.

entitled not to act for those reasons, to exclude them from one's considerations.[153]

*Weak permissions*: no norms regulating certain behavior.[154]

'*Liberty-rights*': a spurious category, Raz suggests.[155]

**Power**:

*Directed powers*: powers restricted by duties. The duties specify conditions for the power's use.[156]

**Immunity**: A reason for not being subject to another party's power.[157]

**Duty**: first-order reasons to act or forbear coupled with second-order, exclusionary reasons to exclude from consideration certain reasons for not conforming with the first-order reason to act/forbear.[158]

*Duties correlating with rights*[159]

*Absolute* (*Non-correlating*) *duties*, e.g., self-regarding ones[160]

**Liability**: (undefined?)

Raz's *Purported* Order of Justification for legal rights and other legal positions

Interest → Right → Duty

1, Weighty interest + 2, a weighty moral right, grounds a (legal) duty

Interest → Duty

(I.e., rights are not the exclusive grounds of duties).

Interest → Right → Liberty

Interest → Right → Power (e.g., enforcement powers to protect the right)

Interest → Right → Immunity (e.g., to protect the right from nullification)

Interest → Right → Another Right

The *Actual* Order

An interest + a *moral* right + a conceivable class of duty-bearers *and* a discernible agent who can actually bear the duty. If all four co-obtain, then a *legal* right and a legal duty can be generated concurrently.

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153 Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) at 89-91; Raz (2009), *supra* note 11 at 117 n 4.

154 Raz (2009), *supra* note 11 at 117 n 4.

155 Raz (1994), *supra* note 6 at 275.

156 *Id.* at 241.

157 Raz (1986) *supra* note 6 (1986) at 168 n 1.

158 Raz (1994), *supra* note 6 at 40.

159 Raz (1986), *supra* note 170-1, 196.

160 *Id.* at 210-13; Raz (1994), *supra* note 6 at 32-40.

# Chapter 3: Rights Exercise and Enforcement

## § I. Introduction

This chapter provides preliminary bases for understanding the concepts of rights exercise enforcement, remedying, and vindication. Despite their ubiquitous employment, there has never been (to my knowledge) any serious explanation of, or attempt to distinguish amongst, these concepts. The *terms* 'rights exercise', 'enforcement' etc., are frequently used interchangeably, which masks pertinent differences amongst the *concepts*. Clarifying their differences will get us greater mileage out of our linguistic and conceptual resources, and with greater precision when doing so.

To get there, Section II first explains the Active-Passive distinction. This is a common heuristic in the philosophical literature on rights, which aims to show what each conceptually basic type of normative position, on its own, is meant to do. By design, though, the Active-passive Distinction is too narrow to explain all forms of rights exercise. Section III therefore explains why it must be supplemented with the idea that either one normative position can exercise another, or can at least exercise a right 'complex'. Section V addresses objections to this supplementation.

In between, Section IV outlines the concepts of rights exercise, rights enforcement, remedying rights, and rights vindication. To summarise, rights *exercise* concerns authorised actions or omissions that advance a right's content, whether or not that is the right-holder's subjective motivation for acting. Rights *enforcement*, in turn, is a subset of modes of rights exercise. Enforcement concerns efforts to try to vindicate the right or to procure remedies for its violation. Rights remedying and vindication can also differ, as the latter sometimes concerns status recognition rather than the procurement of some form of compensation from, or a sanction imposed upon, another party.

## § II. The Active-Passive Distinction

To understand the concept of rights exercise it helps to become familiar with a common heuristic in jurisprudential literature: the Active-Passive distinction.[1] It carves up the various basic types of normative positions (i.e., not just rights, but also 'ligations': duties, liabilities, etc.) as being either 'active' or 'passive'. More specifically, the distinction identifies a type of position as authorising or requiring a certain action, the forbearance from an action, the (in)competency to act, or as marking its bearer as the agent towards whom a different agent's action or forbearance is to be directed or to affect.[2]

'Active' and 'passive' are misleading labels, though. Normative positions mark out what each party is entitled to, able to do, required to do, unable to do, etc. Yet an 'active' right is neither itself an action, nor the physical basis in virtue of which someone acts. Rights may authorise an action, but the physical act thereby authorised is an event, not a normative position.[3] Take the right to self-defence as an example. Kicking an attacker is not itself a right; a right is rather what entitles you to kick the attacker.

The distinction is most easily explained in terms of two agents, be they individuals or

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[1] The distinction may be hundreds of years old. It certainly predates the twentieth century. See, e.g., John Salmond, *Jurisprudence, or The Theory of the Law* (1st edn, Stevens & Haynes 1902) at 225, who cites to earlier authors discussing it.

[2] Leif Wenar explains the distinction as being thus: 'Active rights are signalled by statements of the form "A has a right to φ"; while passive rights are signalled by statements of the form "A has a right that B φ" (in both of these formulas, "φ" is an active verb)'. Leif Wenar, 'Rights', Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights/ Accessed 1 January 2016. The Active-Passive distinction applies to all rights models, even Monistic ones (i.e., those positing only a single conceptually basic kind of right); for it still makes sense to say that that one kind of right is 'active' or 'passive'.

[3] For a discussion of the difference between facts and normative positions, see Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L.J. 16, 20, 21, 24, 43, and 52 ["Hohfeld, *FLC #1*"]. Andrew Halpin thinks Hohfeld's rigid Fact-Position distinction is problematic. It is a mistake, he thinks, to treat normative positions as being wholly abstract and thus disconnected from the facts comprising human action. See Andrew Halpin, *Rights and Law: Analysis and Theory* (Hart Pub. 1997) at 29-30. It is unclear, however, whether Hohfeld's division between facts and positions is as firm as Halpin presents the case.

groups, and one normatively guided or authorised action. An 'active' right renders its holder competent or entitled to act. A second party, the ligation-bearer, is directly affected by that act.[4] Further, a right counts as an 'active' one even if it is not being exercised at a given moment; it suffices that the right be *potentially* exercisable. For example, assuming *arguendo* that (at least certain) powers count as a kind of right, the right to give a gift to a friend enables the owner (the power-holder) to alter the friend's legal status from non-owner to owner of the gifted item by undertaking some legally relevant performative act.

By contrast, a 'passive' right marks its holder as the intended recipient or beneficiary of a second party's action, forbearance, or incompetency. It is the second party, the ligation-bearer, who must, must not, or cannot act vis-à-vis the right-holder. Here, the ligation is 'active', while the right is 'passive'. However, even if the ligation is active it does not follow that the ligation-bearer is entitled to act – even if he or she *must* do so. For while the duty ought to be fulfilled, whether the duty-bearer is entitled to act in any of the myriad ways that would enable him or her do so is a distinct matter. For example, you may bear a duty to deliver flowers to a particular office at a particular time, but due to the building being locked, you have no authority to enter and complete the delivery.[5]

Despite the distinction's prevalence, scholars disagree about which normative positions are active or passive. Concerning Hohfeld's model, for example, the majority interpretation is that liberties and powers are active, while claims and immunities are

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[4] The right-holder's action affects the ligation-bearer directly, even if the latter is not cognisant of it. For example, *A* exercises a liberty to park a car in a public parking spot. This directly affects *B* because *B* cannot park there in the interim. However, *A* need not have acted with *B* in mind, and nor must *B* even be aware of the fact that *A* has acted.

[5] Cf. Matthew Kramer, 'Rights Without Trimmings" in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 17-18 ["Kramer (1998)"]; Nigel Simmonds, 'Rights At the Cutting Edge' in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 184 n 91 ["Simmonds (1998)"]; Hillel Steiner, *An Essay on Rights* (OUP 1994) at 74-85 ["Steiner (1994)"].

passive.[6] The minority view is that claims and/or immunities are, or can also be, active rights.[7] Hence Hohfeldians disagree about whether Hohfeldian claims are passive entitlements to another party's action or forbearance, or whether they *additionally* authorise claim-holders to *make* claims of right. (All would probably agree, though, that a duty-to-act is the only 'active' kind of ligation. Recognising this, however, reveals problems with the very Active-Passive distinction, which will be addressed below). John Finnis and Glanville Williams understand Hohfeldian claims to be passive:

> *A Hohfeldian claim-right can never be to do or omit something: it always is a claim that somebody else do or omit something*: A's claim-right is always to B's action or omission, never to A's.[8]
>
> No one ever has a [claim-] right to do something; he only has a right that some one else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another, while a liberty and a power relate to the conduct of the holder of the liberty or power.[9]

It may be tempting to interpret these quotes as suggesting that, while the *content* of a claim is the duty-holder's action, the Hohfeldian claim-holder may nevertheless *claim* the

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[6] Examples of the majority view are: Albert Kocourek, 'The Hohfeld System of Fundamental Legal Concepts' (1920) 15 Illinois L. Rev. 24, 25; Glanville Williams, 'The Concept of Legal Liberty' (1956) 56 Columbia L. Rev. 1129; Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985) at 65 ["Wellman (1985)"]; Andrew Halpin, 'More Comments on Rights and Claims' (1991) 10 Law and Philosophy 271, 293 (two senses of 'claim': as an assertion and as a justified restraint); Kramer (1998), *supra* note 5 at 13-14, 22 n 8; Vivienne Brown, 'Rights, Liberties, and Duties: Reformulating Hohfeld's Scheme of Jural Relations?' (2005) 58 Current Legal Problems 343; George Rainbolt, *The Concept of Rights* (Springer 2006) at 32-3.

[7] E.g., Simmonds (1998), *supra* note 5 at 223 and n 137. The American Legal Realists interpreted Hohfeldian claims as not only active, but also as invariably *enforceable* kinds of rights. See e.g., Max Radin, 'A Restatement of Hohfeld' (1938) 51 Harvard L. Rev. 1141 1148, 1152; Karl Llewellyn, *Bramble Bush: On Our Law and its Study* (Oceana Pub 1996) at 96.

[8] John Finnis, 'Some Professorial Fallacies About Rights' (1972) 4 Adelaide L. Rev 377, 380. Finnis also says 'A claim-right is always either, positively, a right to be given something (or assisted in a certain way) by someone else, or, negatively, a right *not* to be interfered with or dealt with or treated in a certain way, by someone else. When the subject matter of one's claim of right is one's own act(s), forbearance(s), or omission(s), that claim cannot be to a claim-right, but can only be to a liberty or, in the case of juridical acts, to a power'. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) at 200 ['Finnis (2011)"].

[9] Williams, *supra* note 6 at 1145.

right. For example, *B* owes *A* ten dollars. While *B* must transfer the funds, *A* may nevertheless claim the money from *B*. According to the passive view, though, that interpretation of Hohfeldian claims is erroneous. Claiming a right is a normatively governed act. Yet *Hohfeldian* claims, interpreted as passive positions, refer to a second party's conduct: the duty-bearer's requirement to act or forbear from action (here, to transfer the ten dollars). Were the ability to claim a feature of a Hohfeldian claim, then the latter would not be conceptually basic: it would be composed of (at least): (i) an entitlement to someone else's act or forbearance and (ii) a normative capacity or permission, or set of them, to act oneself. Hence, if the right-holder's own conduct is in question, e.g., in claiming money from someone, then it must be explained by something other than a Hohfeldian claim (e.g., by a liberty or power). The same holds for the passive view of Hohfeldian immunities: they simply mark one party's (a disability-bearer's) powerlessness to alter the immunity-holder's normative positions. On the passive view, one does not 'use' a Hohfeldian immunity either.

Of course, one does not 'use' a Hohfeldian disability either. It simply marks another party's lack of power. Indeed, Immunity/Disability relations and Claim/Duty-to-forbear relations mark the breakdown of the Active-Passive distinction's soundness and utility. For where is the relevant action? Further, how are we to understand duties of the following sort: the duty to obey a commander's orders (this, rather than the duty to obey a commander's particular order, e.g., to go over the trench)? Is a duty to adhere to a state of affairs (e.g., an authoritative command structure), or to adhere to future orders, really best described as a normative requirement to act or forbear? Third, powers affect *both* the power-holder and liability-bearer's positions concurrently. *A*'s gift-giving to *B* changes both parties' statuses vis-à-vis the chattel. Is the power-holder's position *both* active and passive, then? Does the

power correlate with liabilities in both a second party and the power-holder? While the Active-Passive distinction therefore cannot accurately or fully account for what these sorts of normative positions do and require, it is nonetheless valuable for flagging the fact that normatively authorised, entitled, or required action accompanies many if not all rights and ligations.

## § III. Exercisable Rights vs. Active Rights

The Active-Passive distinction governs individual normative positions – a conceptually basic right or ligation – understood exclusively vis-à-vis their specific correlatives, e.g., a Hohfeldian claim and its relation to a duty. Being 'active' just means that a given normative position authorises or requires some action, forbearance, or (in)capacity. However, the distinction is not designed to explain the *interplay* between different normative positions outside of their correlative pairings, i.e., how one position can be used in conjunction with another. Thus, it cannot account for all the ways that rights can be exercised.

Further, while the Active-Passive distinction helps show how some kinds of rights are exercisable, it might give the impression that only active rights are. This section suggests otherwise, arguing that active rights can be used to exercise both other positions and right complexes (i.e., larger constructs composed of tokens of one or more of the basic types, e.g., a Hohfeldian claim + a liberty + a power). In other words, passive rights are potentially exercisable, even if they are not *self*-exercisable. Hence, the set of exercisable rights is larger than the set of active rights.

Here are two examples. The first is the right to a contract option. That right is actually a complex, composed of: a RCTD[10] (which correlates with your duty to let me call

[10] A right correlative to a duty. "RCTD" will be used to cover the various philosophical conceptions of this basic kind, e.g., a Hohfeldian claim, a Razian right, a Hartian one, etc.

in that option whenever I please); a power to create the contract; and liberties to call in the option or not, etc. These liberties exercise the entire right complex, not just themselves. In ordinary and legal parlance it makes sense to say that I exercised my right to the option, not just that I had a power and accompanying liberties that were exercised. A second example is calling in a debt. You owe me 100 pounds, collectable at will. Amongst other things, you have a duty to pay, while I have a RCTD to the money. You call me on the telephone and say 'come collect the money whenever you please'. I show up at your office next week. I have thereby exercised my right to claim the debt, i.e., exercised the whole right complex.

It is also important to note that, under this more expansive conception of rights exercise (as opposed to limiting it to an individual active right's self-exercise), it need not be the case that one and the same person possesses both the passive position (e.g., a RCTD or an immunity) and its means of exercise. This, regardless of whether the positions form part of a complex. In other words, to count as 'exercisable' it is *analytically* (but perhaps not morally or politically) irrelevant whether right-holders exercise their rights personally, or whether other authorised parties do so on their behalf, e.g., a legal guardian, a trustee, an agent for a principal, a state official for a citizen, etc.[11]

[11] Here is an inexhaustive list of ways that normative positions may relate. First, two may be connected if one entails the existence of a second. For example, as it affects two or more parties' positions, there is no use of a power without other *pre-existing* or *resulting* rights and ligations also obtaining – or coming to obtain. See Rainbolt (2006), *supra* note 6 at 12-3. Using a power to make a gift of a watch concerns the RCTDs, duties, and liberties concerned with that personal chattel (bestowing those normative positions on one party, divesting them from another). Powers are therefore logically connected to other (a not necessarily determinate set of) positions. A second and third are correlativity and logically contradictory (Hohfeldian 'opposite') relationships. A fourth way is when two or more positions serve as components in a larger construct, e.g., a right complex. A fifth way positions can be connected is due to the overlapping application of different rules for a given situation, transaction, or state of affairs.

## § IV. Rights Exercise, Enforcement, Remedying, and Vindication

### § IV.1 Exercise vs. Enforcement

How can one claim that the set of exercisable rights is larger than the set of active ones without already knowing what the concept of 'rights exercise' even is? This section provides the beginnings of an explanation by clarifying the concept of 'rights exercise' and several related concepts: rights enforcement, remedying rights, and vindicating rights.

As a preliminary suggestion, rights exercise is a normatively authorised or allowable action or omission, undertaken either in furtherance of the right's content, or on behalf of another right. There are two parts to this conception: (I) an entitlement to act; and (II) acting in a way that advances a right's content. What is it to 'advance a right's content'? Take the right to park a vehicle in a public parking spot for example. The right's features might include the authorisation to park, to be able to assert that others refrain from acting in certain ways (e.g., from moving your vehicle, touching it, etc.), capacities to try to seek remedies for the transgression of correlative duties, etc. The right's content is about parking. You exercise your right by parking your vehicle in a parking spot.

Must rights *solely* be used to further their content? No. People can and often do use their rights for ulterior purposes: to extort or punish others, to gain publicity, etc. *A* may sue *B*, who has infringed *A*'s right, simply because *A* knows it will hurt *B* financially to put the latter through a costly litigation process. *A*'s real aim is this sadistic undertaking, not vindicating the right as such. (Even so, it makes sense to say that *A* 'enforced' the right (which, will be argued below, is a way to exercise it), despite *A*'s being somewhat indifferent to the right *qua* right. Alternatively, we might also say that *A* exercised a secondary right in order to enforce the primary one, not because *A* cares about the secondary right as such, but rather because of the fear and anger its use might instil in *B*). Similarly, lawyers sometimes

use procedural rights simply to drag out proceedings (by filing genuine but unnecessary motions, say) in order to put financial pressure on opponents and to give them an incentive to settle or drop a lawsuit. People are usually motivated to sell their houses for the monetary gain, rather than out of a special concern with their right to alienate *qua* right, or to vindicate their property-holding status. They generally solicit others to enter contracts because they desire to engage in mutually (or individually) profitable exchanges, and not out of concern with the right to solicit as such. Additionally, people can sometimes exercise their rights without even being aware that they have done so, such as when parties make a legal contract despite believing they simply have an informal agreement.

Therefore, the initial suggestion about 'rights exercise' requires further specification. The idea of normative actions 'undertaken in furtherance of a right's content' is better understood in terms of the actions themselves, rather than the agent's subjective motivations for so acting. In other words, exercising a right to φ by undertaking action *X* furthers the right's content (φ-ing), even if the agent's subjective motivation for so acting is really to accomplish action ψ.

This modification should suffice to explain the cases in the penultimate paragraph: *A* exercises his right to sue *B* by commencing litigation, even though all *A* personally cares about is hurting *B*. *C* furthers the content of her right to alienate property by soliciting and finalising a sale to *D*, even though all *C* really cares about is the financial bottom line.[12] It

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[12] It might further be objected that not all normatively authorised actions (even *post hoc* authorisation) counts as 'rights exercise'. Two possible counterexamples, standard to the philosophical literature on rights models and theories, are adverse possession and dishonest transferring (the exception to the *Nemo Dat* rule). These are also often taken to be examples of powers that are not rights.

Adverse possession is easier to counter. The case simply does not concern normative authorisation. *D* breaches duties by trespassing on *E*'s land. The law simply holds that, after a given statutory period, and after meeting all the statutory requirements, *D*'s actions entitle him or her to gain relatively superior title to the property. More accurately, meeting all the statutory requirements *bestows* rights upon *D*. *D* did not exercise a right (nor a non-right power) to adversely possess the land. What *D* did was unauthorised.

makes sense to say that *A* and *C* exercised their rights, even though both parties may have been indifferent to their rights *qua* rights.

Not all forms of rights exercise are positive acts, though: omissions can count as instances too. For example, you can exercise your right against self-incrimination by not taking the stand in a legal proceeding. (This need not depend on some legal assertion or gesture, such as orally refusing to take the stand). It is beyond this chapter's purview to give a comprehensive account of what counts as 'action'. Nevertheless, suffice it to not that cases involving neither performative utterances nor actions are often spoken of as 'acts of omission'.

What, then, is 'rights enforcement'? What is its relationship to rights exercise? Are they distinct, is one a subset of another, or are they the same? There may be no shared criteria amongst ordinary folks, lawyers, and/or philosophers about what counts as 'rights enforcement'.[13] Indeed, legal, philosophical, and ordinary discourse about it governs, and is

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What about the dishonest transferor? *A* steals *B*'s television, and sells it to *C* a third party purchaser for value, i.e., who genuinely did not know the item was stolen. Irrespective of *A*'s criminal and civil liability, in some jurisdictions *C* gains superior title to *B*, the original owner. This means that, while *A* was under a duty not to steal or transfer the television, he or she was nonetheless capable of generating a valid contract, or something akin to one, which creates new legal rights for *C*. How could *A* have been 'normatively authorised' to act despite bearing a duty to forbear from doing so? The dark answer is that *A was* authorised to do so, in a way. The power to contract and the duty not to transfer are in direct conflict: *A* is legally capable of doing that which is not permitted. The problem does not lie in the concepts of power, duty, or authorisation, but rather in with the dishonest transfer rule itself, which contains a paradox ('You are empowered (authorised) to do what you may not do, and your doing so will render you liable to punishments and rectificatory action').

[13] For example, Joseph Raz appears to aim to delimit it to Sense A (explained below) in the following quote:

> Because the law is an institutional system, it is concerned primarily with those rights and duties which it is willing to enforce or following the violation of which it is willing to provide remedies or sanctions… Such adjudication is normally undertaken to obtain remedies or secure sanctions for violation of rights or for breach of duties, or to prevent such behaviour. The only important exception in modern legal systems is litigation to obtain a declaratory judgment. But even that is usually undertaken to facilitate or make unnecessary action for enforcement, remedies, or sanctions, or in circumstances where by convention it is respected as if it were an ordinary enforcement or remedial action.

Joseph Raz, *Ethics in the Public Domain* (OUP 1994, Revised edn) at 256 ["Raz (1994)"].

ambiguous between:

> (**Sense A**) a capacity or set of capacities requisite for *trying* to ensure that a correlative duty-bearer complies with his or her duty;
> (**Sense B**) a capacity or set of capacities requisite for *trying* to obtain a remedy or vindication for (threatened) rights violations;
> (**Sense C**) *successfully* securing duty compliance;
> (**Sense D**) *successfully* procuring a remedy or some alternative means of vindication when a correlative duty is breached

Clearer distinctions in philosophical and juridical rights vocabulary are therefore needed to emphasise these differences. For example, while rights scholars treat (certain sorts of primary and) secondary rights as instruments of rights enforcement, almost no lawyer or jurist thinks rights enforcement efforts must be successful.[14] Thus, despite being commonly considered as such (particularly in terms of secondary rights) one could object to Senses A and B's being included as part of the concept of 'rights enforcement'. It would be odd, if not nonsensical, to say that 'Suzy enforced her rights by going to court but the judge decided against her'. How can a failed effort count as 'enforcement'? One might therefore be inclined to replace "enforced" with "tried to enforce" instead. As the term 'enforcement' is commonly used for both efforts and successes, however, should its usage not be limited to one set or the other?

Additionally, in the philosophical literature on the concept(s) of 'a right', 'enforcement' is generally used to refer to certain normative powers: those enabling right-holders to try to seek a remedy for (anticipated) breaches of ligations; to try to ensure duty compliance; to try to vindicate the right in other ways; or to secure a third party's command for duty compliance or ordered remedy. In legal contexts, this often means commencing and prosecuting institutional dispute resolution processes such as litigation (i.e., using powers to

[14] Perhaps only that subset of Legal Realists, who hold that legal rights are either determinable or 'real' only after a judge or other legal official has levied a legal opinion, might think otherwise.

commence a lawsuit, to try to implement a court-granted remedy, etc.).

In that same literature, 'enforcement' is generally used a synecdoche to cover both rights enforcement and waiver. ('Waiver', in other words, is treated as a species of enforcement). It is generally used to mean a capacity to forego undertaking such processes despite being entitled to do so. (In legal contexts, an official or authorised agent – or some 'third party' – presumably oversees the dispute resolution process in order to provide determinative, binding resolutions to disputes). While a given morality or set of social conventions need not have analogous third-party dispute resolution mechanisms, there may nevertheless be other ways by which to enforce (some) such rights (sometimes).

Why should waiver be deemed a form of enforcement, though?[15] It is difficult to square with the notion of enforcement as a way of protecting or defending a right. Is it not better to construe rights waiver instead as a way of 'controlling' a right, as HLA Hart sometimes does?[16] Yes, but those who both reject Hart's *theory* of rights yet regularly construe rights waiver as a mode of enforcement may find the notion unpalatable. There are, moreover, possible disconnects between the ideas of 'controlling' and 'enforcing' rights. Several candidate means of controlling rights can help distinguish rights exercise from enforcement, such as alienation (through sale, gifting, transfer, etc.) and nullification. These seem to be ways to control a right that need not be characterised as enforcing it.

In light of these related functions, rights enforcement seems to concern *efforts to try to protect or defend either the content of a right, or (some)one's rights-holding status, in the face of (threatened) challenge, infringement, or violation by another party, by seeking out*

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15 See, e.g., Wellman (1985), *supra* note 6 at 72-3.

16 HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 183.

*some means of vindication*. Furthermore, rights enforcement can be characterised as forming 'Perimeters of Support', whereby one or more normative position is used to try to remedy or vindicate a right. Instead of having to deal with the awkward locution of 'trying to enforce' in contrast with 'enforcement', failed efforts might better be characterised as means of *controlling* or *supporting* rights.

Some philosophers might oppose efforts to distinguish rights exercise from enforcement. One reason might be if they are inclined to see cases of successful enforcement efforts as being rights 'exercise' too.[17] If, however, one treats rights enforcement as a species of rights exercise, then such terminology is unproblematic. Indeed, it seems best to consider all forms of rights enforcement as rights exercise, but not vice versa; for there are many commonplace ways by which to exercise rights that ought not to be construed as modes of rights enforcement. Unfortunately, many philosophical accounts take the use of enforcement and waiver powers to be either the (i) typical or (ii) exclusive ways by which to exercise rights.[18]

Both approaches are mistaken. Here are some paradigmatic or central cases of legal rights *exercise* that seem infelicitous to style as cases of rights *enforcement*. Rights (power-

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[17] For example, HLA Hart says:

> Where infants or other persons not *sui juris* have rights, such powers and the correlative obligations are *exercised* on their behalf by appointed representatives and their *exercise* may be subject to approval by a court. But since (a) what such representatives can and cannot do by way of *exercise* of such power is determined by what those whom they represent could have done if *sui juris* and (b) when the latter become *sui juris* they can exercise such powers without any transfer or fresh assignment; the powers are regarded as belonging throughout to them and not to their representatives, though they are only exercisable by the latter during the period of disability.

*Id*. at 184 n 86 (emphases added). See Raz (1994), *supra* note 13 at 255-7 for a concern about searching for, wrongly positing the existence of, or overemphasising the importance of such means for moral rights.

[18] E.g., 'There are at least six features that have been attributed to rights or presupposed about them in virtually all legal and moral discussions of rights… 5. Rights are exercisable. 6. This exercisability *consists in* the capacity to control [ligation-bearers'] encumbrances by either extinguishing them or enforcing them…' Hillel Steiner, 'Moral Rights', in David Copp (ed) *The Oxford Handbook of Ethical Theory* (OUP 2006) at 461 (emphasis added). Cf. Steiner (1994), *supra* note 5 at 56-7.

rights) to create, modify, or terminate contractual relationships; rights (power-rights) to procure, alienate, or exchange property; and rights (liberty-rights) to act, speak, create, or destroy, within certain boundaries. For example, it would be odd to say that *X* 'enforced' his right to buy property by purchasing Blackacre from *Y*. It would be equally odd to say that *Y* 'enforced' her property rights by selling *X* her house. But it seems perfectly fine to say that *X* and *Y* exercised their rights to buy and alienate the property. When *A* gives *B* a gift of a gold watch, or forfeits the claim to a watch he wants *B* to have, it would be odd to say that *A* thereby 'enforced' his rights. When *C* and *D* self-publish pamphlets on the finer points of neo-mercantilist economics no one will ever read it is sensible to say that they are exercising their rights to free speech, but not that they are thereby enforcing them. When *E* sends *F* an email soliciting a contract bid, it makes sense to say that *E* is exercising the rights to free speech, to associate, and solicit for contractual relations, but not that *E* is enforcing the rights to make contracts, to free speech, etc.[19]

Not everyone will agree with this characterisation of the relationship between rights exercise and rights enforcement. One of the few (if not the only other) rights scholars to even address the matter, Henry Terry thinks they are simply different things.

> A right of this sort [what Terry calls a 'correspondent' right, a form of RCTD] can not be exercised, but can be violated. To exercise a right means to do, or abstain from, the act which forms its content. But here *ex hypothesi* the only act is one that is to be done, if at all, not by the holder of the right but by the other party on whom the duty rests. There may be some way to enforce the right by compelling that other party to do what he ought to do or to make compensation for not doing so; but enforcement is different from exercise.[20]

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[19] For each of the examples given above there might actually be circumstances in which it is apt to style their actions as rights enforcement after all, but only when characterised with additional information about either their rights or their right-holder status being in question or under threat. For example, *C* and *D* enforced their rights to free speech by publishing an article about a certain economic matter that a local government official dubiously claimed legally could not be published.

[20] Henry Terry, 'Legal Duties and Rights' (1903) 12 Yale L. J 185, 188.

Terry seems to rely on the Active-Passive distinction and the idea that rights exercise is limited to a single position's capacity for self-utilisation. Yet he provides no reasons for thinking either that enforcement ought not count as modes of exercise, or that liberties or powers (what Terry calls 'facultative' rights) cannot either exercise other kinds of rights, or at least right complexes.

Furthermore, there is often interplay between rights exercise and enforcement. It is sometimes said that liberties are needed to *exercise* a power, a power that is in turn used to *enforce* a RCTD. Most of the time there are legal liberties by which to undertake the actions requisite for exercising legal powers. Occasionally there are not, i.e., when one has a power but also a duty (no liberty) not to use it (e.g., the *Nemo Dat* exception mentioned in Footnote 12). Secondary and tertiary rights are combinations of – at least – liberties and powers. To exercise them one must not have duties proscribing the commencement and prosecution of legal proceedings *and* one must legally be competent to do so. Such duties against commencement may be the product of an existing contract between the parties to a dispute. Now, a party may breach the contractual duty by suing anyway and 'get away' with it. However, if the other party raises the duty in court, then, barring other factors, the case can be dismissed.

Of course, not every action undertaken on behalf of a right will count as its exercise. When someone assassinates a political leader based on the belief that the latter impinged upon his or her rights, say, to free assembly or speech, the act of assassinating is generally not taken to be exercising either the right *to* speech or assemble. This is at least in part because the act does not further such rights' contents.[21] Nor is the generation or destruction

[21] On the other hand, one can imagine a legal system where, not only could such acts count as 'speech', but wherein acts of political violence are constitutionally protected, e.g., a *sic semper tyrannis* right.

of a right always a matter of its having been exercised.[22] For example, a right's vesting in someone is not necessarily a function of his or her having exercised that right. For example, a remainderman's interest may vest in some property simply by virtue of a life estate holder's death.

**§ IV.2 Remedy vs. Vindication**

Not only should rights enforcement be distinguished from rights exercise (and be deemed a subset of the latter), but enforcement can also be distinguished from remedying and vindicating rights. Moreover, rights remedying is but a species of rights vindication: all cases of rights remedying vindicate the right, at least nominally, while not all cases of rights vindication concern the grant or procurement of a remedy.

Successful enforcement efforts *vindicate* a right. Sometimes, though, a right can be vindicated even without right-holders being granted by others, or their procuring for themselves, a *remedy*. For example, merely by recognising its validity and another party's transgression of it in their public decisions, officials can vindicate a legal right even without granting the right-holder compensation or equitable repair.

What counts as 'successful' rights vindication varies. It can mean: procuring the remedy or award sought; getting *some* award; or securing desired status recognition; etc. Faced with breached correlative duties, some legal right-holders demand compensation and damages. Other right-holders have ulterior goals. They might seek declaratory judgements (aka 'declaratory remedies'). Sometimes a right can be vindicated even without the grant of either a remedy or a declaratory judgement. For example, people occasionally commence lawsuits just to get officials (and perhaps the public at large) to recognise their rights, even if

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[22] Nigel Simmonds thinks a distinction should be made between exercise and alienation or extinguishment. See Simmonds (1998), *supra* note 5 at 229. However, he gives no reasons for thinking the latter two are not actually varieties of exercise.

they know they will lose the suit. 'Success' can sometimes be gauged in terms of legal, social, or political recognition of one's status. This suggests that the vindication of right-holder status can differ from the way in which remedies are granted or procured.

Comparable efforts at rights enforcement and vindication are also possible in other normative domains (moral, social, etc.), e.g., by personally confronting duty-bearers. *E* promises that he will meet *F* at the park on Tuesday at 2pm. Assume that this gives *F* a right and *E* a correlative duty to show up at the specified time. *E* breaches the duty by failing to show up. When *F* confronts *E*, the former can say to the latter 'Apologise for breaking your promise'. *F* is not simply enforcing the moral right that *E* keep the promise by attending; *F* is rather trying to vindicate that right (by using an additional normative position).

These distinctions may prove unsatisfactory to some because it is also commonplace to style secondary rights as *remedial* rights, self-help actions as self-help *remedies*, and certain institutional proceedings (lawsuits, administrative tribunals, arbitration, etc.) as *remedial* proceedings. These labels might in turn reflect a certain set of prejudices: that claimants are always in the right, that if such third-party processes have been implemented it could only be because a wrong must have transpired, and/or that the bestowal of a remedy is the inevitable result of any such process. These are all untrue. Frivolous law suits happen. Sometimes, sued parties win – for valid or dubious reasons. And so forth. As they are no guarantees of securing remedies, it is therefore problematic to call secondary and tertiary 'remedial' rights.

**Summary**

Some basic kinds of rights are active, while others may be passive. Yet the set of active rights does not exhaust the set of exercisable rights. Some rights can exercise others, or can

at least serve as components in complexes and are able to exercise that larger construct. There are also significant differences amongst the concepts of rights exercise, enforcement, remedying, and vindication.

Take a right against self-incrimination as an example. It is a complex that can include: a RCTD that legal officials not compel you testify under oath; liberties to testify or not if you choose; and an immunity from legal officials changing your legal status by nullifying the right. By choosing to take the stand or not you exercise the right complex, not just its component liberties. You are, moreover, exercising the right against self-incrimination, but not necessarily enforcing it. However, if the right has been breached (say, if a corrupt judge orders the bailiff to forcefully place you in the witness box), then you may try to enforce the right.

While it makes sense to say that secondary rights *exercise* the primary right against self-incrimination, e.g., when seeking to procure a remedy for the primary right's transgression, secondary (and tertiary) rights exist in order to try to *enforce* primary ones. They aim to help to correct a (perceived) wrong, or to try to validate the status of being a right-holder itself. That is what differentiates rights enforcement from most kinds of rights exercise. Still, it is just a species of the rights exercise because, while its content is the primary right (e.g., against self-incrimination), the secondary or tertiary right normatively authorises action in furtherance of its own content as well (to commence a lawsuit, to file a motion, etc.). It would be odd to say that the secondary right enforces itself (but not odd to say that a tertiary right enforces a secondary one).[23]

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[23] It is also commonplace to say that we 'claim' our rights, e.g., by commencing institutional proceedings. This is a (set of) way(s) by which to enforce rights. As evidenced by the problems arising with Hohfeld's technical term, 'claim' is not univocal. For example, 'we claim the right to be granted a claim by staking a claim in a mine'.

## § V. An Objection and Responses

A possible objection to the notion that one type of right can exercise another is that it is erroneous to hold that a either passive right (e.g., RCTD or immunity, say) or a complex can be 'exercised' by powers or liberties. Powers or liberties, whether deemed types of 'rights' or not, simply exercise themselves. Even if a complex contains liberties and/or powers, all that really gets exercised is the liberty *qua* liberty or power *qua* power. That is not the same thing as the exercising a right (a RCTD or right complex) per se, though. A liberty or power may make *reference to a right as its content*,[24] which is also not the same thing as exercising the right.

For example, *A* and *B* enter a contract whereby *A* owes *B* 100 widgets and *B* owes *A* 100 gold coins. *A* has a right to the gold upon fulfilment of the contractual duty. If *B* breaches the duty to pay, *A* may be entitled to sue. But *A*'s right to sue is really a distinct (set of) position(s) – a combination of powers and liberties – from *A*'s contractual right to the gold. The labels 'primary' and 'secondary' rights mark this difference. The content of this second right *refers* to the first ('*B* owes me gold but did not pay so I am entitled to compensation and damages'). The primary right is also the reason for the second's existence. Nevertheless, the secondary right does not *exercise* the first ('primary') right simply by referring to or relying on it.

The objection therefore calls into question many things that lawyers, philosophers, and others typically refer to as 'rights exercise'. I offer two responses. First, the notion of two positions interacting is indispensible for explaining many forms of rights exercise. Second, *one version* of the objection leads to absurdity: it eliminates the very possibility of 'rights exercise' altogether.

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[24] E.g., Finnis (2011), *supra* my footnote 8.

The idea of one normative position 'exercising' another is necessary to explain many forms of rights discourse. In ordinary and legal parlance it is often said that we can usually 'enforce' our legal rights in courts or comparable institutional apparatuses. Barring spurious claims, a primary right is typically the basis for undertaking litigation, arbitration, etc., and it is *that* right which gets enforced – even if via secondary and tertiary rights. If *B* refuses to pay for the widgets, it is *A*'s right to get the gold that gets enforced (enforcement, again, being a subset of modes of exercise) when *A*'s right to commence litigation is recognised by the courts and when a judge sides in *A's* favour.

Further, the objectors' own stance renders certain kinds of rights exercise impossible. Recall the examples in Section III above about the rights to claim an option or to call in a debt. Both are right complexes that get exercised. It is wrong to say that their component powers or liberties alone get exercised, rather than the complexes as a whole. These right complexes are not reducible to their component liberties or powers alone, and nor do those liberties or powers cease to operate as components of these rights (to claim the option, or the right to call in the debts) when utilised.

**Passivism**

Denying the possibility of normative interplay between rights can also generate a serious conceptual difficulty. The problem is as follows. One is free to think that: (**Proposition I)** real rights are all passive; (**Proposition II)** liberties and powers are not 'rights', but simply other kinds of normative positions; and (**Proposition III)** that liberties and powers simply exercise themselves, not other positions. One can consistently endorse all three propositions concurrently. Let us call anyone who does a ***Passivist***.

Passivism is neither a far-fetched scholarly viewpoint nor a mere strawman. Although

I am unaware of anyone who explicitly endorses all three propositions concurrently, many scholars endorse different combinations of at least two of them. For example, Joseph Raz and Matthew Kramer endorse propositions I and II while John Finnis appears to endorse propositions I and III.[25]

Passivism comes at a cost: it entails that the very category of 'rights exercise' is spurious, because it deems that all rights are wholly passive. Again, the most Passivists can say is that, while liberties or powers can *refer* to rights, e.g., that RCTDs can be the content of one's liberty, powers and liberties do not exercise the rights themselves.

There is a partial escape. Passivists could agree that right *complexes* get exercised, not their components. As suggested above, the complex is exercisable because its parts can be exercised, even if its component RCTDs or immunities are passive normative positions. Obviously, Passivists who also deny the very coherence of the notion of a '*right* complex' cannot benefit from this view. (They might deny its conceptual soundness on the ground that the larger construct is not made up of different component 'rights'; instead, it is either (a) an aggregation of different kinds of normative positions, one of which is a right, or (b) a right accompanied by different kinds of positions, but in a way that does not amount to a unified construct warranting 'rights' status). At any rate, the idea violates Proposition III.

Passivists face a daunting prospect: they must hold that all lay or juridical linguistic practices and understandings of 'rights exercise' are mistaken. By claiming it is only a matter of liberties or powers exercising themselves, Passivism ends up explaining 'rights exercise' out of existence. This may be too embarrassing a consequence for would-be adherents to bear. On the other hand, Passivists could bite the bullet and hold that 'rights exercise' is a

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[25] See, e.g., Joseph Raz, *The Morality of Freedom* (OUP 1986) at 167; Raz (1994), *supra* note 13 at 275; Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281, 295-9; Finnis, *supra* note 8. Cf. Rainbolt, *supra* note 6 at 26-30.

misnomer and false depiction after all. If all rights are passive positions that cannot be exercised by other kinds of normative positions, it would be erroneous to consider the use of powers, liberties, or anything else on a right's behalf as actually 'exercising' the right.

If Passivists stand their ground we could appeal to other sorts of methodological considerations to resolve the matter. This would involve, *inter alia*, comparing the relative costs of excising rights 'exercise' from accounts of rights versus the costs of 'misrepresenting' the use of other kinds of normative positions as instances of 'rights' exercise. In other words, it involves weighing the costs of completely discarding ordinary and technical (e.g., legal) usages and perceptions against the supposed benefits of the demystification of a metaphor (presumably, demystified in an accurate fashion) of 'exercising' normative positions, or at least rights. As no one fully endorses, Passivism, though, the debate is best left for another time.[26]

## § VI. Conclusion

This chapter provided a preliminary outline of the concepts of rights exercise, enforcement, remedying, and vindication. It started by explaining a classic jurisprudential distinction, which notes that some types of normative positions are self-exercisable, while others simply

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[26] One might see Passivism as a *reductio* in the same spirit as Tony Honoré's criticism of Hohfeld's schema to the effect that it cannot explain the subsistence of a right over transfers between holders. Hohfeldian rights involve interpersonal relations (between two people vis-à-vis some object, say). Many criticize this view for failing to account for the idea that there are rights in and to objects. If *A* owes *B* £100 under a contract, but *B* transfers the right to money to *C*, Hohfeld's model must tell us that there is a new duty to pay and a new right to the debt. This, instead of saying, as seems commonsensical to lawyers and ordinary persons, that it is the same right to £100 being *transferred* from *B* to *C*. Anthony Honoré, 'Rights of Exclusion and Immunities against Divesting' (1960) 34 Tulane L. Rev. 453, 456-7. Coming to Hohfeld's defence, John Finnis notes that the shifting sets of Hohfeldian positions are unified by the same topic: the right to £100. Thus, the person-object and interpersonal accounts are two equally valid ways of telling the same story. Finnis (2011), *supra* note 8 at 201-2 and in personal conversation (Oxford 12 February 2014). Cf. Pavlos Eleftheriadis, 'The Analysis of Property Rights' (1996) 16 OJLS 31, 36-9.

Similarly, one could argue that parcelling out different interpersonal normative positions makes it impossible to explain how 'a right' can be *exercised* or *enforced*. This need not be the case, though. One might simply deem rights to be unexercisable even if they form part of a relationship with an object (rather than with other persons vis-à-vis the object), obtain over time, and 'survive' transfers amongst different possessors.

mark their holders as the intended recipients of another party's action, inaction, or incompetency to act; some positions are 'active', while others are 'passive'. However, this Active-Passive distinction cannot – and is not designed to – account for all the ways in which rights are exercised. Specifically, it seems possible for one type of right to exercise another; if not an active kind exercising a 'passive' one, then at least a right complex containing at least one 'active' component being exercised *qua* larger construct.

Section IV distinguished amongst the concepts of rights exercise, enforcement, remedying, and vindication. Noting their differences is long overdue in both the philosophy of rights and in legal practice. The chapter suggests that rights exercise is normative authorised action in furtherance of the right's content, whether or not that is the right-holder's subjective aim. Rights enforcement is best construed as a species of exercise. It concerns efforts, successful or otherwise, to try to vindicate a right by either seeking a remedy or some sort of status recognition. Rights enforcement involves efforts to advance the right's content, but it additionally aims to remedy or vindicate another right too. For example, if *B* breaches a contractual duty to *A* to pay the latter 100 gold coins, *A* might be able to *exercise* a secondary right to commence litigation. But the exercise of that right is done in order to *enforce* the primary right. Not all enforcement concerns procuring remedies in the sense of seeking compensation (e.g., awards, damages, compelled duty-fulfilment, etc.). Hence the concept of rights vindication is broader than that of rights remedying.

Some scholars might object to the idea that one right can exercise another. A hypothetical subset of them, styled here as Passivists, would unwittingly generate a *reduction*: for the way Passivists try to delimit what counts as 'rights exercise' unwittingly entails its impossibility. As rights exercise is universally taken to be a genuine, prominent

feature of normative discourse (in law, morality, etc.), Passivists would need to develop considerable bases for believing that the concept of 'rights exercise' is unsound and the term a mere misnomer.

# Chapter 4: The Theories of Rights Debate

## § I. Introduction

What is 'a right'? Do all rights serve some ultimate purpose? What, if anything, makes right different other features of the normative world, such as duties standards, rules, and principles? These questions have plagued philosophers, jurists, and others for centuries, and have helped form the basis of a long-standing philosophical debated on these matters. Two candidates dominate the contest: the Interest and Will Theories of rights.

Chapter 2 distinguished between models and theories of rights, two different kinds of accounts of rights. This chapter explains the Interest-Will Theories debate *qua* debate. Despite its age,[1] the debate's aims and terms are actually quite muddled. Prominent rights theorists have recently offered – competing – explanations. The debate is said to be (at least in part) about: a dispute about the proper explanation of the direction of duties, i.e., unto who are 'directed' or 'relative' duties aimed and why, and/or about who counts as a right-holder.

These delineations of the debate are erroneous. They cannot adequately capture what the debate is really about because the Interest and Will Theories need not, and sometimes do not, provide divergent answers to the questions posed by them. Before addressing those candidate delineations, Section II argues that *two others*, operating in tandem, properly explain what the debate is all about.

The first apt delineation marks a purposive or teleological dispute: do all rights serve some ultimate purpose, a singular raison d'être? The second concerns the fact that each

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[1] For the history of the Interest-Will Theories debate see Roscoe Pound, 'Legal Rights' (1915) 26 Int. J. Ethics 92; Roscoe Pound, 'Rights', in *Jurisprudence* Vol IV (West Pub Co. 1959); Nigel Simmonds, 'Rights At the Cutting Edge', in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) ["Simmonds (1998)"]. The debate seems to build upon a much older one about the nature of rights, or *ius,* which dates back to the twelfth century (at least). That earlier dispute, however, does not try to explain what rights are in terms of *theories* about wills, choices, interests, or benefits, but simply whether rights are invariably enforceable. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press 1997) at 118, 189.

theory levies fundamental criteria for determining what counts as 'a right' in the first place. To cut to the chase, Will Theories consider 'enforceability' to be an indispensable part of the criteria, while Interest Theorists generally reject it. Thus, the debate – which is constituted by a discernible body of literature, with certain kind of philosophical accounts, and arguments rendered in defence of or against those accounts – is best explained as follows: what are all rights' ultimate purpose and is enforceability part of the criteria for what counts as 'a right' in the first place?

Section III then shows why recent efforts have not moved the debate forward. For one thing, attempts to advance it by providing hybrids of, or alternatives to, the Interest and Will Theories fail insofar as they are all merely versions of the Interest Theory. (Whether they are superior versions is another matter). For another, recent efforts to characterise the theories as being exclusively 'normative' (i.e., morally or politically evaluative) and to restrict the debate to such considerations – thereby excluding *analytic* versions of the theories of rights – are mistaken.

## § II. Delineating the Debate

### § II.1 The First Delineation

In what shall be styled its ***First Delineation***, the debate asks whether all rights serve some singular, *ultimate* purpose.[2] The theories thus have, at least in part, a teleological focus. The

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[2] Cf. Chapter 2 § II at Footnote 14. Sometimes the matter of 'ultimate purposes' gets framed in the following way: What makes it the case, if it is indeed true, that Hohfeldian liberties, claims, powers, and immunities (or at least some of them) are all kinds of 'rights'? Are they different species of one genus? Framing the debate in this way, however, cannot be squared exactly with its Second Delineation. For, as we shall see, many theorists deny that all four Hohfeldian types, let alone a given token of a type (e.g., a given claim), count as 'rights'. For that problematic framing, see, e.g., Neil MacCormick 'Rights in Legislation', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, (Clarendon Press 1977) at 194 ["MacCormick (1977)"]; Rex Martin and James Nickel, 'Recent Work on the Concept of Rights' (1980) 17 American Phil. Q. 165, 172; HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 189 [Hereinafter, "Hart (1982)"]; Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985) at 56 ["Wellman (1985)"]; Matthew Kramer, 'Rights Without Trimmings', in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries*

debate's two main rivals answer that all rights concern right-holders' wills (Will Theory), or some interest of theirs (Interest Theory). As they aim to provide rival explanations of rights' ultimate purpose, debaters treat the two theories as being mutually exclusive. Matthew Kramer explains them in part as being thus:

> [For the Interest Theory,] the essence of a right consists in the normative protection of some aspect(s) of the right-holder's well-being… For the Will Theory, the essence of a right consists in opportunities for the right-holder to make normatively significant choices relating to the behaviour of someone else…[3]

Both are actually families of theories. There are: nuanced differences concerning their teleological claims; Analytical and Normative versions of each theory; Justificatory and Protection versions; and theories with different scopes, i.e., where they claim to cover only a certain normative domain (such as law, but not morality) or a kind of conceptually basic type of right (like a RCTD, but not liberties, immunities, etc.).

Concerning teleology, Will Theories sometimes dispute amongst themselves about their theory's ultimate locus of concern: is it about affording right-holders with the ability to make certain kinds of choices; protecting their wills even if they cannot make those kinds of choices; or about the structure of freedom and independence afforded by rights? HLA Hart's account of private law (and perhaps some other legal ones too) rights-correlative-to-obligations holds that they are really powers to enforce or waive the correlative duty at different stages.[4] These powers, which Hart styles 'measures of control' afford their holder a

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(OUP 1998) at 1 ["Kramer (1998)"]; Rowan Cruft, 'Rights: Beyond Interest and Will Theory' (2004) 23 Law and Philosophy 347, 356; George Rainbolt, *The Concept of Rights* (Springer 2006) at 25, 33.

[3] Matthew Kramer, 'On the Nature of Legal Rights' (2000) 59 Cambridge L. J. 473, 473-4 ["Kramer (2000)"].

[4] Hart, (1982), *supra* note 2 at 183-4. 'These legal powers (for such they are) over a correlative obligation…'. *Id*. at 184. See also Chapter 2's Appendix 2 regarding Hart's 'elements of control'.

modicum of choice over other parties.[5] This in turn makes a (private law) right-holder a 'private legislator' or 'small-scale sovereign', who is afforded a *locus standi* by which to be recognised by the system (and others) and through which he or she can effectuate his or her will within the legal domain to some extent.[6]

Carl Wellman nevertheless tries to distinguish between 'Choice' and 'Dominion' or Will Theories. He denies that the capacity to make choices is what is essential to a right. The critical notion is instead the vindication of the party's status *qua* right-holder: the holder should win in a hypothetical dispute with other parties even if he or she lacked such enforcement capacities.[7] However, Wellman can neither explain why enforcement powers are nevertheless indispensible in his own account of rights, nor why a focus on status vindication alone does not amount to version of the Interest Theory. The notion of dominion that he outlines,[8] moreover, must understood in part via enforcement powers.

Arthur Ripstein, a Kantian, damns 'Will' theories for instrumentalising rights. Will Theories, he claims, treat rights as mere instruments for making choices regarding their enforcement or waiver, or for some ulterior ends. Rights, on this view, may thus be modified or terminated based on how well they serve that function. The problem for Kantians is that this (supposedly) undermines the forcefulness of rights as the basis of the very structure of

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5 *Id*. at 183-4, 183 n 85.

6 *Id*. at 183; HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) at 41 ["Hart (1997)"]. Joel Feinberg discusses the dignity rights possession affords to holders, and like Hart he discusses the idea of a right giving people 'something to stand on' in terms of being able to assert oneself in the world, etc. Joel Feinberg, 'The Nature and Value of Rights', in *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) at 151. See also Kramer (2000), *supra* note 3 at 476-81. For further discussion of Feinberg's view, see Chapter 7 § II.1.

7 Wellman (1985), *supra* note 2 at 54, 65-73, 80, 89-90, 92, 95; Carl Wellman, 'Review of A Debate Over Rights' (2000) 109 Mind 954, 954-5.

8 Wellman (1985), *supra* note 2 at 95-102.

interdependent legal and political freedom.[9] (Note that Wellman would in turn accuse Ripstein of confusing Choice and Will Theories here). Ripstein's is an odd charge, since Kant is taken to be the father of the Will Theory.[10] Kant defines 'a right' as a title to coerce. [11] Such coercion is, at least in part, a function of enforcement and waiver powers, and not just the (the normative force of) private demands of right made to a correlative duty-bearer.

What makes these all versions of the 'Will' Theory, then? All of them deem enforcement powers to be essential to the concept of 'a right' and rights possession. They therefore all (ultimately) hold that right-holders' wills are protected or vindicated through the employment of such powers, and thus are not simply vindicated by having their status *qua* right-holder recognised (by legal officials, the community, etc.).

Turning to the Interest Theory, it admits of 'thick' and 'thin' versions. Some analytical Interest Theories offer accounts of interests-as-well-being, with a fully developed account of 'well-being'. Joseph Raz's account ostensibly counts as one example.[12] By contrast, other analytic versions claim to provide 'thin' accounts, postulating that determinations about the kinds of interests that rights serve are system or domain contingent. Matthew Kramer's Interest Theory is of this sort. He believes that determining which sorts of interests that rights ought to protect is a matter for political philosophy, not analytic jurisprudence (and hence not for an analytical Interest Theory).[13]

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9 Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) at 34-5.

10 Simmonds, *supra* note 1 at 122-7, 134-8, 179.

11 See Chapter 2's Appendix 2 regarding Kant.

12 Joseph Raz, *The Morality of Freedom* (OUP 1986) ["Raz (1986)"]; Joseph Raz, *Ethics in the Public Domain* (OUP 1994, Revised edn) ["Raz (1994)"], particularly the essay 'Rights and Individual Well-Being'.

13 Kramer, (1998), *supra* note 2 at 79. However, he also suggests there can be political-philosophical, rather than jurisprudential, versions of each theory. Matthew Kramer, 'Some Doubts about Alternatives to the

For better or worse, though, the Interest Theory does not really have an equally developed teleology as the Will Theory.[14] As it holds that claimability and enforceability are neither necessary nor sufficient conditions of a right, one cannot even say that the theory is about the social or legal recognition of one's right-holding status. On Kramer's version, for example, there are 'nominal' rights ('nominal' because they are unprotected or unenforceable).[15] On Raz's version of the Interest Theory, rights need not even really protect considerations of well-being: this is because there can be rights predicated upon corruption, officials' mistakes, the fact that rights can protect trivial interests, etc.[16] Interest Theorists may have to develop more convincing accounts in this regard, or show why that doing so is unnecessary (e.g., because, as a 'thin' version of the Interest Theory might hold, the relevant sorts of interests are system contingent and thus no overarching interest account will stand).

As intimated above, despite the teleological focus, each theory admits of both

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Interest Theory of Rights' (2013) 123 Ethics 245 ["Kramer (2013)"]. Kramer deems Raz's to be of the former variety, rather than a jurisprudential one. However, this cannot be squared with what Raz says and does with his theory – especially in his article-cum-book-chapter 'Legal Rights', e.g., where judges are said to use legal rights to generate new ones. Raz (1994), *supra* note 12.

[14] Sometimes this matter is framed as a different delineation of the debate, i.e., what it is 'to have' a right. See, e.g., John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) at 203 ('What, if any, is the underlying principle, unifying the various types of relationships that are reasonably said to concern 'rights'? Or, more crudely: Is there some general explanation of what it is to have a right?'); Markus Stepanians, *Rights as Relational Properties—In Defense of Right/Duty-Correlativity* (Habilitation Thesis, University of Saarland 2005) at 68; Kramer (2013), *supra* note 13 at 246. This is inherently ambiguous, though. Is it really asking what the right-holder can do with a right, or what a right does for the right-holder? If the latter, then the matter is better understood as forming part of the right's ultimate purpose; if the latter, however, then it is just another inapt delineation.

[15] Kramer (1998), *supra* note 2 at 8-9, 34, 46, 63-65, 100, 106; Kramer (2000), *supra* note 3 at 476-7, 481-2. In his more recent work, however, Kramer may have changed his mind about what makes a right 'genuine'. If this is the case, he has done so without explanation. His cursory remarks on the matter now suggest they might only involve claims protected by immunities. See Matthew Kramer, 'Rights in Legal and Political Philosophy', in Gregory A. Caldeira et al (eds) *The Oxford Handbook of Law and Politics* (OUP 2008) at 417, 418; Legal and Moral Obligation', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2007) at 187; Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281, 297 ["Kramer & Steiner (2007)"]; Matthew Kramer, 'Refining the Interest Theory of Rights' (2010) 55 Am. J. Juris. 31, 33 ["Kramer (2010)"]; Kramer (2013) *supra* note 13 at 247.

[16] E.g., Raz (1986), *supra* note 12 at 186, 262.

analytical and normative versions. *Analytical* versions are said to be morally and politically neutral in the sense of providing explanations of what ultimate purpose rights serve, without judging whether rights are good, bad, or valuable things, whether people ought or ought not have them, whether their ultimate purpose is good or bad, etc. *Normative* versions are moral or political accounts of the ultimate purpose rights ought to serve, i.e., what rights ought to do and what values they ought to serve.

Whether analytic or normative, it has been said the Interest and Will Theories admit of *at least* two varieties: Protection and Justification versions.[17] *Protection* versions claim that all rights protect the right-holder's will or interests respectively. *Justification* versions hold that the existence or imposition of correlative ligations (duties, liabilities, etc.) borne by other parties is justified by the right-holder's interests, or by the need to buttress the right-holder's will vis-à-vis other parties' wills.

While many theorists employ protection or justification language, they are generally inconsistent in their usage. For example, one and the same theorist may use 'protection' or 'justification' language, but then switch to discussing the 'effectuation', 'promotion', or 'facilitation' of interests or the will within the same work. This may simply be due to their not being cognisant of the potentially different theoretical implications.

As mentioned in Chapter 2 § II, some scholars also delimit the scope of their theories. They specify that theirs only concerns (A) a certain domain or system and/or (B) a certain conceptually basic kind of right. For example, some present theories of *legal* rights exclusively. While they admit that the theories can admit of more expansive versions, Matthew Kramer and Hillel Steiner think it is dubious to inflate the debate beyond a focus

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[17] See Rainbolt, *supra* note 2 at 86-7. Rainbolt notes, however, that no one has actually put forward a justification version of the Will Theory. *Id*. at 87. The next chapter will challenge the Protection-Justification distinction's exhaustiveness.

upon *legal* rights – which are best understood as legal Hohfeldian claims – not moral, social, institutional, or other claims, let alone other basic Hohfeldian types.[18] Others present theories governing only moral, social, legal, and institutional rights correlative to duties[19] – hereinafter "RCTDs". Still others concern RCTDs and liberties of any sort.

Theorists also differ on what their delimitations entail. Some suggest that their theories are merely preparatory work for a more expansive theory, i.e., they think it could later be extended to apply to other kinds of rights, or other normative domains. Others hold that their theories (should) extend only as far as the conceptually basic kinds of rights, or domains, they discuss. Hence, neither kind of delimiter necessarily denies that other kinds of rights exist.

For heuristic purposes, this chapter nonetheless ignores stipulated domain or kind-of-right delimitations. It will treat all versions of each theory as being of global import, i.e., as covering all normative domains and all conceptually basic kinds of rights. One reason for doing so is that theorists are only able to articulate differences amongst their versions because of their common conceptual building blocks.

For example, rights scholars divide over whether rights are functional or modal kinds. In order to hold that legal rights differ functionally from moral ones (holding, perhaps, that the former are per se enforceable while the latter are not, or vice versa) Functionalists must explain the differences in terms of their purportedly different conceptual structures, e.g. that a legal RCTD includes a Hohfeldian claim plus enforcement powers, while a moral RCTD might only be composed of a claim. For the comparison to be intelligible, however, the basic

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[18] Kramer & Steiner (2007), *supra* note 15 at 295-9; Kramer (2010), *supra* note 15 at 31-2.

[19] As shall be discussed in Section IV below, Leif Wenar presents two theories about Hohfeldian claims in any domain.

building blocks of claims and powers must be common to both domains. In other words, we already need to know what each basic conception means in order to *establish* the supposed functional difference between legal and moral rights. This suggests that, despite any professed limited application or range, 'qualified' theories rely on a basic conceptual toolkit that is applicable to all normative domains.

As the Interest-Will Theories debate's First Delineation is purposive or teleological, however, theorists might reject that heuristic move. They might claim that it commits the Fallacy of Composition. Concerning *domain* limitations, just because the building blocks are common, it does not follow that the combinations produced from those blocks serve the same ultimate purpose, let alone when in different domains. Regarding *kind-of-right* limitations, furthermore, it is question begging to extrapolate from a theory about one basic kind of right by applying it to the other kinds.

In response, it begs the question to presume that the common building blocks serve distinct purposes in different domains (e.g., a RCTD + an enforcement power in morality vs. a RCTD + a power in a legal system). Further, it is helpful to treat a theory with a stated domain limitation as a synecdoche for more expansive views. As will be shown in § II.2 below, many theorists who stipulate kind-of-right limitations about the scope of their theories also exclude other kinds of normative positions from counting as 'rights' altogether. Yet even those who think that there are other rights ungoverned by their theories present unconvincing reasons why their theories do not, or could not, cover those other kinds.

### § II.2 The Second Delineation

In addition to the earlier delineation about choices, wills, interests, and wellbeing, the Interest-Will Theories debate equally concerns how rights are meant to effectuate those

purposes. Determining the means of effectuating, however, forms part of a more complicated story: for the debate is equally about what counts as 'a right' in the first place. For how can the matter of whether rights serve one or the other candidate ultimate purpose be answered if we do not already know what rights even are? The debate also concerns the theory's competing criteria for determining the concept's intension and extension. The short version of the second delineation story is whether enforcement and waiver powers for necessary parts of the criteria.[20]

If you think that all rights ultimately protect holders' wills or interests, then you must explain *how* they do so. Interest and Will Theorists generally agree that many legal rights are enforceable via powers.[21] Their disagreement is about whether *all* rights must be. Will Theorists either hold that 'rights' are to be identified with enforcement and waiver powers, or that such powers are constitutive features of rights.[22] Interest Theorists deny that. This is another reason why the two theories are considered to be mutually exclusive.

To clarify, the debate does not centre upon any and all sorts of normative powers. It concerns those of enforcement and waiver. As explained in Chapter 3, 'rights enforcement' generally refers to right-holders' efforts to try to seek a remedy for (anticipated) breaches of

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[20] E.g., Simmonds (1998), *supra* note 1 at 141; Kramer (2000), *supra* note 3 at 474; Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202, 226 ["Wenar (2013)"].

[21] See, e.g., Raz (1994) *supra* note 12 at 256-7; Kramer (1998), *supra* note 2 at 9, 64-5, 100; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2008) at 129 ["MacCormick (2008)"].

[22] Examples of Will theorists who identify RCTDs with powers include HLA Hart and Nigel Simmonds. Hart, *supra* note 2 at 184; Simmonds, *supra* note 1 at 223. Examples of Will Theorists who hold that RCTDs are invariably associated with, tethered to (e.g., as part of a right 'complex'), or accompanied by enforcement powers include Carl Wellman and Hillel Steiner. See, Wellman (1985), *supra* note 7 at 92; Carl Wellman, *Real Rights* (OUP 1995) at 8-9 ["Wellman (1995)"]; Hillel Steiner, *An Essay on Rights* (OUP 1994) at 61 ["Steiner (1994)"]. Pavlos Eleftheriadis, a Will Theorist, distinguishes between "rights" (reasons with some force) and "relations" (Hohfeldian complexes meant to effectuate rights). Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) at 168. However, even on his view relations must include enforcement and waiver powers.

ligations, or to try to vindicate the right in other ways.[23] In legal contexts, this often refers to being able to trigger and prosecute institutional dispute resolution processes like court cases. 'Waiver' means a capacity to forego such processes despite being entitled to initiate them. (In legal contexts an official or authorised agent presumably oversees dispute resolution proceedings in order to provide determinative, binding resolutions to disputes). Moral and social domains need not have analogous third-party dispute resolution mechanisms, but there may be other means by which to enforce rights.[24]

## Fundamental Criteria

The dispute over enforcement powers is embedded in the theories' competing criteria for determining what counts as 'a right'.[25] A theory's criteria incorporate its candidate raison d'être of effectuating (protecting, justifying, etc.) either interests or the will per the First Delineation. These criteria are complex rules for determining the concept's features and for identifying instances of rights within a given data set. They include the following components: 1, a requirement that rights *protect, justify, effectuate, etc.,* holders' wills or interests; 2, specifications about *how* rights are protected, effectuated, etc., e.g., by *imposing* duties, or by *controlling* duties via powers, etc.; 3, specifications of which tokens of which types of basic concepts, and which combinations thereof, are actually 'rights'. Both analytic and normative theorists try to provide such criteria.

The criteria are not mere stipulative definitions of 'a right'. They are not candidate

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[23] Chapter 3 § IV.1

[24] See Raz (1994), *supra* note 12 at 255-7 for a concern about searching for, wrongly positing the existence of, or overemphasising the importance of such means in moral domains.

[25] See, e.g., Eleftheriadis, *supra* note 22 at 8; Hamish Stewart, 'The Definition of a Right' (2012) 3 Jurisprudence 319, 335; Cruft, *supra* note 2 at 347-8, 369, 384; Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223, 237-8 ["Wenar (2005)"]; Wenar (2013), *supra* note 20 at 210. Kramer (1998), *supra* note 2 at 1.

rules for the usage of a word – especially as rights are not always signified by the word 'right'. Instead, they are either so-called *analytic* definitions, or something akin to them as some versions might only concern the necessary but not sufficient conditions of 'a right'.[26] They are concerned with word usage, but are not simply efforts to give clear meaning to ordinary usage, because they sometimes exclude what ordinary people or lawyers might call 'rights' from counting as bona fide instances. The criteria may try to include (or entail) rules for linguistic usage, but that is not their sole aim, which is to classify what properly falls under the category of 'rights' – even if different words are involved. The criteria do not aim to define the word or phrase 'a right', because multiple words or phrases might fall under them (e.g., 'claim', 'liberty', 'power', 'right', 'entitlement', etc.).

Interest and Will Theorists who adopt an existing rights model (e.g., Hohfeld's schema) superimpose their preferred criteria upon it, like affixing a grid over raw matter to give it form, in order to determine which of the model's features are actually 'rights' and which are not. In other words, the criteria function as a qualification test for which components of a model count as 'rights'. Theorists that construct their own models, rather than adopting existing ones, do something similar. They fix what count as rights and related 'non-right' normative positions in a model based on their criteria.[27]

Why are such criteria of 'a right' necessary? Theorists could present the following answers. First, as mentioned above, how can you assess a model's accuracy unless you

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[26] See Chapter 1 § II. See also Leif Wenar, 'The Analysis of Rights' in C. Colburn et al (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (OUP 2008); Stewart, *supra* note 25 at 319-20. I say 'akin to' because Normative theorists do the same thing, but might oppose characterising matters in terms of analytic definitions replete with necessary conditions, etc.

[27] E.g., 27Raz (1986), *supra* note 12 at 166. Raz starts his chapter 'The Nature of Rights' by providing an analytic definition of 'a right', distinguishing between duties grounded on rights and those that are not, and by distinguishing between rights and other normative positions that can support them (e.g., liberties, powers, immunities, etc.), but which are not themselves rights. *Id.* at 165-7.

already know what 'a right' is? For example, how can we otherwise assess whether certain Hohfeldians are correct or mistaken to construe powers and immunities as types of 'rights'? Second, there are legal, social, institutional, moral, and game rights. On what other grounds could it be determined whether these are modal kinds, functional kinds, or mere homonyms? Third, we need some basis by which to determine where rights obtain. Not all instances can be found by simply looking for the word 'right'. If you take a given country's laws as your sample data, its usage of the words 'shares', 'equity', 'property', 'entitled', etc., may signal the existence of rights. On the other hand, it might be the case that, even though the word 'right' is used in a given instance, no right actually obtains. How can we tell whether instances obtain or not in such cases without knowing what counts as 'a right' is in the first place? (Chapter 5 nevertheless challenges the need for these 'theoretical' criteria).

What are these criteria and how do they lead to diverse conceptions of rights? Let us employ Hohfeld's schema for heuristic purposes. Expanding upon and modifying Pavlos Eleftheriadis' classification, there are at least nine different *theory-driven* interpretations of Hohfeld's model:[28]

(a) Only claims are rights
(b) Only complexes containing a claim and enforcement and/or waiver powers are rights (Will Theories only)

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[28] Eleftheriadis' own classification is as follows:
(a) Legal rights are claims
(b) Legal rights are any one of the four concepts: claim, liberty, power, immunity
(c) Legal rights are any of the four concepts and any combination of such concepts
(d) Rights are only suitable incidents or combinations of Hohfeldian incidents, and
(e) Rights are only suitable combinations of Hohfeldian incidents.
Eleftheriadis, *supra* note 22 at 7.

(c) Rights are any one of Hohfeld's four types of rights
(d) Rights are any one of Hohfeld's four types of rights *and* complexes composed of such types
(e) Rights are any of Hohfeld four types of rights plus one or more type of ligation (e.g., a duty-right, a liability-right, etc.) and complexes thereof
(f) Rights are only some of Hohfeld's four types of rights
(g) Rights are only some of Hohfeld's four types of rights and complexes composed of such types
(h) Rights are suitable tokens of any of Hohfeldian types (only some Interest Theories)[29]
(i) Rights are suitable tokens of only certain Hohfeldian types
(j) Rights are suitable tokens *or* complexes composed of such tokens
(k) Rights are only complexes composed of suitable tokens

For Interest Theories who endorse Interpretation A, 'a right' is only a single Hohfeldian claim. For them, liberties, powers, and immunities are not 'rights'.[30] More expansive versions of the Interest Theory, however, treat some or all of those other positions, and/or complexes thereof, as 'rights' too.[31] These more expansive versions (which endorse Interpretations B through K) allow for single instances or complexes to be accompanied by, or include, enforcement and waiver powers. However, they deny that being conjoined or associated with such powers is what make such positions 'rights'.[32]

By contrast, the Will Theory usually considers 'a right' to be, at a minimum, a complex of a claim plus *at least* one power of enforcement *or* waiver (Interpretation B). Most versions of the Will Theory require that multiple enforcement and waiver powers

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[29] 'Token' just means a given instance of a class. The theoretical criteria delimit which instances counts as rights and which do not. For example, some liberties may be rights, but perhaps not all. Notice the difference between saying that some but not all Hohfeldian claims are 'rights', versus saying that liberties and powers are not 'rights'.

[30] Kramer (1998), *supra* note 2 at 13-14.

[31] Some Interest and Will Theorists treat Hohfeldian liabilities and other kinds of ligations as 'rights' too. For those Will Theorists, of course, enforcement powers must be included in any such 'ligation-right'. See Wellman (1985), *supra* note 2 at 86; Cruft, *supra* note 2 at 358-9; Rainbolt, *supra* note 2 at 34-9. This idea was critiqued in Chapter 2.

[32] See, e.g., Stepanians, *supra* note 14 at 72.

obtain, though. For *legal* rights, duplicates of each sort of power are needed to cover the different stages of institutional dispute resolution processes, i.e., to afford right-holders with secondary and tertiary rights too.

The Will Theory can also account for other kinds of rights. More capacious versions allow for liberty, power, and immunity-rights, and for right complexes that do not contain component RCTDs – so long as enforcement and/or waiver powers are included in the package.[33] As examples, 'a right' could be composed of: an immunity and three powers; a liberty and two powers; etc. However, almost all versions of the theory focus on RCTDs and enforcement powers.

A minority of Will Theorists would deny the need to aggregate different elements into 'a right' complex, because they adjudge Hohfeldian claims to really be a species of enforcement powers. For this minority, treating all rights as being complexes would create redundancies (why do you need a separate enforcement power when you already have a Hohfeldian claim, i.e., a self-enforcing RCTD?).[34]

Notice also the Type-Token distinction in the classification above. Given what they count as rights, the theories neither track ordinary language[35] nor theory-independent models completely. A token only counts as 'a right' if it fulfils the theory's specified theoretical raison d'être.[36] Consequently, many theorists deny that any and all tokens of a type found in a

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[33] See Wellman (1985), *supra* note 2 at 80; Wellman (1995), *supra* note 22 at 8-9; Cruft, *supra* note 2 at 367-8; Wenar (2005), *supra* note 25 at 239, 243-6; Wenar (2013), *supra* note 20 at 226.

[34] See e.g., HLA Hart, 'Definition and Theory in Jurisprudence', in *Essays in Jurisprudence and Philosophy* (OUP 1983); Simmonds (1998), *supra* note 1 at 223 and n 137.

[35] Wellman (1985), *supra* note 2 at 204; Cruft, *supra* note 2 at 372-3, 382, 384.

[36] Wenar discusses the possibility of an Any Incident Theory, which would treat any token of a Hohfeldian type as 'a right'. (He leaves this ambiguous, though: does he mean all eight positions, the four usually called 'rights', or some other combination?). He rejects such a theory on the grounds that not all Hohfeldian tokens are 'rights', as some fail to meet his specified criteria. Wenar (2005), *supra* note 25 at 243-6.

model (e.g., a Hohfeldian claim) are actually 'rights'. The Interest Theory asks whether a normative position protects or advances the holder's interests, while the Will Theory asks if it protects or effectuates the holder's ability to vindicate his or her will. If it does not meet the preferred raison d'être then a candidate normative position is denied rights-status. The theories thus provide competing qualification tests for candidate tokens of types of normative positions, which demarcate the set of rights from within the total set of all normative positions.

Here are some examples of the Type-Token distinction. First, although it registers as an instance of a Hohfeldian claim, if it does not protect the holder's interests (or, does not normally protect the interests of the class of persons that that kind of claim generally benefits, e.g., property holders, citizens, shoemakers, etc.), then according to certain versions of the Interest Theory that claim is not 'a right'. The token claim is simply something else – exactly what, theorists leave unclear. Second, some theorists deny that a power to break the law is 'a right'.[37] Third, as mentioned above, others think it mistaken to style an immunity from advantageous changes to one's position as a right either.[38]

The criteria not only identify which normative positions count as 'rights' based on whether they either protect the holder's interest or will, or justify the imposition of normative positions on other parties, they also include specified modes of protection, effectuation,

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Cf. Cruft, *supra* note 2.

[37] For 'illegal' powers, see, e.g., Colin Tapper, 'Powers and Secondary Rules of Change', in AWB Simpson (ed) Oxford *Essays in Jurisprudence Second Series* at 245 (OUP 1973); Wellman (1985), *supra* note 2 at 44-6, 50, 68-9, 80; Raz (1994), *supra* note 12 at 267; Kramer (1998), *supra* note 2 at 103; Finnis, *supra* note 14 at 226-7.

[38] For disadvantageous immunities, see Hart (1982), *supra* note 2 – but at *infra* note 48. For the idea of disadvantageous powers see Wellman (1985), *supra* note 2 at 84. Hart does not mention advantageousness as a factor in regards to RCTDs, so it is unclear if it really is part of his theoretical criteria for all rights, or if he is just inconsistent or incomplete on the matter.

justification, etc. For notice that from the idea that rights protect one's interest or will alone it is impossible to say *why* a Hohfeldian claim is 'a right' while a power (of the enforcement variety or otherwise) is not. The theoretical criteria are therefore not simply a matter of one preferred candidate from the First Delineation (interests, well-being, will) plus some arbitrary list of some tokens or types from a given model that the theories adjudge to count as 'rights'. The criteria additionally delimit the ways in which rights must protect interests or the will, or the particular forms of justification for imposing normative positions upon others in order to effectuate the right-holders interests or will. Only if they operate via the specified modes do certain normative positions count as 'rights'. For example, when certain Interest Theorists assert that only Hohfeldian claims are rights, their criteria include the idea that rights *protect* interests *via* duties borne by, or imposed upon, other parties. According to this subset of Interest Theorists, then, while a liberty may be based on a person's interest, because it fails to protect that interest *in the relevant way* it is therefore not 'a right'. Many Will Theorists might in turn say that a complex composed of a Hohfeldian claim plus some number of powers is 'a right' because it protects the will *by affording* its holder capacities to enforce or waive it. In other words, the relevant form of protection is the power to control the (non-)fulfilment of the correlative duty, rather than just the duty-bearer's normatively required action or forbearance in furtherance of the right's content. For this subset of Will Theorists, then, a bilateral liberty, say to park your automobile in a parking spot or not, is not 'a right'. For while it might be said to either afford the liberty-holder choices or vindicate his or her will, the bilateral liberty does not do so in the relevant way, i.e., affording its holder the capacity to *enforce* that choice, his or her status, etc.

More contentiously, the theoretical criteria also serve to help identify where rights are

to found in a given normative domain or system. If confronted with a given legal norm, for example, the criteria in part aim to tell us whether it counts as 'a right', e.g., if the candidate case meets the theory's structural and purposive requirements. Once you know the architecture and purpose of the concept, why would you be unable to detect instances thereof in a given data set?[39]

At least a few theorists will adamantly reject my account of the debate, as they would deny that their theories serve that identificatory job. On their view, the criteria merely give an answer about rights' structure and purpose, without having to, or even being able to, identify given instances.[40] This seems to be a contested (or contestable) feature of analytic definitions, or these theoretical criteria of 'a right' at any rate. To my mind, though, it would be odd to purport to be able to identify and articulate the features of a concept without being able to use that information as criteria for noting real-world instances thereof.[41]

In summary, the debate's Second Delineation asks: what counts as 'a right' and is enforceability part of the criteria of the concept? Each version of the Interest and Will Theory offers its own criteria to answer those questions. These criteria specify three kinds of features of what 'a right' is: (I) a requirement that a right either protects something, justifies

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[39] If the criteria serve this identifying role, then the theories' claims are bolder than those of Legal Positivism's. Positivists hold that *law* can be determined by a set of social conventions, 'rules of recognition', without making normative (in the sense of moral or political) evaluations about those conventions. Such conventions being system contingent, one needs to know what the local conventions are in order to know what *the* law is in a given system. Unlike the rights theories' fundamental criteria, then, the Positivist view must employ local facts about what conventions obtain.

If the rights theories also serve to identify rights in given domains, their problems are compounded by the fact that they seem to be insensitive to local facts. Chapter 5 argues that Positivist legal rights theorists go awry for ignoring the rule of recognition and validity conditions. Their criteria must be supplemented with local rules of recognition. Yet, as Rudolph von Jhering's challenge (discussed in Chapter 5 § IV.3) makes clear, even when a rule meets that test, it is still debatable whether it generates rights.

[40] E.g., Kramer (2010), *supra* note 15 at 35; Wenar (2013), *supra* note 20 at 210 is ambiguous on the issue.

[41] See Chapter 1 § II at Footnote 21 and accompanying text for Hilary Putnam's view.

something, promotes something, effectuates something (embedding the debate's First Delineation); (II) identifying the relevant mode, or set of modes, of protection, justification, etc. (e.g., *by* imposing a duty on other parties; *via* enforcing or waiving that correlative duty; etc.); (III) determining which tokens of which basic types of normative positions are indeed 'rights' based on features I & II.

These fundamental criteria are therefore seemingly indispensible for: (A) determining the conceptual features of 'a right'; (B) assessing a given rights model's accuracy; (C) assessing functional versus modal views of rights; and (probably) (D) determining where rights obtain and whether a candidate instance counts as 'a right' in a given system.

Once more, some Interest Theorists hold that only RCTDs are rights. Others hold that liberties, powers, etc., and complexes thereof, can be rights too. All Interest Theorists agree, though, that normative positions that fail to serve the ultimate purpose of generally protecting/promoting the *interests* of a class of agent under which the right-holder falls, either *by* imposing duties on other parties, or through other specified means, are not rights.

Many Will Theorists think that only a complex composed of a RCTD and at least one power of enforcement or waiver (used to protect or effectuate the will), at a minimum, counts as 'a right'. A minority, though, hold that rights can be combinations of various Hohfeldian positions (immunities, liberties), on the condition that such complexes include the relevant sorts of power, as rights *protect* the will *via* such powers over other persons.

The Interest-Will Theories Debate mostly centres on features (II) and (III) listed above. Does duty-imposition upon another party alone suffice to make a correlative normative position 'a right',[42] or are enforcement powers equally essential? While features

[42] Note that the Interest Theory does not claim that it is *adequate* protection.

(II) and (III) bear the potential for much more expansive considerations than just those two modes, only a handful of debaters have really considered the idea of larger sets of rights and modes of will or interest protection/advancement.[43]

This generates the following question: if we kept feature (I), but gave much more expansive specifications to features (II) and (III), i.e., considered many more candidate modes of protection/justification and candidate tokens/types as bona fide rights,[44] would we still have the same – albeit greatly inflated – debate, or instead a different one about what counts as rights altogether?

A more easily answered question is the following: why is this a second delineation of the Interest-Will Theories debate, rather than just a specification of the first one – or vice versa? As will be shown in the next chapter, the answer is that the two delineations actually govern potentially divergent matters. Particularly, the debate could be carried on without its excessive focus upon duties and powers. Furthermore, the relevant modes of protection, advancement, etc. are neither readily discernible from, nor necessarily entailed from the First Delineation views about interests or wills.

## § II.3 Erroneous Delineations of the Debate

### Explaining a Duty's Direction

Quite a few prominent philosophers have claimed that the theories of rights debate is, or is at least in part, about providing competing explanations of a duty's direction.[45] Granted that

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43 I.e., Rowan Cruft, HLA Hart, Nigel Simmonds, and Leif Wenar.

44 For example one could say that liberties advance the will or interests by allowing unimpeded action, or that an immunity does so by keeping one's status as one prefers, free from others' meddling, etc.

45 Hart (1982), supra note 2 at 168; Jeremy Waldron, 'Introduction', *Theories of Rights* (OUP 1984) at 8-9; L. Wayne Sumner, *The Moral Foundations of Rights* (Clarendon Press 1987) at 24, 100; Cruft, *supra* note 2 at 367; Kramer & Steiner (2007), *supra* note 15 at 298; Kramer (2013), *supra* note 13 at 245-6; Stewart, *supra* note 25 at 322; Wenar (2013), *supra* note 20 at 207-8; Stepanians, *supra* note 14 at 47-8; Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 OJLS 257, 258 n 5 ["Sreenivasan (2005)"]; Gopal Sreenivasan,

there exists a duty owed to someone, unto whom is it owed and how do we determine who that party is? Who bears the right correlating with that duty? Is a directed duty owed: to the *intended* beneficiary of the obligatory action or forbearance; to unintended beneficiaries too; to the party with the power to try to seek a remedy in the face of a (threatened) breach; to a party that has no correlative right; to some other sort of agent?[46]

Part of the problem seems to be this. There is a difference between the action that forms the content of a duty being directed towards someone and the duty itself being directed to that party. So *A* may owe *B* a contractual duty to fix *C*'s roof, but the duty might not be directed towards or owed to *C*. How do we even know who *B*'s duty is in fact directed towards, though: to *A*, *C,* both of them, some other party too, none of them? If that is correct, then the real problem these theorists are addressing when asking about directed duties is about who bears rights correlative to directed duties.

While explaining the direction of duties may be a worthwhile endeavour, it is erroneous to hold that this issue explains or frames the Interest-Will Theories debate, because its constituent theories need not, and sometimes do not, provide different or conflicting explanations. For one thing, many contemporary versions of the Will Theory,[47] but not all,[48] hold that a duty can be owed to one party even though a second party possesses

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'Duties and Their Direction' (2010) 120 (3) Ethics 465 ('But it remains controversial whether these [criminal law] duties are directed or not, that is, whether they correlate with claim-rights or not'. *Id.* at 473) ["Sreenivasan (2010)"]; Adina Preda, 'Rights: Concept and Justification' (2015) 28 (3) Ratio Juris 408, 409-10.

[46] Philosophers and jurists often distinguish between 'absolute' and 'relative'/'directed' duties. The latter are owed to particular persons, while the former are not (e.g., self-regarding duties).

[47] See e.g., Hart (1982), *supra* note 2 at 184 n 86; Wellman (1985), *supra* note 2 at 192 ('the representative does not thereby become the possessor [of the right]'; Simmonds (1998), *supra* note 1 at 226 n 138.

[48] For Hillel Steiner, a Will Theorist, it is the controllers of a duty, not the beneficiaries, who are the right-holders. Steiner (1994), *supra* note 22 at 62. E.g., despite being called 'children's rights, the rights of the handicapped, etc., Steiner thinks these are really the rights of state officials: Enforceable powers used on behalf of children, the incompetent, etc. Hillel Steiner, 'Working Rights', in Matthew Kramer (ed) *A Debate Over*

the relevant enforcement and waiver powers. In other words, they allow for the separation and distribution of a single right's components amongst different agents. This is true, they think, of: the legal guardians of children; state officials who can commence litigation on citizens' behalf; agents authorised to act for principals; etc. Most Will Theorists do (or would) deny that the duties are also directed to the enforcement-power holders, when that that person is not identical with the RCTD-holder. For Hohfeldian Will Theorists, moreover, that the duty is directed towards the correlative claim-holder is simply axiomatic. Who counts as that claim-holder, as an epistemic matter, is different from worrying about the grounds by which he or she is or ought to be the claim-holder. Hence, Will and Interest Theorists need not produce different results on the directionality of duties.[49]

How these rights really figure into the Will Theory is nevertheless a difficulty its proponents have yet to sufficiently explain. How is it that a right's components can be distributed amongst different agents, yet still count as singular, unitary normative construct? How is it one party's right rather than the other's? If one party holds the RCTD portion, but another party the relevant powers, how can that be squared with the idea of rights protecting the will or choices? Perhaps this subset of Will Theorists will want to construe such cases as 'peripheral' rather than 'central' cases of rights, or as exceptions to the rule about rights and

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*Rights: Philosophical Enquiries* (OUP 1998) at 258-62.

[49] John Finnis states that the two candidate means for identifying the direction of duties – the beneficiary, or the remedial power-wielder – need not be *theories*. Finnis, *supra* note 14 at 465 n 32. This is a direct response to Kramer (1998), *supra* note 2 at 61 n 23. In a personal correspondence Finnis clarified his view: One could adopt either candidate by one of two means. The first is by mere stipulation. This resolves a purely technical problem, which is not, and does not involve, a philosophical explanation (a 'theory') of rights. The second is as the result of an analysis seeking an explanatory rationale for rights. Hohfeld, Finnis thinks, took the former approach and adopted the 'enforcer' option. Email from Professor John Finnis to the author (24 November 2014). Whether or not Finnis is correct about there being alternative means for coming to adopt one of the two candidate views, or about Hohfeld's own preferences vis-à-vis the beneficiary vs. enforcer options, it does not affect the issue of whether a disagreement about different identity tests (even partly) *frames* the Interest-Will Theories *debate*.

who counts as right-holders.[50]

The Third Delineation, about the direction of duties, is also problematic because it would seem to end the debate at the starting gate. If the Will Theory must construe rights as complexes, and if it holds that a right's raison d'être is to effectuate holders' wills via such powers, then parcelling out a right's parts to different agents undermines the theory. To both be coherent and have global application over all rights, or even just those within a specified domain, the Will Theory should be required to maintain that *all* rights concern a RCTD plus enforcement powers in a single person's hands, since it is those powers that engender the capacity to make the theoretically relevant sort of choices.

However, because certain versions of the Will Theory do hold that, in certain cases, two or more parties may possess the component RCTD and powers (but *not* exceptions to the rule that rights must include powers, irrespective of who possesses them) the direction-of-duties matter can define neither the Will Theory nor the Interest-Will Theories debate. The Will Theory simply demands that, if one wants to identify 'a right', one must locate both the RCTD and powers – even if they are parcelled out amongst different parties. A finding of one component without the others simply marks the absence of 'a right'.

Alternatively, if the Third Delineation does capture what the debate is really all about, then the Will Theory fails at the outset because it admits that there are right-holders who do not personally possess the relevant sorts of power. (It would also seem to be a stretch for them to hold that one person *possesses* the power, while a second person – a rational,

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[50] See, e.g., Chapter 5 § III.2 for a discussion of Simmonds' Dystopia Argument (found in Simmonds, *supra* note 1 at 225) as a candidate Will Theory explanation for treating such cases as exceptions to the rule. Since Simmonds identifies a Hohfeldian claim as a species of enforcement power, it will nevertheless be difficult for his version of the Will Theory to deny that a directed duty is directed to a legal guardian and not just to the child, to the agent and not just to his or her principal, etc.

competent one – simply *wields* it on the former's behalf). As another matter, all the work being done in this delineation seems just to be about figuring out what a 'correlative right' is. Determine what that is, and then you will know the duty's direction.

**Who Count as Right-holders?**

Another erroneous delineation that can be gleaned from the recent literature, whereby the debate is said to be about providing explanations of who count as bona fide right-holders.[51] The theories are often taken to either posit or entail widely divergent sets of potential right-holders. Indeed, some of the supposedly most damning arguments levied by one theory against the other, staples of the debate, concern who does or does not count as a right-holder.

The Will Theory is charged with excluding: the rights of the mentally ill, the comatose, children, and others deemed legally incompetent to enforce or waive their rights; rights wherein the holder cannot alienate their entitlement; and the rights of victims under the substantive criminal law. The Interest Theory in turn is charged with including the rights of parties the law does not necessarily recognize, including those of third party beneficiaries of contracts.[52]

The Will Theory's set of right-holders is said (by opponents and even some adherents) to be artificially restricted to competent, rational beings capable of personally enforcing their rights. By rejecting the personal enforceability requirement, by contrast, the Interest theory is said to allow for a much more expansive set. Particularly, the Interest Theory can include rights for children, the mentally ill, the dead, the comatose, animals,

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[51] See, e.g., Finnis, *supra* note 14 at 203; Stepanians, *supra* note 14 at 68. Compare Kramer (2010), *supra* note 15 at 35 with Kramer (2013), *supra* note 13 at 262.

[52] See, e.g., Neil MacCormick, 'Children's Rights: A Test Case for Theories of Rights', in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982); Kramer (2000), *supra* note 3 at 487; Hart (1982), *supra* note 2 at 187.

vegetation, etc. – agents or things which the Will theory is said to exclude or be unable to account for in its set.

This Fourth Delineation marks important philosophical issues. Nevertheless, it also fails to capture what the debate is all about because here too, the theories need not generate divergent sets of right-holders. As already seen, many contemporary versions of the Will Theory allow for the separation of a right's components amongst different agents. This divvying up of parts seems to allow the Will Theory to cover all the same candidate right-holders as the Interest Theory (children, animals, etc.). (Again, as they consider enforcement powers to be essential to the concept of a right, such Will Theorists will deem these cases to be exceptions to the rule that the right-holder must personally possess the enforcement and waiver powers).

This is not to deny that the Interest and Will Theories can create divergent candidate sets of right-holders. The reason for such a divergence, however, will be because the Interest Theory can identify rights even where no relevant enforcement powers are to be found in *anyone's* possession, whereas the Will Theory will deny that such cases constitute bona fide findings. However, since some Interest Theorists would also deny that unenforceable rights constitute 'genuine' cases,[53] it cannot be said that this issue frames the debate.

It is better to understand the matter of who counts as a real right-holder, and the canonical arguments pertaining thereto (e.g., the Incompetency, Inalienability, Criminal Law, and Third Party Beneficiary Arguments) as *reductio* arguments. 'Given what each

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[53] The deem such cases of rights to instead be merely 'nominal', or 'degenerate', 'imperfect', etc. See, e.g., John Salmond, *Jurisprudence, or The Theory of the Law* (1st edn, Stevens & Haynes 1902) at 223; Rex Martin, *A System of Rights* (Clarendon Press 1993) at 82-3; MacCormick, (2008), *supra* note 21 at 122, 122-3, 129; Kramer (1998), *supra* note 2 at 9, 100. Joseph Raz thinks that the concept of an unenforceable legal right is parasitical upon protected ones, as the law is primarily concerned with enforceable legal rights and duties. Raz (1994), *supra* note 12 at 256-7.

theory's criteria of a right *entails*', each such argument goes, 'this over or under-inclusive result follows'.

**§ II.4 So What's The Debate Really All About?**

In his introductory remarks to the most important collection of essays about the theories of rights debate in the twentieth century, Matthew Kramer states that some of the prime issues of the debate are to ascertain:

> What the holding of a right involves… what a thing must be if it is to count as a right… What are the necessary and sufficient conditions for the existence of a right?… What is the connection between the existence and the enforcement of a right (ie, between rights and remedies)… What are the similarities and differences between rights and other sorts of entitlements? What are the basic values which rights protect?[54]

Theorists, he says, aim to construct 'a comprehensive account that overarches the numerous possible instances and varieties of rights'.[55]

So what is the debate really about? Why does it seem to admit of such diverse delineations, or why do some theorists think it does at any rate? This section has argued that only the First and Second Delineations – operating in tandem – properly capture what the debate is about. Holding that rights are, must include, are not, or need not include, enforcement powers, requires explanation. We need to know *why* that is, or should be, the case. For the same reason, theorists need some basis for deeming whether certain tokens or types of normative positions constitute 'rights'. Of the several options, this must be in terms of the First Delineation – at least insofar as the theorists themselves believe their theories are fruitful and worthwhile enterprises. (They may not be). And yet *why* the relevant modes of protection, advancement, etc., are deemed relevant, or exclusively relevant, sometimes seems

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54 Kramer (1998), *supra* note 2 at 1.

55 *Id*. at 5.

mysterious from the perspective of a purely First Delineation consideration about interests or wills alone. For example, why is it that some Interest Theorists hold that the interests underpinning rights are protected *exclusively* or paradigmatically by the imposition of correlative duties? For Will Theorists, why is an enforcement power the paradigmatic or exclusive way to protect the will? (Again, the next chapter will address the various delineations' conceptual disconnects).

So too if we want an account of the direction of duties: if the rival theories do yield distinct answers after all, then they must explain why it is that a 'relative' duty is directed either to the intended beneficiary or to the person holding the power to enforce that duty. Here theorists must rely on their criteria to determine what counts as 'a right'. Such criteria in turn include, or rely in part upon, First Delineation beliefs about the ultimate purpose of all rights. Further, how can we know what it is to have 'a right', or who can qualify as a right-holder, unless we already know what counts as 'a right' and what its ultimate purpose is?

Of course, whether or not any version of either theory has to date provided a rich or deep enough account, i.e., to successfully explain why only *X* and *Y* normative positions protect the will, or to explain the direction of duties, etc., and whether *any* such theory could provide convincing, successful explanations in these terms, are different matters.

At any rate, it is best to understand the theoretical debate in terms of the First and Second Delineations operating in tandem: what is 'a right' and what is its ultimate purpose? The Interest Theory is best understood as holding that (I) rights are normative positions securing, protecting, promoting, etc. interests (of some sort or other), however imperfectly or inadequately; and (II) RCTDs secure such interests by imposing duties on other parties. They

need not be enforceable, though. The Will Theory, by contrast, is best understood as deeming rights to be normative positions that advance or protect the holder's will. They do so by affording holders, or another party acting on their behalf, the capacity to control a correlative duty. 'Control' here particularly means using powers to either try to secure the duty's fulfilment, or to try to vindicate the right if the duty is (perceived to be, or going to be) breached. While the Will Theory treats such powers as essential features of any right, not all versions require that a single person hold all of a right's parts: a right complex's component RCTD and enforcement powers could be divvied up amongst various agents.

## § III. Recent Efforts

In the last decade or so there have been several efforts to move the theoretical debate forward. It is important to address them, because at least some of the authors of such projects would object to Section II's argument about how best to understand the debate. This is because they aim to provide either hybrids of, or alternatives to, the Interest and Will Theories. Section III.1, however, shows that these all simply amount to versions of the Interest Theory. It also points out certain defects in some of them too. Section III.2 then argues why recent efforts to advance the debate by characterising it as being wholly normative (i.e., morally or politically evaluative) affair, entailing that there are no analytic versions of the theories, are misguided.

### § III.1 Would-Be Alternative and Hybrid Theories

2005 saw two efforts to move the debate forward. Gopal Sreenivasan presented a 'Complex Hybrid' Theory about Hohfeldian claims. Per his theory, *Y* has a claim-right that correlates with *X's* duty to φ just in case *Y's* measure of control (or, if *Y* has a surrogate *Z*, e.g., a legal guardian, then *Z*'s measure of control) over *X's* duty to φ matches (by design) the measure of

control that advances *Y*'s interests on balance.[56]

In turn, Leif Wenar put forward a 'Several Functions' Theory. Characterising theories as concerning rights' 'functions' (rather than an ultimate purpose), he denied that they have a singular, overarching one. Instead, a right is a Hohfeldian position, or combination of positions exhibiting one or more of six possible functions. The six functions are as follows:

> The provision of:
> 1, an exemption,
> 2, discretion, or
> 3, authorization,
> Or the entitlement to:
> 4, protection,
> 5, the provision of something, or
> 6, some performance[57]

In keeping with idea that not all tokens of types outlined by models count as rights (per the debate's Second Delineation), Wenar's Several Functions Theory implies that if a Hohfeldian claim does not fulfil at least one of three functions of 'rights that are claims' – protection against harm or paternalism, provision in case of need, or to some specific performance – then it is not 'a right'.[58]

Matthew Kramer and Hillel Steiner have shown that Wenar's 'Several Functions' account is simply a version of the Interest Theory.[59] The same should be said of

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[56] Sreenivasan (2005), *supra* note 45 at 271; Sreenivasan (2010), *supra* note 45 at 488. Sreenivasan cites to HLA Hart to understand the concept of 'measures of control'. These are enforcement or waiver powers over the correlativity to duty by which to waive the duty, enforce it in the face of its breach, waive that enforcement, etc. Sreenivasan (2010), *supra* note 45 at 482, citing Hart (1982), *supra* note 2 at 183-4.

[57] Wenar (2005), *supra* note 25 at 246.

[58] *Id.* at 244-5.

[59] Kramer & Steiner (2007), *supra* note 15.

Sreenivasan's. Holding that a right's 'measures of control' (enforcement powers, etc.) must match the measure of control that advances the right-holder's interests on balance *makes* it an Interest Theory.

For one thing, Sreenivasan makes a category mistake by treating 'measures of control' as being at the same level as 'interests'. Whether delimited to enforcement or waiver powers, or extended to include other positions like immunities, liabilities, etc., Will Theorists hold that the 'measures of control' are means for, or exist for the sake of, something else: affording the right-holder the status of a 'small-scale sovereign' or 'private legislator'; the *locus standi* by which to assert one's personhood or status; effectuating a person's capacity to choose; a 'dominion' status enabling right-holders' wills to prevail over others' in any confrontation in which the right is relevant; free and equal status within a legal system; etc.[60] Moreover, on Sreenivasan's account, there may be times when no measures of control, or at least enforcement and waiver powers, are warranted. However, a right without any such means of control is not 'a right' at all per the Will Theory. Hence, Sreenivasan's account is not really a hybrid after all.

For another thing, Interest Theories have always noted that rights can be afforded 'measures of control'. It is simply that, for Interest Theories, the measures of control are neither necessary nor sufficient for the existence of 'a right' or for the holding of a right.[61]

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[60] Hart (1982), *supra* note 2 at 183 ('The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty *so that* in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed'. Emphasis added); Hart (1997), *supra* note 6 at 41; Wellman (1985), *supra* note 2 at 96 ('The dominion conferred upon a right-holder by a respected legal right… is a two-sided freedom-control concerning a limited domain defined by the core of the right and in the face of the second party or parties to that right. To the extent that it is realized, this dominion *enables* the will of the right-holder to prevail over the will or wills of the second parties in any confrontation to which the right is relevant'. Emphasis added).

[61] Kramer, (2013), *supra* note 13 at 246.

For Interest Theorists, 'a right' is a normative construct used to effectuate or protect a predicate interest, and that the kind of a right that correlates with a duty, particularly, is primarily protected by, and/or justifies the imposition of, *that* duty (though the theory makes no claims about how effective correlative duties are or must be in that regard).[62] The Interest Theory can even account for modifications to the means of control. Legal officials, say, can add or subtract a particular means of control in order to try to try to better effectuate the interest. These additional means of control can actually strengthen or weaken the right.[63] Critically, though, that these 'measures of control' are granted to the right-holder and/or imposed on other parties, is ultimately to be explained in terms of the right-holder's interests. Even if all rights in a given jurisdiction were, as a matter of historical fact accompanied by measures of control, the Interest Theory would account for them as effectuating some interest or other, rather than as protecting the right-holder's will. Hence they deny that rights 'essentially' make someone a small-scale sovereign, etc.[64]

Sreenivasan's account is also problematic in ways that other Interest Theories are not. For his cannot be squared with the Legal Positivist view that legal rights can be the product of legal corruption, of legal officials' mistakes, etc.[65] Therefore (a) some legal rights have

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62 Raz (1986), *supra* note 12 at 165-6; Kramer, (2013), *supra* note 13 at 246. Kramer claims that Raz's account is a moral or political philosophical version of the Interest Theory, whilst his is a 'jurisprudential' one. *Id.* at 245. That this is an inapt characterization of Raz's theory, see his 'Legal Rights', where Raz shows that moral rights get adopted as law by legal officials, and then *qua* legal rights than justify the creation of yet other legal rights and normative positions (duties, liabilities, powers, etc.). Raz (1994), *supra* note 12.

63 See, e.g., Raz (1986), *supra* note 12 at 168 and 168 n 86.

64 See, e.g., Rudolph von Jhering, III *Der Geist des Romischen Rechts auf den verschidenn Stufen seiner Entwicklung* at 339 (1924 edn) (A right has an interest as its 'core' and variable elements of control as the core's 'protective shell'). Cf. Stepanians, *supra* note 14 at 72 n 28 on von Jhering's position. Raz (1986), *supra* note 12 at 168 ('When the condition which activates the duty is an action of some person, and when the duty is conditional on it because it is in the right-holder's interest to make that person able to activate the duty at will, then the right confers a power on the person on whose behaviour the duty depends'.).

65 Sreenivasan says that his interests are primarily in morality rather than law, but that that his theory does apply to it. Sreenivasan (2010), *supra* note 45 at 468. Specifically, his 'by design' clause, which qualifies

measures of control that that they ought not given their right-holders' interests and (b) some rights have either no measures of control, or at least not the requisite measure, despite the right-holder's predicate interests potentially warranting otherwise.

Three other efforts to provide alternative theories are also just versions of the Interest Theory. For example, Rowan Cruft endorses an Interest-Theory-with-Exceptions. According to Cruft, most rights (of any Hohfeldian type) serve the holder's interests by protecting them, justifying the imposition of ligations upon others, etc. Even so, there are subsidiary or peripheral cases of rights that have nothing to do with the holder's interests. His examples include promissory rights and certain property rights.[66]

Influenced by Wayne Sumner and Hillel Steiner, George Rainbolt offers a 'Justified (Normative) Constraint' theory as an alternative to the Interest and Will Theories. Whereas Sumner and Steiner believe that imposing normative constraints on other parties is but one amongst several essential features of any right, Rainbolt combines that notion with the idea of rights being based upon a particular sort of justification as together constituting all rights' raison d'être.[67] By their nature, Rainbolt holds, rights impose justified normative constraints on other parties. 'A right' obtains when" (I) a second party bears a normatively constraining correlative position, like a duty or a disability, and (II) the justification for the existence or imposition of that normative constraint is *some* feature or other of the right-holder.[68]

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the Complex Hybrid theory's explanation of the amount of control that matches the measure of control that advances the right-holder's interest on balance, cannot be squared with legal positivism and the possibility of corrupt legal rights, rights created by mistake, etc.

66 Cruft, *supra* note 2 at 372-3, 384, 387.

67 Sumner, *supra* note 45 at 35; Steiner (1994), *supra* note 22 at 59; Rainbolt, *supra* note 2 at xi-xii. Rainbolt thinks claims, immunities, and certain complexes containing tokens of both or either are 'rights' (but not singular powers or liberties) because only these impose 'normative constraints' on others.

68 Rainbolt, *supra* note 2 at xiii, 118. In this way, Rainbolt believes he overcomes the shortcomings of Raz's Interest Theory, which focuses upon wellbeing as the sole basis for justification. *Id*. at 118-9.

In 2013 Wenar developed a Kind-Desire Theory. While the theory is thus far restricted to Hohfeldian claims, Wenar is far from holding that a claim is the only kind of right.[69] The Kind-Desire Theory purports to be able to identify claim-holders in any normative system that has such positions.[70] It builds upon an extensionally inferior Role Theory, which attributes desires to members of a class:[71] property owners *qua* owners want others not to intrude on their land; promisees *qua* promisees want the agreements to be fulfilled; journalists *qua* journalists want their sources to be protected; etc. This role-based desire approach is then extended to natural and social kinds. The Kind-Desire Theory incorporates three conditions: 1, identify a duty within the normative system; 2, attribute desires to a role-bearer or kind-bearer (who is distinct from the duty-bearer) who wants that duty to be fulfilled; 3, a genuine (Hohfeldian) claim must be enforceable, whether by the right-holder personally or by another party acting on his or her behalf.[72] Wenar thinks 'desire' is at 'the same conceptual space' as 'will' or 'interest' and thus not reducible to either. Moreover, it is said to be conceptually prior to 'interest' in certain areas.[73]

While illuminating and innovative, these efforts are neither alternatives to, nor hybrids of, the Interest and Will Theories. They are all just versions of the Interest Theory. Concerning Cruft's, it is doubtful whether his examples of rights-sans-interests actually fail to advance or protect right-holders' interests. Even if they do not, his account leaves it

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69 Wenar (2013), *supra* note 20 at 207-8.

70 *Id.* at 210.

71 *Id.* at 208-18.

72 *Id.* at 218-9, 226.

73 *Id.* at 225.

uncertain why, conceptually, rights must otherwise generally advance interests. Further, his divergences from ordinary usage seem to be based on wholly unsubstantiated (moral) preferences.

Regarding the Justified Constraint Theory, Rainbolt never explains why rights must be normative constraints. Thus, he excludes powers and liberties from counting as 'rights' without warrant.[74] While Rainbolt's is not a Sanction Theory of law, one is nevertheless reminded of Hart's arguments against such a view in *The Concept of Law*, particularly the idea that law permits and empowers and does not simply impose duties and liabilities.[75]

Turning to Wenar's Kind-Desire Theory, critics have already questioned why such desires or wants cannot be equally explained in terms of the 'interests' inherent in such roles or kinds.[76] All of his 'X *qua* X' and 'X wants Y' statements can be rephrased without loss

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[74] Cruft shows that, if it is indeed a theory, a *pure* Normative Constraint account (where Rainbolt's justification prong is discarded) *may* be distinct from Interest or Will Theories. This is because it would allow for rights that are neither of value or benefit to the holders, nor protects their will. Cruft then argues that such a theory is over-inclusive because it counts many more instances of rights than our ordinary and legal usages allow; and, despite himself, Cruft also shows that a Normative Constraint view is *also* under-inclusive, since ordinary usage treats liberties and powers as rights, even though they do not impose constraints upon others. Cruft, *supra* note 2 at 355, 359-60, 362-4.

*Pace* Cruft, Interest Theorists often say that rights need not be idiosyncratically tailored to the holder's interests, but must *normally* or *generally* be in the interests of persons in their situation. Hence, a Normative Constraint view can be seen to promote a right-holder's interest, as it were. See, e.g., Kramer (1998), *supra* note 2 at 96; MacCormick (1977), *supra* note 2 at 202. Furthermore, it is fair for theories to ask what *justifies* those normative constraints. For example, *pace* Rainbolt, Raz would say that rights are the reasons for those constraints.

[75] Hart (1997), *supra* note 6 at 27-8. Hohfeld says the same thing. 'A rule of law that *permits* is just as real as a rule of law that *forbids*; and, similarly, saying that the law *permits* a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law *forbids* a certain act to X as between himself and Y. That this is so seems, in some measure, to be confirmed by the fact that the first sort of act would ordinarily be pronounced "lawful," and the second "unlawful".' See Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L.J. 16, 42 n 59. This undermines most of Albert Kocourek's (Austinian) criticisms of Hohfeld's schema put forward in the 1920s. Kocourek thought Hohfeldian liberties and immunities were not genuine 'jural relations', because all laws, and hence all jural relations, necessarily involve the idea of 'constraints'. See, e.g., Albert Kocourek, 'The Hohfeld System of Fundamental Legal Concepts' (1920) 15 Illinois L. Rev. 24, 26 n 9, 35 n 28.

[76] Arthur Ripstein and blog commentators, 'Ethics Discussions at PEA Soup: Leif Wenar's "The Nature of Claim-Rights" with [sic] Critical Precis by Arthur Ripstein', (*PEA Soup* 10 April 2013) <http://peasoup.typepad.com/peasoup/2013/04/ethics-discussions-at-pea-soup-leif-wenars-the-nature-of-claim-

into 'in the interests of the role/kind-bearer *qua* role/kind-bearer'. Second, Wenar does not explain why claim-rights must be enforceable. (Excising that condition seems to do no damage to his theory, though). Third, it is unclear whether the Role Theory or the more expansive Kind-Desire Theory can explain secondary and tertiary rights – if, that is, such rights are or include Hohfeldian claims. For example, Americans and others have rights to be heard in U.S. Federal courts. Those courts employ standing requirements. One is that, for diversity jurisdiction, plaintiffs must bring claims of more than $75, 000.[77] But what is the nature of the plaintiff's desire or role as such, rather than the nature of his or her dispute, which reflects this pecuniary quality and thereby enables the Kind-Desire to identify the holder of such a secondary right?

**§ III.2 Attacks on Analytic Versions of the Theories**

There have also been a series of critiques levied against analytical versions of the theories. For example, Pavlos Eleftheriadis considers the Interest-Will Theories debate to be a wholly normative affair. For Eleftheriadis, the debate is really just about competing moral views about political institutions and how to interpret legal doctrine. Hence, analytical versions are misguided enterprises.[78] While he recognises the possibility of an philosophical project of 'describing' or interpreting a normative position's ultimate purpose, Eleftheriadis finds it dubious that such projects would take the form of theories that just happen to track the ones found in the moral-political debate. Is it a mere coincidence? Not according to Eleftheriadis. The analytical versions of the theories are therefore simply 'crypto-normative' theories:

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rights-with-critical-precis-by-arthur.html> Accessed 19 August 2015.

77 28 U.S.C. § 1332(a): Diversity of citizenship, amount in controversy; costs.

78 Eleftheriadis, *supra* note 22 at 10-5.

analytic theorists are really just presenting moral arguments and theories disguised as analytical accounts.[79] They 'ignor[e] their own methodological constraints by pursuing normative projects under the guise of analysis'.[80] This, he thinks, is evidenced by the fact that their theories do not track the facts of legal practice well. Further, each theory admits it is inconsistent with at least some of the data, 'the facts of legal practice'.[81] Hence, analytic Interest and Will Theories 'are distortions rather than accurate explanations'.[82]

Space does not allow for a full discussion of the debate's genealogy or whether it is primarily a moral-political affair. Suffice it to say, though, that Eleftheriadis' preclusion of analytical versions of the theories is misguided. He ignores the possibility that the existing analytic versions are either simply inadequate, or the relatively best analytical jobs that can be done. Just because a theory has many explanatory gaps or failings (e.g., it does not track the facts well, covers only so much of the facts before counterexamples run rampant, etc.) it does not follow that analytical theorists are really motivated by moral or political impulses, or that their theories are really moral or political ones. Insofar as it is one of his reasons to favour the Will Theory over the Interest Theory, HLA Hart's version of the Redundancy Argument (addressed in Chapter 5 § V.4) seems to be a counterexample to Eleftheriadis' view. For, correct or not, Hart's argument needs not be construed as a moral or political one, nor as being predicated upon moral or political impulses.

Hamish Stewart also argues that 'definitional' (analytic) versions of the theories are fruitless enterprises. On his view, Analytic Interest and Will Theorists simply lay down

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79 *Id*. at 14-5.

80 *Id*. at 15.

81 *Id*.

82 *Id*.

stipulative definitions of 'a right' and present counterexamples to their rivals' definition.[83] Analytic rights theorists want their definitions to both reflect ordinary and legal linguistic usage (at least to some extent) and to provide a precise, technical vocabulary that can later be used in normative philosophical debates about what rights people ought to have and what sort of beings ought to count as right-holders.[84] However, these dual aims are in 'irreconcilable conflict': the more precise a definition, the less it will track or reflect ordinary usage; the more it tracks ordinary usage, the less precise it will be.[85]

Stewart also believes that the analytic rights theories are not doing what they claim to be. As shall be discussed in Chapter 5, for example, the Will Theory purportedly cannot handle cases of inalienable and unwaivable rights, or the rights of certain agents (e.g., children). In turn, the Interest Theory is said to be unable to explain or exclude the rights of third party (and potentially other) beneficiaries. Stewart thinks that, if the *Analytic* versions really are correctives to ordinary usage, then such counterexamples should not prove bothersome. Yet all theorists treat them as important. That attempts to address counterexamples are even undertaken belies the fact that analytic theorists' own conceptions of rights are not really delimited by their proffered definitions, and nor are such definitions what really motivates them to concoct counterexamples and responses. Like Eleftheriadis, Stewart believes that the means by which analytic theorists attempt to accommodate the

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[83] As mentioned above in Section ii.2, *pace* Stewart, theorists present complex criteria for what count as rights, not (just) definitions (if at all). Theorists are not simply concerned with rules for the usage of words, but with capturing the various features of the concept.

[84] These meta-theoretical desiderata come from Kramer & Steiner (2007), *supra* note 15 at 296. See also Chapter 1 § V and Chapter 2 § III.

[85] Stewart, *supra* note 25 at 320. He suggests that the best way to understand a basic concept is not to begin with a definition and then defend it against every possible counterexample. Instead, one should 'grasp the main features of the concept as they present themselves in the relevant body of material and then try to understand the role the concept plays in the material'. *Id*. at 338. If this is a feasible approach, it still seems to leave the door open to analytical theories. They need only modify their modus operandi.

counterexamples are really crypto-normative arguments. Their analyses and counter-arguments incorporate evaluative components that undermine the theories' efforts to be morally neutral.[86]

According to Stewart, then, what really motivates analytic theorists to craft counter-arguments is a belief that certain classes of agents (e.g., children, third party beneficiaries, etc.) *should* (not) have rights. They manipulate their definitions and their applications to accord with such beliefs. Doing so, however, undermines the very reason for constructing such definitions in the first place: they are no longer morally neutral tools for philosophical discussion. Again, this practice belies the fact that the definitions do not actually represent Analytic theorists' own conception of rights.

Stewart certainly demonstrates that particular theorists go awry methodologically. The damage, though, is probably not as ruinous for analytic rights theorisation as he suggests. The simple solution for Analytic theorists, which he himself provides, is to simply avoid those sorts of arguments! Stewart might reply that these normative matters form the 'central moves in the debate' between analytic versions of the theories,[87] and are hence unavoidable. This begs the question, though, because it seems possible to provide alternative, non-normative (in the sense of morally or politically evaluative) explanations for the

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[86] Stewart's particular arguments are as follows. First, both Interest and Will Theorists really think it is normatively unpalatable for the Will Theory to exclude certain classes of agents from being right-holders. Some Will Theorists stretch their theories to include such agents, or provide outlandish justifications for their exclusion from the set of right-holders. But their motivation either way is moral or political, not analytical. Second, when Interest Theorists like Kramer try to distinguish amongst different kinds of interests in order to determine whether a third party beneficiary possesses rights or not, their analyses are really based on substantive grounds about why such people should (not) have rights, and not their Interest Theory definitions of 'a right' (Kramer would be the first person to admit this, though, and would not deem it problematic for his theory. See Kramer (1998), *supra* note 2 at 79 and Kramer (2010), *supra* note 15 at 35). Third some Interest Theorists distinguish between what is 'generally beneficial' from what is 'generally detrimental' to people or a class of persons in order to deny that a parent would have a right to be informed upon, which would be correlative to a duty borne by his or her child to inform on the former for seditious sentiments under a hypothetical law. Stewart, *supra* note 25 at 325-6, 332-3.

[87] *Id*. at 320.

theories' responses to the counterexamples. For example, theorists may think it 'ghastly' to deny children the status of right-holders for normative reasons, but they may also think it is a *mistake* because their definitions entail the exclusion of salient data from ordinary parlance, from law, etc. Its exclusion or inclusion from (the implications of) a definition (in the name of a precise vocabulary, or due to some other meta-theoretical/epistemic desideratum) need not be based on the moral or political idea that children ought to have rights. Similarly, ascribing rights to third-party beneficiaries need not be based on moral or political preferences. It may simply be an attempt to handle the data. Third, Analytic theorists need not (and perhaps ought not) try to deny that hypothetical laws would generate morally abominable legal rights.

## § IV. Conclusion

This chapter explained the Interest-Will Theories of rights debate. As theorists do not agree about what it is even about, several delineations of the debate are available. However, only two of them – the first two presented, operating in tandem – accurately capture it properly. On the First Delineation, the debate is about rival conceptions of all rights' shared ultimate purpose or raison d'être. The debate thus demands purposive or teleological explanations of rights. The Will Theory holds that all rights protect or promote the right-holders' will, while its rival, the Interest Theory, posits that all rights protect or promote some interest of the right-holder.

The Second Delineation is about what counts as 'a right' in the first place. Each theory provides criteria for making such determinations: qualification tests for ascertaining which types of normative positions, or which tokens of such types, count as 'rights' and which do not. These 'theoretical' criteria include the following three features: (I) a

requirement that a right either protects something, justifies something, promotes something, effectuates something (thereby embedding the debate's First Delineation); (II) identifying the relevant mode, or set of modes, of protection, justification, etc.; and (III) determining which tokens of basic types of normative positions, as posited by theory-independent models, or in their own theory-driven models, are indeed 'rights' based on features I & II. These criteria are seemingly indispensible for: (A) determining the conceptual features of 'a right'; (B) assessing 'theory-independent' rights models (like Hohfeld's schema), helping to discern which of their features (if any) actually count as rights, and as a guideline for constructing new right models; (C) assessing functional versus modal views of rights; and, probably, (D) determining where rights obtain and whether a candidate instance counts as 'a right' in a given system.

There are other candidate delineations, but this chapter shows why they are inapt. Lately, some scholars claim that the debate is about explaining the direction of 'relative' duties. Per this Third Delineation, is a duty owed to the (intended) beneficiary, or to the person capable of trying to seek a remedy of the duty-bearer breaches his or her duty? A Fourth Delineation is about who counts as a right-holder. Both the Third and Fourth candidate delineations are inapt because the Theories need not, and sometimes do not, provide divergent answers to issues posed; they can but need not generate differently sized sets of right-holders or disagree about the identity of the person to whom a duty is directed.

## Appendix. The Theories of Rights

| | **Choice Theories** | **Will Theories** | **Kantians** | **Interest Theories** | **Raz's Well-Being Theory** |
|---|---|---|---|---|---|
| **All Rights' Ultimate Purpose** | To protect or effectuate domains of freedom | To vindicate holder's wills in conflicts | To structure autonomy and independence | To protect or effectuate interests of any sort | To effectuate holders' well-being |
| **Normative Positions That count as 'A Right'** | **A**, a Hohfeldian claim + at least one enforcement power<br><br>**B,** any complex that includes such powers | **A**, a claim + at least one enforcement power<br><br>**B,** any complex that includes such powers | | **A**, a claim<br><br>**B**, Any Hohfeldian incident<br><br>**C**, Any complex, whether or not it includes enforcement and waiver powers | A claim of sufficient force that can ground a duty in others |
| **ID Test for a Duty's Direction** | **A**, the power-holder<br><br>**B**, the claim-holder, where *someone* has the relevant power(s) | **A**, the power-holder<br><br>**B**, the claim-holder, where *someone* has power(s) | The right-holder | The intended beneficiary of a duty – *not* just any claim-holder | Was the duty generated based on a particular person's interests-cum-right? |
| **Application to Rights Models** | **A**, Not all Hohfeldian *types* or their analogues in other models count as rights<br><br>**B,** All Hohfeldian types, and their analogues, are rights – if they are self-enforceable<br><br>**C,** Not all tokens of all types count as rights | **A**, Not all Hohfeldian *types,* or their analogues, count as rights<br><br>**B,** All Hohfeldian types protect their holder's will *if* claims and immunities are kinds of power<br><br>**C,** Not all tokens of all types count as rights | Monistic conception of a right | **A,** Not all *tokens* of all Hohfeldian types, or their analogues, are rights. If the position does not generally serve the holder's interests, then it is not 'a right' | Monistic conception of a right |

# Chapter 5: Against the Theories of Rights

## § I. Introduction

There is a long-standing philosophical debate about the concept(s) of 'a right'. The two main disputants, the Interest and Will Theories of rights, provide competing criteria for what counts as such.[1] Philosophers and others may be attracted to such criteria partly because they are wary that the mass proliferation of rights language over the last few decades, replete with ubiquitous contests over what counts as genuine instances, will devalue the concept(s).[2] It would therefore be helpful to be able to appeal to some definitive standard or test by which to resolve all disputes about: (i) what rights are and (ii) where genuine instances obtain.

Unfortunately, these theories are not it. Indeed, this chapter argues that the philosophy of rights should leave them behind. Sections II presents possible defences of their importance. Section III-IV then argue that each theory suffers idiosyncratic defects and that their proponents' best efforts to resolve them are wanting. (The chapter also clarifies that some of those flaws actually differ somewhat from the canonical criticisms of each theory found in the literature).

Both theories also face other, graver problems. For one thing, the bases by which the theories establish their criteria of 'a right' as *the* criteria are uncertain, for they are under-inclusive on multiple grounds and of questionable accuracy. Furthermore, as the theorists' own works seem to evidence, other sorts of legal philosophical accounts and theories appear to render these rights theories superfluous. They may be unnecessary for understanding what

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[1] Some versions of both theories profess to have more limited aims: providing kind-of-right and/or domain theory delimitations for their versions. These do not affect their susceptibility to the analyses presented below. See Chapter 4 § II.

[2] See, e.g., L. Wayne Sumner, *The Moral Foundations of Rights* (Clarendon Press 1987) at 1; Hillel Steiner, 'Working Rights' in Matthew Kramer (ed) *A Debate Over Rights* (OUP 1998) at 223; George Rainbolt, *The Concept of Rights* (Springer 2006) at 147.

rights are; identifying instances in data sets; or for 'modelling' rights.[3]

Lastly, there is a commonly held belief that rights are unique, that they differ somehow from other normative concepts like rules, principles, standards, duties, etc. The theories, however, have done an inadequate job making a case about that belief either way. Particularly, the accuracy of each theory's analytical 'reduction' of a right to other concepts (i.e., interests, duties, or powers) remains questionable.

## § II. Is the Debate Indispensable?

Interest and Will Theorists would argue that their accounts are indispensible. First, they will claim that their theories are the requisite means for determining which data in law, morality, and elsewhere, count as bona fide instances of 'rights'. For example, when surveying a piece of legislation, or a legal case, how do we know whether it concerns 'a right'? It may be inappropriate in some circumstances to treat a candidate as a bona fide instance simply because the phrase 'a right' is used. Further, rights are not always signified by the word 'right', so that it would be misguided to look for them only where the word is found or used. The theories resolve these problems by supplying *the* fundamental criteria for such purposes. Such criteria are also necessary for ascertaining which types (and tokens of types) of normative positions count as 'rights', e.g., whether (certain) powers or liberties constitute kinds of rights. Therefore, rights theories are indispensable to any understanding of models, let alone the set of all models, and for fixing what counts as 'a right' in the first place.

## § III. The Will Theory's Particular Defects

This section argues that the Will Theory has unique defects (i.e., ones the Interest Theory does not suffer), and that at least one of them is not what is taken to be its flaw in the

[3] See Chapter 2 § II on models vs. theories of rights.

literature. The section also shows why Will Theorists' best efforts to remedy such defects, or claims to rebut that they are indeed problems, fail.

**§ III.1 Divvying Up 'A Right'**

First, the Will Theory lacks a principled explanation of how right-holders can be separate agents from enforcement-power-holders. To show that this is so, one must first appreciate why it is adjudged incapable of identifying certain genuine rights and for entailing that certain sorts of agents cannot qualify as right-holders. The theory is held to be unable to account for the rights of: children; the mentally handicapped; the incapacitated; the dead; non-persons; third party beneficiaries; substantive criminal law victims; animals; and other sorts of agents.

This under-inclusivity is discernible in different ways. The 'Incompetency Argument' chastises the Will Theory for entailing that certain agents lack rights simply because they would not be competent and authorised to enforce them (e.g., minors, the mentally handicapped, etc.).[4] The Will Theory is also upbraided for entailing the non-existence of victims' rights under substantive (as opposed to procedural) criminal law in Common Law jurisdictions.[5] Further, in response to the Will Theory's own Third Party Beneficiary of Contracts argument, some Interest Theorists posit that, instead of marking their own inability to explain why third parties beneficiaries lack rights, the Will Theory itself fails to explain the fact that they *do* have rights.[6] Each of these arguments relies on the same point: *pace* the

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[4] See, e.g., Neil MacCormick, 'Children's Rights: A Test Case for Theories of Rights' in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982); Matthew Kramer, 'Rights Without Trimmings', in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 4 ["Kramer (1998)"]

[5] See, e.g., HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 182-3 ["Hart (1982)"] in defence of the Will Theory against this argument.

[6] See, e.g., Neil MacCormick 'Rights in Legislation', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality*

Will Theory, rights can obtain even without accompanying enforcement powers.

Contemporary Will Theorists have a reply. In the past, many of its proponents disputed the appropriateness of classifying these types of agents (minors, the mentally handicapped, etc.) as 'right-holders'. Many contemporary Will Theorists, however, do not. Indeed, despite the fact that arguments about both theories' over- or under-inclusivity inclusivity vis-à-vis who counts as right-holders are stapes of the debate, the theories need not actually generate divergent sets – at least not based on the above-listed arguments, at any rate.

Historically, Interest Theorists could argue that its rival's claimed structure of rights *entailed* that certain agents were incorrectly or wrongly excluded from the set of right-holders; for if right-holders had to be both competent and authorised to use (invariably obtaining) enforcement powers, then children, the mentally ill, etc., could not qualify. Many contemporary Will Theorists bypass this problem, however, by parcelling out a right's various components amongst different agents, e.g., the right correlative to a duty (hereinafter "RCTD") in one party's hands and the relevant enforcement powers in another – competent, authorised – party's (the latter of whom is either identified as a mere power-holder or power-wielder).[7]

The real problem, then, is that the Will Theory lacks a principled basis for this distributive manoeuvre. Given its own criteria, what makes the parcelled out components 'a' right? Why treat it as one unified construct, rather than as distinct (kinds of) rights held by

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*and Society: Essays in Honour of HLA Hart*, (Clarendon Press 1977) at 205-6 ["MacCormick (1977"]. The Third Party Beneficiary argument will be addressed below.

[7] Interest Theorists tend to ignore this distributive manoeuvre, repeating these arguments throughout the recent literature even though they do not (or no longer) hold against all versions of the Will Theory.

different parties? Given the theory's focus on rights protecting the right-holder's will, should such cases count as exceptions to a rule about one person holding all of a right's parts? If so, *why* should they count as mere exceptions? Those who parcel out a right's components amongst different agents cannot explain why it is the power-holder/wielder, rather than the RCTD-holder, who is the real 'right-holder', or what makes the (impotent) RCTD-holder a right-holder.[8]

Nigel Simmonds's Dystopia Argument can be taken as being in part a Will Theory explanation of why the separation of a right's components amongst different agents should be considered exceptional. Imagine a legal order where only legal officials hold the relevant enforcement and waiver powers. Under such a system, he thinks, private citizens would not really have 'rights'.[9] Why? Given his interpretation of a Hohfeldian claim as a species of normative power, Simmonds cannot allow for the separation of a right's components amongst different agents. If rights are construed to be capacities to enforce correlative duties, then those private citizens have no legal rights at all.

The Dystopia Argument need not stand or fall with Simmonds' idiosyncratic view of a Hohfeldian claim. It could be reconstructed to say that, if citizens only had passive claims, while legal officials possessed all the relevant enforcement powers, then that could be a worrisome state of affairs. Right-holders would always be at the whim of officials to see if their rights are enforced.[10] Going even further, imagine a legal system with the same

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[8] What if there are no enforcement powers to be found whatsoever? A Will Theorist will simply deny that there are rights in those cases. (That does not necessarily amount to a denial of the possibility of right-holder status for the entire class of agent, though). Interest Theorists will of course reject that assessment, which returns us to the problem of clashing fundamentals.

[9] Nigel Simmonds, 'Rights At the Cutting Edge', in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 225 ["Simmonds (1998)"].

[10] This is essentially Matthew Kramer's construal of, and rebuttal to, Simmonds' argument. More

comprehensive division of RCTDs and enforcement powers amongst private citizens and legal officials respectively, but where the officials systematically refuse to enforce any citizen's RCTDs. Would the citizens actually have legal 'rights'? (We will return to this issue in Chapter 6's Argument 5 on 'genuine' versus 'nominal' rights. For now, however, suffice it to note that both Interest and Will Theorists will disagree (and not necessarily on party lines) about whether such citizens do in fact have rights). One reason for thinking that they do concerns duty fulfilment rather than rights enforcement. Private citizens may have reasons to conform to, or comply with, their legal duties correlative to rights, independently of the possibility of enforceability – even in a loathsome regime.

**§ III.2 Explaining Enforcement Powers**

The Will Theory's second serious defect is as follows. As it cannot adequately explain why certain rights are either inalienable or unwaivable, the theory also cannot explain *which sorts* of enforcement powers (i.e., enforcement and waiver powers, along with powers of alienability) are germane to rights and will vindication, and why certain rights are afforded more such powers than other rights do. If rights ultimately serve to protect their holders' wills, why are certain relevant sorts of ways of doing so unavailable for some rights?

Neil MacCormick's original version of this 'Inalienability Argument' goes a little further: if all rights protect the will via enforcement powers, why is it that our more important (politically and legally more significant) rights, such as constitutional rights, are inalienable or unwaivable in certain ways?[11] The Will Theory therefore generates a paradox:

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precisely, Kramer argues that deciding whether such a condition is morally abominable, dystopian, etc., or not is no basis for denying or affirming whether rights obtain in such a system. Matthew Kramer, 'On the Nature of Legal Rights' (2000) 59 Cambridge L. J. 473, 476-81. For most Will Theorists, Kramer's response is off the mark. For them, a right's ultimate purpose is to protect/effectuate the right-holder's will. If a party never had the means by which to do so, then it would be senseless to call the party 'a right-holder'.

the fewer the means of control (enforcement mechanisms) it includes, the less of 'a right' it is. This is odd, as such rights are normally deemed to be the more important ones.[12]

Simmonds attempts to defend the Will Theory from this argument too. He holds that there are no discernible standards for determining which particular enforcement powers are critical to, or weightier for, a given right.

> Where we are confronted by different facets of control, the strength or efficacy of the protection given to the individual will cannot be judged simply by the number of facets present in any particular entitlement. The different dimensions of autonomy represented by the different forms of control cut across each other; just as the worker's autonomy to alienate his rights may cut across his continuing autonomy to choose whether or not to sue his employer. To provide all the different facets of control will not necessarily offer the most effective or extensive protection to the right-holder's will. Much depends on the circumstances and the nature of the threats to choice in any concrete set of circumstances. Given these complexities, there is no reason to assume that it will be possible to range monotonically upon a single scale of strength or weakness; there is still less reason to expect such strength or weakness to be a simple function of the number of different facets of choice associated with the right.[13]

Simmonds accounts for the very possibility of unwaivability and inalienability, but does not overcome the paradox. This is because his strength-weakness and effective-ineffective distinctions do not suffice to cover HLA Hart's fuller-lesser means of control.[14] He also begs the question about how rights vindicate the will: certain rights are rendered unwaivable or inalienable in order to vindicate the will in ways the *legal system* decides are appropriate, not in ways the *right-holder* might personally decide such matters. For legal rights, the former will always be the case, at least to some extent, given that they are

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11 MacCormick unwittingly waivers between the concepts of alienability and waivability, but his argument could apply to both.

12 MacCormick (1977), *supra* note 6 at 195-9.

13 Simmonds, *supra* note 9 at 229-30.

14 See Hart's 'elements of control' in Chapter 2's Appendix 2.

institutional norms shaped by legal officials. Even so, the idea of limiting the range of options for doing so cuts across the will enhancing/protecting aspect of rights most scholars consider important to the theory. (Perhaps it is not, or need not be, though – especially for those versions that emphasise right-holder status vindication). Will Theorists could claim that alienation power is not a 'relevant' mode of enforcement or control, and so treat the inalienability part of the argument (as opposed to unwaivability) as being ineffectual. But there is no clear reason why that power should be excluded from the set. The Will Theory therefore seems to lack principled explanations about: (I) which sorts of powers are germane to will vindication and (II) which enforcement and waiver (and alienation) powers obtain for a given right and why.

**§ III.3 A Mere Version of the Interest Theory**

The Will Theory's third major defect is that it is wholly subsumable under its rival. There is no reason why a version of the Interest Theory could not hold that all rights are enforceable, while still denying that such powers are essential to the concept of 'a right' and that enforcement is its quintessential feature or concern. Indeed, early Interest Theorists maintained that all legal rights are enforceable (presumably in order to protect the holder's interests).[15]

Imagine it was universally agreed that all rights correlate with duties and include enforcement powers. That would nevertheless be insufficient information to answer the

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[15] See, e.g., Roscoe Pound, 'Legal Rights' (1915) 26 Int. J. Ethics 92, 111 ["Pound (1915)"]; Roscoe Pound, 'Rights', in IV *Jurisprudence* (West Publishing Co 1959) ["Pound (1959)"] at 62-3, 67. Cf. HLA Hart on Rudolph von Jhering's account of enforceable rights that protect interests. Hart (1982), *supra* note 5 at 181 n 76; Markus Stepanians, *Rights as Relational Properties—In Defense of Right/Duty-Correlativity* (Habilitation Thesis, University of Saarland 2005) at 72. In the view of certain medieval scholars like Marsilius of Padua and William of Ockham, 'rights' (*ius*) were both enforceable in courts and protected interests. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press 1997) at 23, 118, 189.

question of whether all rights exist in order to facilitate or protect right-holders' interests or wills. For example, it would still not construe such powers as being essential to, or the most critical feature of, the concept of 'a right', the Interest Theory might better explain *why* such powers obtain (e.g., as tools used to help effectuate the holder's interests).

The Will Theory therefore lacks a deep explanation about why the ultimate locus of concern for rights is *the will* – even vis-à-vis the existence and use of enforcement powers. Now, some versions of the theory seem to emphasise will vindication via right-holder status recognition over the choices that can be made vis-à-vis these use of enforcement and powers.[16] However, these versions are equally subsumable under the Interest Theory, despite any possible objection that the two theories' ultimate purposes clash. For it must be asked: do we vindicate the right-holder's status for its own sake, i.e., for the sake of vindicating his or her will, personhood, soul, etc., or to advance the holder's interests? What, moreover, are the differences between personhood vindication and those interests? (Will Theories also lack in-depth explanations of *why* rights afford their holders this privileged status).

## § IV. The Interest Theory's Particular Defects

### § IV.1 Too Generic

The Interest Theory has three major idiosyncratic defects. First, 'interests' is too generic to be a philosophical explanation of all rights' ultimate purpose. It conveys very little information. Now, some versions of the theory *appear*, at first glance, to be better than

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[16] Carl Wellman's 'Dominion' (version of the Will) Theory is of this sort. He presents his account as being quintessentially about vindicating right-holders' wills, rather than being able to make choices concerning the right's enforcement per se. Enforcement powers are merely the means – albeit indispensable ones – for rights vindication. Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985) at 95-102 ["Wellman (1985)"]. For a critique of Wellman's view, see Kenneth Campbell, "Book Review of Carl Wellman's *Real Rights* and *The Proliferation of Rights*" (2001) 110 (439) Mind 881. See also Wayne Sumner's effort in terms of establishing 'autonomy within a domain'. Sumner, *supra* note 2 at 98.

others in this regard. As examples, Joseph Raz seems to delimit the relevant sorts of interests to ones about wellbeing.[17] Leif Wenar provides two theories (both presented as alternatives to the Interest Theory, but which are simply versions thereof)[18] outlining either several different 'functions' that rights can serve, or the 'desires' inherent in certain roles or natural kinds, respectively.[19] Matthew Kramer has hinted at further specifications to his version by distinguishing between 'vicarious' and 'altruistic' interests.[20]

Consider Raz's Interest Theory. It is not what it appears to be at first glance, because the 'well-being' prong is not actually integral to his view of legal rights. To provide some context, Raz's theory of law includes the theses that (i) the law can be identified simply by its sources and (ii) law claims to have legitimate authority (whether it has it or not).[21] On Raz's Positivist view, legal authorities can create legal rights for any reason they see fit. 'One has a legal right because the authority declared that one has an interest which justifies holding others to be subject to duties. One has that legal right even if the authorities' declaration is mistaken'.[22] There can also be trivial legal rights.[23] Legal officials can also create rights that fail to work as hoped or designed. For example, legislators may fail to

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17 See Joseph Raz, *Ethics in the Public Domain* (OUP 1994, Revised edn) ["Raz (1994)"], particularly the chapter 'Rights and Individual Well-Being'.

18 See Chapter 4 § III.

19 Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223 ["Wenar (2005)"]; Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202 ["Wenar (2013)"].

20 Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281, 302-4 ["Kramer & Steiner (2007)"].

21 Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) ["Raz (2009)"]; Joseph Raz, 'Authority, Law, and Morality', in Raz (1994), *supra* note 17.

22 Joseph Raz, *The Morality of Freedom* (OUP 1986) at 262 ["Raz (1986)"].

23 *Id*. at 186.

address their initial concern with an individual or class of persons' wellbeing (that which catalysed them to act) by either codifying a right that unwittingly protects different interests instead, or which is incapable of advancing the intended interests.[24] Officials may even intentionally misrepresent a right as promoting someone's wellbeing, knowing full well that it does not and will not. Further (and as intimated above), they might ignore considerations of wellbeing altogether when constructing the right.[25] (This actually flags the fact that not all rights are predicated upon their holders' *personal* interests).[26] In light of these considerations, Raz cannot really be taken as holding that *all* rights necessarily protect individuals' wellbeing. His Interest Theory is therefore really no different from others.

It is also hard to see how other wellbeing-based theories of rights could account for status-based, inegalitarian rights, e.g., those that help structure aristocratic or priestly classes. Does it generally advance an individual's wellbeing to be a peer of the realm? If *primum noctum* had been a real medieval law, how would we determine if the right was really a matter of its holder's wellbeing (*a fortiori* if the right's existence was buttressed by the community's interests)? What about rights to trial by combat, by fire, or ordeal? Again, this

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[24] On differences between predicate interests and 'legally delimited and secured' ones that form part of rights as legal constructs see Pound (1959), *supra* note 15 at 67-8.

[25] *Pace* Raz, Kramer argues that wicked legal systems need not even feign belief in the morality of their laws, or of a given law. Matthew Kramer, 'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties' (1999) 109 Ethics 375; Cf. Matthew Kramer, 'Legal and Moral Obligation', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2007) at 186. This is a counterexample to Raz's view that law necessarily claims morally legitimate authority. If Kramer's argument is sound, and if counterexamples are indeed problematic for (let alone undermine) philosophical accounts, does it also suffice to undermine Raz's claim of an identity between legal and moral rights and duties? For if legal rights need not be weighty interests, or even *(mis-)represented* as weighty interests, then they need not be said to be, or presented as, the codification of (purported) moral rights. In other words, lawmakers need not present their rights as being morally legitimate, as being anything other than expressions of their power, and thus need not claim to protect or promote the holders' wellbeing. Alone, this may not suffice to demonstrate a structural difference between moral and legal rights, save insofar as the latter need not be (predicated upon) weighty reasons.

[26] Wenar suggests this is typical of Interest Theories, because rights 'outrun' interests of any sort. Leif Wenar, 'The Analysis of Rights', in Matthew Kramer et al (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (OUP 2008) at 256 ["Wenar (2008)"].

is not to say that such rights do not protect or advance *any* interests. They simply do not track most contemporary philosophers' views about wellbeing. Of course, a theory of wellbeing that accounts for these rights could be constructed, but it would probably be out of step with the dominant Western values of this epoch and those of any Interest Theorist of the last two centuries. (I will return to the issue of Interest Theories claiming to delimit the relevant sorts of interest below).

**§ IV.2 Identity Issues: Part I**

The Interest Theory's second and third major flaws are that it cannot explain why many interest-holders are or are not right-holders. Some versions of the theory systematically register false positives, rendering them an over-inclusive, unreliable guide for identifying or explaining real world rights and rights models. Furthermore, no version successfully explains why particular interest-holders – those known to have had particular laws created in their favour, ones that impose duties on other parties – are not right-holders.

Let us start with **Flaw #2**: those versions that systematically register false positives. The standard argument for this concerns third party beneficiary of contracts (hereinafter a "3PB"). This is where *A* and *B* enter a contract whereby *B* must either perform a service or provide some good to *C* (say, to fix the roof of *C*'s house). It may be irrelevant whether *C* is cognisant of the contract's existence. The issue is this: does *C* have a legal right under the contract? Will Theorists charge their rivals with being incapable of explaining why 3PBs (or 4PBs) fail to have legal rights under the law.

The 3PB Argument actually serves a dual role. First, it marks a problem with these versions of the Interest Theory's criteria: they identify rights in places where, according to certain legal systems, none actually obtains. Second, the theory suffers a delimitation

problem. Whose interests warrant rights-bearing status: *A*, who contracted with *B* for the roof fixing to be done? C, who has an interest in *B*'s doing the job, as it entails that his or her roof will be fixed? What about *D*, the next-door neighbour of *C*, whose own house's value will be affected by the roofing job? What about Party *E*, a neighbour on the same street, whose property value will also be affected by *B*'s work? Party F, who lives in the same neighbourhood and wants to sell his or her home? Et cetera. Does the theory not entail that all such parties (ought to) bear rights?

The Interest Theory lacks convincing grounds for denying that parties *C*, *D*, *E*, *F*, etc., have legal rights per its criteria, even though they, along with others – an infinite, or at least indeterminate, set of parties – might be said to have interests in seeing *C*'s roof get fixed. The 3BP Argument does not merely show that the Interest Theory generates false positives, but that it *systematically* does so. It therefore cannot reliably be used to determine either where rights are to be found in a given domain or system.[27]

In response, some Interest Theorists simply deny the misattributions claim. For them, *C* obviously has a right. Here is one of Kramer's examples. A married couple (or, at least one of the pair) are the 3PBs of a contract. The couple are supposed to receive flowers delivered from you that I paid for. Kramer holds that the couple have a bona fide "Interest Theory right" to the delivery of the flowers *because* they have a Hohfeldian claim against you to

[27] Gopal Sreenivasan argues that Raz's version Interest Theory avoids the infinite proliferation prong of the 3PB problem. '[Raz's] threshold requirement that Y's interest must itself suffice, other things equal, *to justify* X's duty may be regarded as formidable enough to set a suitable limit on the number holding a claim-right correlative to X's duty to φ. Is your nephew's or niece's interest in the £100, for example, itself sufficient to ground a duty on your part, other things equal, to pay your sister? Probably not'. Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 OJLS 257, 265. Not only does this beg the question, but it cannot be squared with with Raz's view that officials can: make mistakes when weighing those interests; disagree about the weight of those interests; be disingenuous about the importance of those interests; etc.

deliver the flowers. They have a real right even if they lack the power to enforce it.[28]

According to Wenar's Kind-Desire account, in legal systems that have inherited the Roman concept of *jus tertii*, third parties have rights simply because the law holds that beneficiaries *qua* beneficiaries want such benefits. The legal system itself determines the 'desires' inherent in such roles. (It need not be the case that any given person who happens to fulfil that role subjectively desires the contractual benefit).[29]

Both accounts are troubling. Kramer and Wenar are both Legal Positivists. Per Positivist strictures, is it not system contingent whether 3BPs have rights, irrespective of a system's inheritance from older ones? Some legal systems grant certain third party beneficiary rights. Even within that subset of legal systems, though, the law may only recognise rights for certain sorts of 3PBs and not others. Historically, most 3PBs did not have legal rights and they still do not in many systems.[30] There is also no reason why any legal system must either codify or recognise such rights, or be rendered incapable of rescinding them.

So what exactly are these theorists asserting here? How can they claim to have identified, argued, or proved anything about the married couple's (or other 3PBs') legal status or entitlements? Are they (Option 1) providing nothing more than stipulations about where their preferred theories hold rights *ought* to be found? If so, then they must admit that

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28 'The fact that the couple have no power to enforce or waive their claim does not mean that they have no Hohfeldian claim. Indeed, they surely *do* have such a claim, quite as much as the person who ordered the flowers'. Kramer (1998), *supra* note 4 at 67-8. Kramer is responding to a Will Theory argument from Hillel Steiner, *An Essay on Rights* (OUP 1994) at 61-2 ["Steiner (1994)"]. Cf. Matthew Kramer, 'Refining the Interest Theory of Rights' (2010) 55 Am. J. Juris. 31, 32 ["Kramer (2010)"].

29 Wenar (2013), *supra* note 19 at 213.

30 Until a recent change in law in 1999 most 3PBs in England did not have such rights. Contracts (Rights of Third Parties) Act 1999 c 31. Even with the change, many 3PBs still lack rights. Will theorists can say that that subset of 3PBs now have rights *because* the law affords them enforcement powers.

their theories will register many false positives. (Option 2) Alternatively, do their theories merely provide competing *prima facie* bases for identifying rights, ones that must be coupled with other bases in order to confirm or disconfirm the existence of a right? (Option 3) Are they better interpreted as offering normative (i.e., morally or politically evaluative) arguments to the effect that the couple ought to have legal rights? None of those three options seems to fit the bill, because each theory claims to provide *the* fundamental criteria for what counts as 'a right'.[31]

**Option 2: Analytic Theory**

On the second option, a given rights theory is but a *prima* facie basis for identifying rights, one that must be supplemented by a different kind of theory. Kramer seems to suggest something to this effect regarding legal RCTDs.

> On one point, the Interest Theory and Will Theory concur. That is, each theory accepts that the sheer fact that a certain right would tend to benefit *X* is not a sufficient condition for *X*'s holding of that right. Also needed is the existence of some law—a statute, a judicial ruling, a constitutional provision, an administrative regulation, an incorporated moral principle, a contract, or some other authoritative legal norm—that bestows the specified right on *X*.[32]

Being the mere beneficiary of someone else's duty-required action is insufficient to warrant legal right-status because some (authoritative) norm on point is (also) needed to tell us whether the beneficiary has or ought to have a right.

One difficulty, however, is discerning what an authoritative legal norm of that sort

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[31] E.g., 'Role Theory [and Kind-Desire Theory] is an analysis of what rights *are*, not of what rights *there are*. The analysis merely says that if there is a system of norms, and if these norms refer to certain roles, and if one norm relates role-bearers in a particular way, then there is a claim-right within that system of norms. The analysis does not endorse or condemn any system of norms. It does not endorse or condemn any roles or duties within any system of norms. That is to say: given any system of norms with roles, this analysis will show where the rights are. Describe any role-laden practice you like—real or imagined, sacred or wicked—and this analysis will find the claim-rights within it'. Wenar (2013), *supra* note 19 at 210.

[32] Kramer (2010), *supra* note 28 at 33. Cf. Kramer (1998), *supra* note 4 at 67.

entails: does it grant a right exclusively to party *A,* or also to parties *C*, *D*, etc.? There are of course legal rules, principles, etc., about contracts. The question is how to determine whether they provide (at least certain sorts of) 3PBs, if not also *fourth* party beneficiaries, with rights. This reflects part of the reason why theorists aim to provide criteria for 'a right' in the first place. It seems to be a *theory's* job to tell us whether an authoritative legal norm entitles a given 3PB to a right, i.e., whether 'a right' is a feature of such legal rules or not. A rights theory is therefore seemingly required to interpret the authoritative legal norm (or set of norms).

So here is the problem. On the one hand, simply identifying something as an authoritative legal norm cannot tell us whether party *C* counts as a right-holder or not – even though it seems, at least in part, to be a rights theory's job to determine what qualifies as 'a right'. On the other hand, such a theory alone cannot tell us whether *C*, *D*, *E*, *F,* etc., are or are not *legal* right-holders, because some additional basis is needed to interpret or understand the content, contours, and implications of a legal norm. Hence, no rights theory alone suffices to identify the rights of a given domain – or, at least those of legal systems.

Some theorists will be unperturbed by this. For them, the theories merely aim to explain rights' structural and purposive features, not *who* counts as a right-holder in any given domain or system or on what bases. That, they think, is the job for a different kind of theory, or for system-contingent queries. Hence, they could deny that the 3PB argument poses a real problem for the Interest Theory. That parties *C*, *D*, *E*, *F*, and everyone else may have rights based on a contract between *A* and *B* is also of no great concern, since it is conceivable that a legal system could afford everyone (or at least some larger set, including fourth party beneficiaries) such rights. Different systems will have different rules for

determining which parties bears rights and on what bases, i.e., which interests warrant rights protection.

Despite his earlier remarks about the married couple's Hohfeldian claim to flowers, this the last paragraph seems to reflect Kramer's actual view.

> [T]he Interest Theory (the Interest Theory expounded here, at any rate) is not a political theory; like Hohfeld's analytical jurisprudence, it does *not* attempt to prescribe the **appropriate** distribution of entitlements. Questions concerning who **should** hold which entitlements are questions not for analytical jurisprudence but for political philosophy and for ordinary political discourse. When the Interest Theory contends that rights are modes of protection for interests that are treated as worthy of such protection, it is setting forward a general thesis about the general nature or structure of rights. It is not advancing any criterion or set of criteria for what should count as the 'worthiness' of an interest. Instead of flowing from the Interest Theory and instead of serving as essential aspects of it, any criteria for worthiness would supplement it.[33]
>
> Before the Interest Theory can be applied, the class of potential right-holders has to be demarcated; the task of demarcating that class has to be undertaken on the basis of factors outside the Interest Theory itself. Such a task is a **moral** endeavor, albeit at a high level of abstraction.[34]

Claiming that theories need only identify the structure and ultimate purpose of rights, and not who bears rights or where rights obtain, nevertheless seems to be an inadequate escape route. For, again, some debaters believe that their theories *do* perform this identificatory role.[35] (It is also strange to hold that a moral theory about who counts as right-holders is a necessary prerequisite for a Legal Positivist's jurisprudential theory of rights).

**Option 3: Normative Theory**

As the Interest Theory appears to afford rights to *any* interested agents, or at least those who

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[33] Kramer (1998), *supra* note 4 at 79 (bolded emphases added).

[34] Kramer (2010), *supra* note 28 at 35 and n. 7 (bolded emphasis added).

[35] E.g., Wenar (2013), *supra* note 19.

would 'typically' benefit from duties, its proponents feel obligated to provide a delimitation principle or test. Jeremy Bentham and Matthew Kramer have made valiant efforts to provide one. Let us address Kramer's most recent version, the Minimum Sufficiency Test. Again, Kramer states that it forms part of a normative theory, one that must be established before the Interest Theory can be applied.[36] The test is as follows:

> [I]n order to determine whether someone holds a legal right under a contract or under any other legal norm, we need to ask what facts are ***minimally sufficient*** to constitute a **breach** of the contract or norm. If and only if at least one minimally sufficient set of facts includes the undergoing of a detriment by some person *Q* at the hands of some other person *R* who bears a duty under the contract or norm, *Q* holds a right—correlative to that duty—under the contract or norm. (The phrase "undergoing of a detriment" should really be [read as] "undergoing of some development that is typically detrimental for a human being.")… A set of facts is minimally sufficient to constitute a violation of a legal mandate if and only if (1) the set is sufficient to constitute such a violation, and (2) every element of the set is necessary for the set's sufficiency. In other words, a minimally sufficient set contains no redundant elements.[37]

Kramer's new example, which differs in structure from the 3BP one about the married couple above, is that an employer has a contractual obligation to pay his employee named Doris. Doris usually uses part of her salary to buy groceries at the local supermarket. If the employer fails to pay Doris, does the supermarket owner, who relies in part upon Doris' patronage to make a living, have a right that the employer pays Doris? Not according to Kramer's Minimal Sufficiency test. **Fact A** is Doris not being paid. **Fact B** is that the supermarket gets no money in sales from Doris. **AB** is a set of facts. By itself, Fact A suffices to establish a breach. Fact B, by contrast, is relevant if and only if Fact A obtains. Hence, B is rendered redundant. This in turn disqualifies the set AB. Fact A alone suffices to make a complete, non-redundant set. Since the facts that would underpin any additional right

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[36] See Kramer (2010) *supra* note 28, but at footnote 34 and the accompanying text.

[37] *Id*. at 36-7 (bolded emphases added and with Kramer's footnote 9 embedded into the text in brackets).

are rendered redundant by Fact A's 'self-sufficiency', the supermarket owner is excluded from having a right.

Once again, Kramer notes that this delimiting test is a function of normative theory. It is not necessarily an explicit norm of a given legal system or set of them. So why give it any credence – especially if the concern here is with *legal* rights? It is odd that a moral (or at least normative) test must be applied before a purportedly 'jurisprudential' theory of rights can be established, and it is unclear how this can be squared with Kramer's positivist commitments. If it is a *sine qua non* normative precursor for an analytic rights theory, should the meta-theoretical desideratum not be that it accurately identifies which parties in (certain? all?) legal systems actually have rights and which do not? If so, then the main reason to adopt or endorse the test is its identificatory power. If not, it is unclear why analytic theorists would adopt it.

Leaving aside the very conceivability of a legal system potentially affording supermarket owners such rights (rendering the test under-inclusive), Kramer's test disappoints for at least two other reasons. First, while it might work when there are two or more relevant actions, the test fails to delimit in one-relevant-action scenarios. The last example concerns a salary payment and a shopping transaction. However, the minimum sufficiency test fails to delimit the set of rights when there is only one relevant action, e.g., where *A* pays *B* to fix *C*'s roof. Do *B* and *C* both have rights because the roof was not fixed? Once again, the answer is actually system contingent. Do neighbours *D* and *E* have rights because the roof was not fixed? The new test cannot exclude their having them, even though it should be able to do so.

**§ IV.3 Identity Issues: Part II**

**Flaw #3**: Kramer's test also fails to meet Rudolph von Jhering's challenge. The nineteenth century scholar (and Interest Theorist) was not insensitive to the issues of theoretical identificatory power, the potential for false positives, and determining what counts as 'a right'. von Jhering presents the following case. A domestic manufacturer, through political or financial pressure, or corruption, gains the government's favour. He convinces it to pass a law imposing tariffs on certain foreign goods that compete with his own. The domestic manufacturer has an interest in the new law being enforced (indeed, it was grounded in his interests), which also directly benefits him – and intentionally so, in a sense. Does he therefore have a right under that law? Is it a right correlative to other parties' duties to pay the tariff?[38]

The test seems incapable of avoiding the attribution of 'a right' to the domestic manufacturer. If a given party breaches the duty to pay the tariff – the minimal set of facts – that seems sufficient to entail that both the domestic manufacturer and the government have RCTDs. Now, someone might bite the bullet and say that the domestic manufacturer indeed has a legal right. (As the Minimum Sufficiency test is deemed to be a matter of 'normative' theory, though, it would be odd, but not impossible, for Kramer to agree).

Furthermore, what counts as a 'breach' for the test's purposes? Is that not *system* contingent as well, or at least dependent upon some other kind of legal theory, e.g., the Sources Thesis?[39] This exposes another problem: the tool for assessing the Minimum

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[38] Rudolph von Jhering, III *Der Geist des Romischen Rechts auf den verschidenn Stufen seiner Entwicklung* at 351-3 (1924 edn), *cited in* Hart (1982), *supra* note 5 at 180.

[39] The Legal Positivists' Sources Thesis is that the law determinable simply by looking at its social sources, without needing to assess its merits. See, e.g., Raz (2009), *supra* note 21 at 47-8; John Gardner, 'Legal Positivism: 5 ½ myths', in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012).

Sufficiency Test's identificatory power is itself reliant upon that which is supposed to help us determine what counts as 'a right' in the first place. What, moreover, does it identify? Does the supermarket owner have a RCTD under Kramer's test, just not a *legal* one, or does he lack any sort of right? (We will return to this issue in § V.3).

One might take Joseph Raz's Interest Theory as being capable of providing a different kind of delimitation test: that right holding is restricted to individual beings of ultimate value, and values of certain importance (even if others' interests are used to buttress the individual being's interests in order to ground its rights).[40] However, a legal system's ability to generate both 'mistakes' and 'trivial' rights shows that the idea of 'ultimate value' works, at best, only as an ideal – one that might greatly restrict rights to a small set of concerns, and, again, is not really integral to Raz's theory after all. His Interest Theory therefore equally fails to answer von Jhering's challenge.[41] (von Jhering's own attempted solution will be addressed in § V.4).

## § V. Shared Problems

### § V.1 Will & Interest Protection and Vindication

This section commences criticism of both theories, with a particular focus on their criteria. For one thing, both theories provide woefully under-inclusive options accounts of how rights

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[40] Raz (1986), *supra* note 22 at 247-8. His Interest Theory criteria of 'a right' is partly covered by his analytic definition of it:

> *Definition*: '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.
> *Capacity for possessing rights*: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation).

*Id*. at 166.

[41] Chapter 4 argued that delineating the theories of rights debate in terms of who counts as a right-holder is erroneous. So why are the second and third arguments against the Interest Theory relevant here? That delineation was deemed to inessential to understanding the crux of the *debate* because it is sufficient but unnecessary that the Interest and Will Theories actually *dispute* the issue; even so, the theories do entail answers to it.

can advance, protect, etc., their holders' wills or interests. While in the last couple of decades a handful of scholars have presented more expansive versions of both theories, accounting for more kinds of rights than just RCTDs,[42] their understandings of the Will Theory remain enforcement-centric. In turn, the Interest Theory cannot adequately appreciate that liberty-rights and power-rights can advance or protect their holders' interests.

To appreciate this, it is first important to recognise that the concept of 'rights exercise' is not restricted to, or reducible to, the concept of 'rights enforcement'. The Will Theory's delimitation of will vindication to enforcement mechanisms – means by which someone in a (potential) conflict might try to remedy or vindicate a right – is myopic. In identifying rights *exercisability* with rights *enforcement*, Hillel Steiner's view is representative. He states:

> There are at least six features that have been attributed to rights or presupposed about them in virtually all legal and moral discussions of rights… 5. Rights are exercisable. 6. This exercisability *consists in* the capacity to control [ligation-bearers'] encumbrances by either extinguishing them or enforcing them.[43]

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[42] Here are some examples. At least in 1994 Hillel Steiner considered rights to be Hohfeldian claims *or* immunities protected by enforcement and waiver powers. He may have modified his view since then, though, by restricting it to claims. (See Kramer & Steiner (2007), *supra* note 20 at 295). George Rainbolt suggests a 'Justified [Normative] Constraint theory, which considers rights to be claims, immunities, and complexes. To count as 'a right', though, a complex must contain either a claim or immunity (or both). However, singular powers or liberties do not count as 'rights' on their own. Rowan Cruft and Leif Wenar suggest the possibility of more expansive Interest and Will Theories in addition to other theories that no one actually endorses (i.e., Normative-Constraint-Sans-Justification and 'Any Incident' Theories). Cruft's more expansive version of the Will Theory and Wenar's 2013 Kind-Desire theory can treat Hohfeldian incidents other than claims as 'rights', but both Cruft and Wenar maintain that, under either, every kind of right must be accompanied by enforcement powers. Wenar also explicitly rejects the idea that any Hohfeldian incident counts as a right, which a hypothetical 'Any Incident' Theory would hold. Cruft's Interest-Theory-With-Exceptions, however, can cover instances of all four basic Hohfeldian kinds of rights. Hence, only his version of the Interest Theory could cover the idea of rights exercise beyond rights enforcement. (Strangely, his version also includes a claim for recompense upon violation in some form or other). Nevertheless, Cruft's theory suffers from other difficulties, which are discussed in Chapter 4. Wenar correctly insists that such powers need not be held by the right-holder personally. *Id*. Still, he leaves it unclear whether the claim + powers form a complex with its various components held by different agents. See Steiner, (1994), *supra* note 28 at 61; Kramer & Steiner (2007), *supra* note 20 at 295-9. Rainbolt, *supra* note 2 at xi-xii, 30-9; Rowan Cruft, 'Rights: Beyond Interest and Will Theory' (2004) 23 Law and Philosophy 347, 367-8, 381, 388; Wenar (2005), *supra* note 19 at 233-4, 239, 243-6; Wenar (2013), *supra* note 19 at 226.

[43] Hillel Steiner, 'Moral Rights', in David Copp (ed) *The Oxford Handbook of Ethical Theory* (OUP

What warrant is there for this limited focus and identification of exercise with enforcement? Delimiting the Will Theory's scope to enforcement issues has heretofore gone without justification, and is, I submit, unjustifiable. Even versions of the theory with specified domain (e.g., law-only) or kind-of-right (e.g., Hohfeldian claim-only) delimitations could not adequately determine a right's ultimate purpose with such a narrow focus on enforcement.[44]

Further, the use of enforcement and waiver powers does not exhaust the ways by which rights can be exercised or enforced. So even if a theory holds that all rights were accompanied by such powers it would be no answer to the question of whether rights protect interests or the will. It would be terribly under-inclusive because there are many more ways to make normative (e.g., legal) choices or defences of the will, or to protect interests, than simply using enforcement powers. Why consider *only* those means? Why, for example, are the powers used to create, modify, and terminate rights (e.g., for the buying and selling of property, or of entering and terminating contracts) less essential to the concept of 'a right' than those concerning its enforcement? The Will Theory lacks an adequate explanation of will vindication in order to justify limiting its concern to rights enforcement, rather than rights exercise more generally. (Even Wellman's 'Dominion' version cannot really justify delimiting 'vindication' to status recognition in hypothetical *disputes* between parties, let alone the use enforcement and waiver powers).

Interest Theorists may complain that the debate's enforcement-centricity is not their fault. They are just responding to Will Theorists, whose propositions about the relationship between rights and enforcement mechanisms shaped the debate. In response, some Interest

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2006) at 461 (emphasis added). Cf. Steiner (1994), *supra* note 28 at 56-7.

[44] This perhaps does not count as criticism of such versions' criteria, though. For their criteria could be justified as indispensable for determining what counts as a right without additionally claiming to be able to identify or explain *all* of a right's given features or capacities.

Theorists (e.g., Joseph Raz and Matthew Kramer) present Monistic accounts of rights that equally helped cabin both the debate and potential explanations of the relationship between rights and interests, e.g., by excluding liberties and powers from counting as types of rights, and thus appreciating how they can advance, protect, etc., their holders' interests.[45]

**§ V.2 Not All Rights Protect or Justify**

Part of a theory's criteria is the idea that all rights do something for their holders. The theories specify different ways for rights accomplish these tasks, i.e., connect with interests or the will. George Rainbolt suggests there are, or could be, *protection* and *justification* versions of each theory. Rights either *protect* something (the holder's interests or will), or *justify* the imposition of other normative positions on other parties (and also perhaps on the right-holder).[46] For the theories, these standardly include affixing correlative duties on other parties (both Interest and Will Theorists) and powers on someone by which to enforce those duties (Will Theories only).

Rainbolt is on to something, but his Protection-Justification distinction is not exhaustive. Theorists also sometimes say that rights 'promote', 'effectuate', or 'vindicate' interests or the will, considerations that are not reducible to protection or justification analyses. They are also often inconsistent in their own word choices vis-à-vis 'protection', 'justification', 'effectuation', etc. within a given work – probably because they are not fully cognizant of the issue's significance.

Continuing with criticisms of the theories' criteria for what count as rights, then, not all rights protect or justify anything, and, again, not all kinds of rights include (or are associated with) duties or powers. Let us take what most ordinary people and lawyers would

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45 See Chapter 2 § III against Monistic modelling.

46 Rainbolt, *supra* note 2 at 86-7.

consider two obvious examples of legal rights: the right to solicit someone to enter a contract and the right-of-way at a four-way traffic intersection. Both rights seem to be complexes, i.e., they are composed of liberties, powers, etc. Both also seem to operate outside the parameters of *any* version of either the Interest or Will Theory.

Take the right to solicit someone to enter a contract. (For brevity's sake, it will be referred to as the 'right to solicit', as the more general 'right to contract' involves additional features). The right to solicit does not 'protect' its holder either by imposing, or via, correlative duties, liabilities, Hohfeldian 'no-rights', or other ligations on other parties. *A*'s right to send *B* an unsolicited email to buy some good does not 'protect' *A*.

If *A* has a right to send *B* such a message it is not simply because *B* owes a duty to forbear from interfering with the solicitation. Nor does *B* necessarily owe a different duty, e.g., to refrain from deleting it, to read it and consider it thoughtfully, etc. *B* may be free to ignore or reject the solicitation outright. Nor can *B* claim that *A* has a duty to forbear from soliciting if *A* is indeed acting within his rights. If *B* had had a right against being solicited in this fashion, which was then qualified or nullified by *A*'s right, then perhaps one could say that *A*'s right did protect him to some extent. Typically, though, this is not the case: *B*'s own position is simply the absence of a right against being solicited.

What about *C*'s duty not to interfere with *A*'s solicitation of *B*? Does that not protect the right to solicit? Both the duty and the correlative right would have to be specified in order to know either way. Particularly, does *C's* non-interference duty vis-à-vis *A* correlate with a right in *A* that forms part of *A*'s 'right to solicit' *B* to enter a contract? Might it instead form part of one of *A*'s other rights? The *A-C* legal relationship seems to be a case of a 'perimeter of protection', whereby a duty *indirectly* protects a distinct liberty; that duty of

non-interference, however, need not have been constructed in order to protect the 'right to solicit' per se. (See Chapter 7 § III for a fuller explanation of 'Perimeters of Protection').

Imagine, for example, a peanut salesman soliciting people on the street by yelling "peanuts!". Being disturbed by the noise, another person on the street turns the volume up on his or her personal music device, thereby drowning out the peanut salesman's chants. This interference with the peanut seller's efforts to solicit are not an infringement of the latter's rights, i.e., not a breach of a duty of non-interference. Now, imagine instead that the second party assaults the peanut salesman to stop his repeated chanting of "peanuts". This is a violation of a duty, but simply one against committing assault. It may *indirectly* protect the right to solicit, but the duty is neither designed for that purpose nor the right's correlative.

Nor is *A* protected by *B*'s susceptibility to a change in legal status from unrelated party to 'contractual offeree'. By sending the solicitation, *A* changes *B*'s legal situation to one whereby (in accepted the offer) *B* can create legally binding rights and duties for both parties. That Hohfeldian liability could be said to *facilitate* the right to solicit (and the more general right to contract), but it does not 'protect' it any meaningful sense.

Does the right to solicit protect the offeror's interests or will in some more general sense? Consider a more expansive version of the Will Theory, one concerned with kinds of rights other than RCTDs (e.g., Hohfeldian powers, liberties, and/or immunities). The right to solicit effectuates the offeror's will to enter into contractual relations. *A* can send an email to *B* or decide not to. It is hard to see how that entitlement to choose *protects A*'s will, though.

In their efforts to 'defend' Hohfeld, American Legal Realists argued that the juridical significance of liberties can be established by showing that, if *B* sues *A* on the mistaken belief that *A* owed *B* a duty, the liberty serves as the basis for determining *A*'s non-

culpability.[47] *That* liberty may be said to constitute a form of protection, serving as the grounds for its holder's non-liability. By exculpating the liberty-holder from legal liability, the background conditions for being free to create contractual relations are secured.

This may be so, but the Will Theory is concerned with the ability to vindicate the will directly – through enforcement and waiver powers in standard versions, or through other forms of rights enforcement even in more expansive ones – rather than securing the background conditions for such possibilities. The right to solicit for contracts seems to structure, facilitate, and/or promote the ability to choose, rather than protect it.

What about for the Interest Theory? Might an Interest Theorist not say that the liberty in question protects its holder's ability to make contracts, free from legal liability? The normative position in question *is* the ability to/the absence of a duty not to make contract offers; there is no entitlement to do so independently of it, which the liberty then 'secures'. It could be said that the liberty serves multiple roles, e.g., both to facilitate making contract offers and as the grounds for exculpation in legal proceedings. However, is one notion not conceptually prior to the other, or is it impossible to understand that liberty save equally in terms of its exculpatory potential?

What about the justification alternative? Does *A*'s right to solicit justify the existence of other parties' legal positions? Raz holds that all rights correlate with duties.[48] However, his account could be expanded to include the right to solicit, which seems to concern liberties and powers. Raz's account also promotes the idea of the justificational priority of rights to

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47 See, e.g., George Goble, 'Affirmative and Negative Legal Relations' (1921) 4 Illinois L. Q. 94, 104-5; Max Radin, 'A Restatement of Hohfeld' (1938) 51 Harvard L. Rev. 1141, 1151. It may also be a ground for *B* to be rendered liable to cover *A*'s costs.

48 See Raz (1986), supra note 22 at 167-8 and n 1; Raz (1994) *supra* note 17 at 275.

ligations: e.g., my right is *the reason for* your duty.

Here, however, my right to solicit people does not necessarily serve as the reason for your Hohfeldian liability (or some comparable legal conception of being susceptible to another party's changing your legal position). My right to solicit is not the reason why you have no right against my making solicitations (within certain legal bounds), or why you are susceptible to being made into an offeree. Rather, we must start with the fact that many societies want people to enter into legally acceptable contracts – or, perhaps in some systems only the legal officials desire that of people under their jurisdiction.[49] We want people to be able to solicit each other for certain purposes. But then *that* interest justifies imposing the liberty, power, liability, Hohfeldian 'no-right', and any other relevant legal positions on all the relevant parties *concurrently*. Those interests justify both the rights and the correlative ligations concomitantly.

A second example of a right that does not protect or justify is a vehicle's right-of-way at a traffic intersection. When two roads intersect there are four ways by which a vehicle might approach the intersection. In most technologically and legally developed countries, such intersections are governed by streetlights or stop signs. Consider the latter case. The general rule at this type of intersection is that, if multiple vehicles are approaching the intersection, the one that arrives first has the right-of-way. This means that other vehicles must let the first traverse the intersection before they themselves start to do so in some legally governed sequence. There is also another common rule that, if two cars arrive at this

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[49] Raz suggests that certain individual interests are insufficient to ground a right. Theirs must be buttressed by those of others', or the whole community's, in order for such persons to have rights. One example is that of a journalist's interest in protecting her sources (here, it is the community's interest in news reporting that adds the additional weight requisite for *the journalist* to have a right to keep her sources secret. A second example is that of parent's right to child support. It is the child's interest that provides a lot of the weight for warranting the *parent* having a right to child support. See Raz (1986), *supra* note 22 at 247-9; Raz (1994), *supra* note 17 at 49-51. Raz's buttressing approach has been deemed fatal to his theory. See Sreenivasan, *supra* note 27 at 265-7; Wenar (2008), *supra* note 26 at 255.

sort of intersection at the same time, the one that arrives to the right of the other has the right of way. Let us concern ourselves with this latter, more specific right-of-way.

It is hard to see how such a right protects either the right-holder's interest or will. The driver's right is neither based on his or her personal interests, nor merely buttressed by the community's interests at large. The right and duty are temporally and justificatorily equal: one position does not ground the other. The driver's right is not the reason for the creation or existence of other driver's duty to wait. Drivers do not even have personal interests in having such a right; while they may prefer being able to go first in order to expedite their own journey, their arrival at the intersection from the right (direction) relative to another driver is a mere coincidence. (Nor is it a role-based or kind-based right: what is the role of the 'accidentally-arriving-first-at-an-intersection-vehicle-driver'?) Now, the driver may be able to waive the right by allowing another vehicle to go first. But this is just another example by which it is odd and mistaken to consider waiver as a form of 'protecting' (rather than, say, 'controlling') the right.

**§ V.3 Are The Theories Superfluous?**

A few of the previous arguments have already hinted at reasons for thinking that the theories are not actually necessary for understanding what rights are, for identifying instances in data sets, or for modelling rights. For one thing, there are both *Hohfeldian* Interest and Will Theorists. They agree that Hohfeld's *schema of jural relations* identifies what lawyers, judges, and ordinary people *call* 'rights' – even though they think their criteria are indispensible for determining which types and tokens of the schema (e.g., which instances of Hohfeldian claims) 'really' count as such.

One is of course free to think that Hohfeld's schema is wholly or partially unsound. What nevertheless matters here is this: how is it that Hohfeld constructed something that many of these theorists *themselves believe* to essentially be correct *without* relying upon their 'theoretical' criteria? Is it a mere coincidence that he was able to construct the schema without their criteria? Did he stumble upon the appropriate concepts? No. All he needed to do was look at legal and ordinary linguistic practices and make practical judgements about what they were and how they related to one another (if at all). This suggests that there are non-arbitrary alternatives to these sorts of 'theories' for the purpose of understanding rights

Second, and as seen above, *Legal Positivist* Interest and Will Theorists may have difficulty showing why their theories are not rendered redundant by their Sources Thesis. I am neither defending nor critiquing that thesis here. Instead, for Positivist rights theorists, such as HLA Hart, Raz, Wenar, and Kramer, and others, it seems both problematic and unnecessary for *them* to claim to additionally require the Interest or Will Theory in order to identify rights in a legal system.[50] For Interest Theorists particularly, claims to be able delimit the relevant interests in terms of those concerning well-being, those advancing certain functions, or in terms of vicarious or altruistic ones, all seem to be voided by their Positivism. Against the charge of superfluity, it would not suffice to say that these rights

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[50] It is also problematic for those like Kramer who think that the Interest-Will Theories debate is (in part) framed in terms of the following issue: unto who are directed duties directed? (Kramer calls this 'the heart of' the debate. See Kramer & Steiner (2007), *supra* note 20 at 298). The Interest Theory's answer is to the parties (that represent a class of persons that typically are) intended to benefit from those duties. How do we determine whether the party was intended to benefit or not, though? Whose intentions matter?

Some theorists might deny that presenting criteria of what rights are entails that they can be employed to determine where rights are. However, it seems difficult to separate the ability to identify the structure of 'a right' from the ability to identify instances of that structure in a given normative domain and thus from identifying particular right-holders – even in legal systems, which (according to Legal Positivists, at any rate) require certain validity conditions, e.g., its recognition by certain system officials. See, e.g., Hilary Putnam, 'The Analytic and the Synthetic', in *Mind, Language, and Reality: Philosophical Papers Volume 2* (CUP 1979) at 67 (at least in regards to analytic definitions).

theories supervene upon those other considerations, e.g., to explain in some deeper sense why 'a right' obtains there or not, as, again, they aim to provide *the* fundamental criteria.

Some Will Theorists might claim to be able to bypass the superfluity charge. They might say that once you have identified an enforcement and/or waiver power (a far simpler task), then you have also found 'a right'. In response, it is unclear that we need theories of this sort to be able to identify where enforcement and waiver powers are. It is also unclear, even on the Will Theory, whether all such power holders or wielders *are* actually right-holders. If Will Theorists respond that one need only then take the further step of discerning who the power-holders are acting on behalf of in order to find the relevant right, they need only be reminded that certain powers can be exercised without any cognate RCTDs. For example, spurious lawsuits are filed periodically. The examples of Hohfeld and Legal Positivism are not meant to be exhaustive. They both suggest that there are non-arbitrary alternatives to these sorts of 'theories' for the purposes of constructing a cogent philosophical account of rights.

**§ V.4 Are Rights Unique?**

The theories nevertheless face another difficulty. People tend to think of rights as being distinct, that they differ somehow from rules, standards, tests, and other normative positions like duties and liabilities. It therefore seems incumbent upon rights theorists to either explain this distinctiveness, or to demonstrate why it is a misperception. What do rights do uniquely, if anything, and why? Will Theorists famously charge Interest Theories with rendering the concept of 'a right' superfluous by 'reducing' it to a duty. What they fail to recognise is that both theories are vulnerable to the charge of 'reducing' rights to another concept: a duty, an interest, or a power. The question becomes whether reductionism is actually a problem.

## ***Rights as Duties***

### Kelsen's Argument

The Will Theory's charge reflects a family of related arguments. von Jhering's domestic manufacturer case, outlined above, presents the challenge of being able to distinguish instances of RCTDs from those where parties intentionally benefit from someone else's duty but without possessing correlative RCTDs. The case *also* reflects von Jhering's worry about treating 'a right' as nothing more than a passive entitlement to another's duty.[51] He explains instances where a party benefits from someone else's legal duty without having a correlative right as being the mere 'reflex operation' (*reflexwirkung*) of that duty.[52]

Hans Kelsen adopts this notion, or a variant of it, in order to argue that legal rights are not merely the reflex operation of duties.[53] One person's duty provides other parties with 'reflex-rights', normative states of protection. Reflex-rights, though, are nothing more than those duties; to treat them as being distinct normative positions would be to err by double-

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51 Hart (1982), *supra* note 5 at 180-1; Stepanians, *supra* note 15 at 11, 59-62. Note that this is a distinct issue, as the domestic manufacture case seems to point to the lack of a legal entitlement altogether.

52 von Jhering, *supra* note 38.

53 Hans Kelsen, *Hauptproblem der Menschenrechte: Hobbes – Locke – Kant* (1911) *cited in* Stepanians, *supra* note 15 at 11, 59-71; Hans Kelsen *Pure Theory of Law* (2nd edn, Max Knight Tr., University of California Press 1967) at 125-30, 132-6 ["Kelsen (1967)"]. Stepanians argues that Kelsen misconstrues von Jhering's concept of *reflexwirkung*. von Jhering intends for it to apply in cases where there are *unintentional* effects on third parties 'beyond [the duty's] proper sphere of effects as posited by the law or by the intention of the agent or the right-holder'. (Rudolph von Jhering, 'Die Reflexwirkungen oder die Rückwirkung rechtlicher Thatsachen auf dritte Personen', in 10 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 245, 248 (Mauke's Verlag 1871) *translated by* Stepanians, *supra* note 15 at 60 n 19). Kelsen is said to have modified the concept to concern a duty's 'intended' effects.

Whether or not he has correctly interpreted von Jhering, Stepanians' Intentional vs. Unintentional normative effects distinction cannot explain the difference between von Jhering and Kelsen here. For to say that the government did not intend to create a right for von Jhering's manufacturer does not resolve whether it nevertheless did so. Why should rights obtain only where the lawmaker *intended* rights to be created? What if judges later hold that the law in question generated such rights anyway? Stepanians' answer depends too much on a particular theory of law, one that he fails to present at any rate. The Intentional-Unintentional effects on third parties distinction fails, moreover, because the government *does* intend for the duties to benefit the domestic manufacturer. This is why von Jhering's theory fails to answer his own (manufacturer) challenge.

counting the legally relevant facts.[54] Real rights instead a complex composed of a 'reflex-right' plus enforcement powers.[55]

**Hart's Version**

Clearly influenced by von Jhering and Kelsen on this matter, HLA Hart presents his own version of the Redundancy Argument.

> The principal advocates of benefit or 'interest' theories of rights correlative to obligations have shown themselves sensitive to the criticism that, if to say that an individual has such a right means no more than that he is the intended beneficiary of a duty, then 'a right' in this sense may be an unnecessary, and perhaps confusing, term in the description in the law; since all that can be said in a terminology of such rights can be and indeed is best said in the indispensible terminology of duty. So the benefit theory appears to make nothing more of rights than an alternative formulation of duties: yet nothing seems to be gained in significance or clarity by translating [statements of duties into statements of rights].[56]

Hart's argument requires unpacking. First, Stepanians is partially correct to identify it as a semantic version of Kelsen's.[57] It concerns apt terminology, the translation of statements, and word meaning. To have such a right, on the Interest Theory view, means no more than being an intended beneficiary of a duty. The argument moves from the idea of *X*'s meaning *Y* to the ideas that:

> (I) All that can be said in a terminology of *X* (1) can be, and (2) is best, said in terms of a terminology of *Y*;
> (II) That this renders *X* to be nothing more than alternative formulation of *Y*; and
> (III) There is no gain in (1) significance or (2) clarity by translating *Y* into *X*.

While Hart states that he has the Interest Theory in mind here, these matters equally affect certain rights models too, ones to which Interest and Will Theories may both

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54 Kelsen (1967), *supra* note 53 at 127.

55 *Id.* at 134-6.

56 Hart (1982), *supra* note 5 at 181-2.

57 Stepanians, *supra* note 15 at 12, 71-4.

subscribe, such as Hohfeld's schema. Certain views of rights correlativity treat RCTDs as passive positions, i.e., mere markers of entitlement for their holders to receive the benefits provided by another party's duty. For Hart, though, this robs 'a right' of a distinct meaning because it allows us to translate all propositions about rights into propositions about duties. If that is correct, then the matters at hand might indeed be better understood in terms of propositions about duties. This renders rights reducible to, or replaceable with, duties. In turn, this deprives us of a distinct *conceptual* resource, one that is constitutive of our moral, social, and legal practices. Actually, Hart claims that such views of rights suffer two vices: (1) it makes the language of 'rights' unnecessary for being redundant and (2) it can cause confusion too.[58]

**Extending the Argument**

We can extend the Redundancy Argument(s) to apply to conceivably more expansive versions of Interest Theories, ones that treat liberties, powers, and other normative positions as 'rights'. If rights are indeed unique, Interest Theories cannot account for this because other kinds of legal rules effectuate, protect, facilitate, etc., interests too: e.g., those resolving coordination problems; those generating absolute duties (duties which are not directed towards anyone particularly); etc.

### ***Rights as Interests***

Some Interest Theorists might deny that rights have a unique job to do despite bearing an ultimate purpose. Joseph Raz probably holds this view. He takes the Redundancy Argument to be a genuine problem.[59] By ascribing to rights a justificational role vis-à-vis other

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[58] Hart (1982), *supra* note 5 at 181-2. I believe Hart's rejection of a certain interpretation of right-duty correlativity motivated him to present his own non-Hohfeldian model in *Essays on Bentham*.

[59] Raz (1994), *supra* note 17 at 269.

normative positions (again, rights are not merely the correlatives of duties, but also the basis for some of them), his account seems to do a better job than most Interest Theories in trying to overcome it.

Following Joel Feinberg and H.J. McCloskey, Raz believes that rights are sufficient (i.e., non-exclusive) *grounds* for duties.[60] Rights are 'intermediate conclusions' between certain sorts of interests and duties.[61] He therefore treats rights as being logically dependent upon the idea of duties; being a reason for imposing a duty, the concept of a right is *logically* posterior to the concept of a duty. Still, in being able to ground duties, rights are *justificationally* prior to them – even if both positions are created at the same time (existentially correlative).[62] Hence, Raz accepts the idea of correlativity as being a relationship between two (or more, *pace* Hohfeld) distinct normative positions. Although they primarily serve as the non-exclusive grounds for duties, rights can also be protected by other positions (liberties, powers, etc.).[63]

Margaret Holmgren nevertheless demonstrates why rights are not actually justificationally prior to duties in Raz's account.[64] On his analysis, for a candidate interest to be deemed sufficiently weighty to warrant generating a right, potential duty-bearers must also be determinable in the first step of the deliberative process.[65] As such, his theory is

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60 H.J. McCloskey, 'Rights' (1965) 15 The Philosophical Q. 115, 116, 121; Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) at 148-9. Cf. Stephen Hudson & Douglas Husak, 'Legal Rights: How Useful Is Hohfeldian Analysis?' (1980) 37 Philosophical Studies 45; Raz (1986), *supra* note 22 at 170, 181, 183-4, 16, 188, 192-3, 202, 210.

61 Raz (1986), *supra* note 22 at 181.

62 *Id.* at 170-1. See Chapter 2's Appendix 1 for the concept of existential correlativity.

63 *Id*. at 167-8.

64 Margaret Holmgren, 'Raz on Rights' (1985) 94 Mind 591.

65 Raz posits a two-stage analysis. Stage I: Determine whether certain interests ground a right. *But* a duty

really about the justificational priority of *interests* to both rights and duties. Thus, Raz does not overcome the Redundancy Argument after all: my strong interest (perhaps buttressed by others' interests) is a reason both for me to have a right *and* for you to have a correlative duty.[66]

So what is the difference between a right and an interest? What distinct work does the concept of 'a right' do in Raz's account? He says we start with the original interest, which then generates a right – a distinct interest – that in turn justifies imposing a duty on someone.[67] One can therefore charge his Interest Theory with reducing rights to interests. While Raz claims that rights are something more than the predicate interests (they are additional, independent *reasons*),[68] he fails to demonstrate a real difference in kind. Does his account seemingly construe rights as weighty interests? Perhaps. Might it involve morally or politically significant interests? Sometimes. Interests that are also reasons? Sure. But interests all the same. Explaining rights wholly in terms of certain sorts of interest makes the

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analysis figures in here too, in determining whether there *could even be* someone on whom a duty might be imposed. Without that possibility, no right can obtain. In other words, if there cannot even be a *potential* duty-bearer, then there cannot be a right either. Stage 2: Analyse whether the right grounds duties. When assessing whether an interest grounds a right, examine both the interests of the potential right-holder (and perhaps other parties), and those of potential duty-bearers to see if the would-be holder's concerns *outweigh* the potential burden that would be imposed on others. See Raz (1994), *supra* note 17 at 35; Raz (1986), *supra* note 22 at 169.

[66] MacCormick agrees that Redundancy Argument is a problem for Interest Theories that utilise existential correlativity. He tries to overcome it by holding that rights are logically and sometimes *temporally* prior to duties, thereby rejecting both the Symmetry View of correlativity *and* the necessity of existential correlativity (discussed in Chapter 2's Appendix 1). For him, rights ground duties and can obtain without any correlatives. One of his examples is a Scottish intestate statute affirming a child's right to inherit under it. But the child has the right even without a correlative duty-bearer to give the child what is owed; for there is no such duty-bearer until an executor is appointed. MacCormick (1977), *supra* note 6 at 200-1.

His effort to present a case of a RCTD-holder without a correlative duty-bearer has nonetheless been found wanting. Matthew Kramer successfully demonstrates that the intestate statute case includes RCTDs after all. Kramer (1998), *supra* note 4 at 27-9. I in turn think MacCormick's case fails to show the absence of existential correlativity because the child's right is an immunity from being divested of the status of 'heir', which other parties are disabled from doing.

[67] Roscoe Pound holds this to be a virtue of von Jhering's account, which distinguishes the original interest from the separate, legally delimited one that the law protects. Pound (1959), *supra* note 15 at 62, 67.

[68] Raz (1994), *supra* note 17 at 46.

latter an inadequate *explansans*: it misses the fact that rights might be *entitlements* or, at least, *normative positions*, and not simply the *grounds* for other normative positions like duties, liberties, powers, etc.

Markus Stepanians, an Interest Theorist, offers the most thoughtful responses to the Redundancy Argument(s). First, he tries to show that Kelsen's version is fallacious. Kelsen, he thinks, wrongly moves from the idea that a reflex-right is a state of protection provided by a duty to the idea that the reflex-right simply *is* that duty. Yet this is to conclude that the cause is the effect. It also leads to the absurdity that, 'husband' and 'wife' being correlative terms, being a wife is being a husband and vice versa.[69]

One problem with Stepanians' argument is that it already presumes a particular conception of correlativity, despite his being aware that there are different ones.[70] It is thus open for someone to simply deny that the aptness of the right:duty::husband:wife analogy, for it could be said that the latter relationship simply involves a different sense of correlativity than the one that is most appropriate for right-duty.

Second, Stepanians converts the duty/reflex-right relationship into a causal one, i.e., wherein the duty creates a state of protection for another party. This may work for von Jhering's concept, but not Kelsen's. For the latter, the duty simply is the protection: a normative requirement to (refrain from) undertaking action φ *is* the protection for another party. Indeed, for the Interest Theory, the paradigmatic mode of protection for right-holders is the existence or imposition of a correlative duty on another party. The protection is not some intended or unintended by-product, but the very duty itself, i.e., the normative

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69 Stepanians, *supra* note 15 at 64, 68-9.

70 *Id.* at 11.

restriction on the duty-bearer's deliberative processes, compelling the person to fulfil his or her requirement to act or forbear from acting. Thus, if Kelsen's argument is fallacious, it is not because of an invalid inference from a normative state of protection produced by a duty to the identification of that state with the duty because no such inference is necessary: it is constitutive of the conception.

Stepanians also presents three 'so what' arguments against Hart's Redundancy argument. First, as Hart's is a semantic version it cannot show that the *concept* of a right is redundant even if the *word* 'right' happens to be.[71] Second, Hart cannot show that the *concept* of a right is redundant either. 'For if concept *F* is identical to concept *G*, then neither is redundant since there is only *one* concept to begin with'.[72] Third, Hart's argument can be taken to be a gripe about the substitutability of the *definiendum* (a right) by the *definiens* (a duty). However, Stepanians thinks redundancy is a requirement for proving an analysis to be correct; indeed, this is how *analytic* definitions are supposed to work. If redundancy is objectionable in this context, then it is so for all analytic definitions, including alternative explanations of 'a right' in terms of other notions like 'will' or 'choice'.[73]

While Hart did not think he was merely theorising about words and their usage,[74] let

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71 Technically, Stepanians holds that Hart's argument only concerns the predicate 'has a right'. This is because Stepanians thinks the Interest and Will Theories only concern what it is to have a right, not what rights are. Stepananians, *supra* note 15 at 68. However, he also holds that the 'classical' Interest Theory is 'based on a certain view of the normative function of rights: they are normative tools at the service of the well-being of persons'. *Id*. at 5.

72 Other Interest Theorists who support the Symmetry View of correlativity have also offered rebuttals to the Redundancy Argument along these lines, none of which is compelling. For example, Kramer argues that, given the correlativity of rights and duties, we can say the same thing about duties being rendered redundant. Kramer (1998), *supra* note 4 at 27. Yet those who are unconvinced by Kramer's arguments against the existence of absolute duties, i.e., in favour of the view that all such duties correlate with collective rights (*Id.* at 59), will have the same reasons for doubting this argument too.

73 Stepanians, *supra* note 15 at 74-6.

74 HLA Hart, 'Postscript', in *The Concept of Law* (2nd edn, Clarendon Press 1997).

us nevertheless grant Stepanians' first argument insofar as it concerns the meaning of words. Even so, his second and third arguments are unconvincing. Hart's objection is that there is something more to the concept of 'a right' than a *duty-qua-definiens* can provide. If rights are, or necessarily include, enforcement powers (or some other additional feature), then that is a basis for deeming the explanation inadequate; it would fail to meet the theoretical desideratum of relative explanatory power (over alternatives that could cover such – purported –additional features of the concept).

The real force of the Redundancy Argument, if any, is not the mere 'fact' of redundancy per se, but rather the inaccuracy of the reductions here – *if*, that is, a *duty-qua-definiens* alone is explanatorily inadequate. The charge is that there are more considerations at play for the *explanans*/analytic definition of 'a right'. Hart (and other Will Theorists) may be mistaken about there being missing analytical features (thereby warranting a superior *definiens* or *explanans*), but that does not make his argument unsound.

***Rights as Powers***

Interest Theorists can also use the Redundancy Argument against Will Theorists: charging them with reducing RCTDs to enforcement powers. Hart, a Will Theorist, even says as much – at least concerning private law rights.[75] However, we already have a concept of normative power: capacities to change parties' normative statuses, e.g., to create, modify, or terminate their positions.

Will Theorists might deem this to be a false charge. For some, this is because they

[75] 'These legal powers (for such they are) over a correlative obligation…' Hart (1982), *supra* note 5 at 184. Cf. Simmonds, *supra* note 9 at 223. This is, again, inconsistent with his belief that a right's components can be separated amongst different agents, such that a child possesses a passive RCTD while the legal guardian possesses all the relevant enforcement powers. Hart (1982), *supra* note 5 at 184 n 86.

hold that rights are complexes comprised of both RCTDs and enforcement powers and that these components can be separated amongst different agents. (Hence, the RCTD component is not itself a power). Others will say that this misses the point of their version of the theory, which is to recognize or vindicate a party's right-holder status (his or her 'dominion') in the face of real or hypothetical disputes. Even so, enforcement powers are integral to both versions' conception of 'a right'. Take away the enforcement power and there is no real right left – this, even for those who mark (what I have labelled) a distinct 'RCTD'.[76]

Interest Theories reduce rights to either duties or interests, while Will Theories reduce rights to powers. What then, is it that *rights* do differently from interests, duties, or powers? If there is a positive answer, the theories have failed to provide a persuasive one.

## § VI. Conclusion

The Interest and Will Theories, two competing philosophical accounts, try to answer questions of great import about rights. What is 'a right'? What do rights do? Do they all serve some unique purpose? What do rights do differently from rules, standards, duties, liabilities, etc.? The theories provide criteria for determining what counts as 'a right' and what ultimate purpose all rights share. This chapter provides reasons for thinking they are unsuccessful in those aims, and that they are not needed to do so either.

Both theories suffer from serious idiosyncratic and shared defects. The Will Theory's particular defects are as follows. It cannot adequately explain or justify why the separation of a right's components amongst different agents (e.g., one portion with a child, but the relevant enforcement powers with his or her legal guardian) should be the exception to the rule, rather than the norm for a given legal system. Second, the theory cannot explain why some rights

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[76] See, e.g., Wellman (1985), *supra* note 16 at 39, 59-60.

have more enforcement powers than others, even though enforcement is integral, on its account, to what 'a right' is. Third, it is wholly subsumable under the Interest Theory.

In turn, the Interest Theory's explanation of all right's ultimate purpose is generic to the point of either being vacuous or merely trivially true. Second, certain versions systematically register false positives. Third, no version of the theory can explain why certain interest-holders are not right-holders when there is a given duty on point.

The two theories also share common defects. Their respective criteria are under-inclusive in terms of (i) which normative positions get counted as 'rights' and (ii) the ways in which rights are said to protect, vindicate, effectuate, etc. right-holders' interests or wills. On the other hand, not all rights 'protect' or 'justify' something in the first place. Hence, the theories' specified modes of protection, justification, etc., of rights are deemed relevant or essential without sufficient argument, and they are not necessarily dependent on the theories' candidate ultimate purpose of protecting the will or interests.

The theories could possibly be salvaged from these particular difficulties if they were to be formulated at greater levels of generality in two ways. First, without the unduly restrictive predicates of 'protecting' or 'justifying' and second, by fully developing more expansive accounts of rights beyond (i) the (one) kind of right that correlates with duties and (ii) enforcement powers. However, the theories have graver deficiencies, ones that provide reason to adjudge them irredeemable. Particularly, other kinds of legal philosophical accounts and methods might render these theories superfluous. Versions of both theories themselves point to non-arbitrary alternative ways by which to discern what rights are and where they obtain.

Differences in the theories' criteria themselves reflect some of the reasons why

people are far from agreement about what rights are in the first place. It is time for the philosophy of rights to look for alternatives. It can look to both ordinary and legal discourses and practices – just as Hohfeld and his predecessors did – to harvest the relevant data to shape their accounts, without concocting such criteria. It might also try to employ the Central Case method to compare candidate tokens, taking their paradigms based on what ordinary and technical discourse users would say is 'a right', and use them to compare the structures of the different instances.

Now, theorists who express domain or kind-of-right delimitations might complain of unfair treatment in this chapter. Their delimitations, they might think, have a more limited explanatory aim, not an effort to explain *all* rights' ultimate purpose. This chapter's criticisms nevertheless apply equally to their versions. Their delimited accounts are still problematic in terms of whether all such instances really concern interests or the will. Their criteria still claim global scope over the specified domains (e.g., within *legal* systems exclusively) or particular kinds of positions (e.g., RCTDs only), determining or entailing which instances count as 'rights' and which do not. They also purport to be able to explain what makes these sorts of normative positions 'rights', if not also to identify where such rights are to be found in a given domain, despite acknowledging that there are other kinds or rights. Hence, their criteria are under-motivated: why adopt them if we *already know* that there are other kinds of 'rights', ones that do not rely on their criteria?

# Chapter 6: Legal Rights Enforcement

## § I. Introduction

This chapter, and its successors, demonstrate how the philosophy of rights can proceed perfectly well without relying upon the 'theories' of rights. This chapter particularly addresses the following question: are legal rights-correlative-to-duties ("RCTDs") *invariably* enforceable by legal powers? This chapter addresses the popular view (held by many legal philosophers, lawyers, and ordinary people) that they are. It is, of course, contested, and has been so since at least the Middle Ages.[1] While largely subsumed under the Interest-Will Theories debate for the last hundred years or so, this 'necessarily-enforceable-or-not' dispute need not stand or fall with that 'theoretical' one.

Section II presents an analytical reconstruction of the 'invariably enforceable' position. Styled the Control View, it explains rights enforceability in terms of a *legal* RCTD's (version A) necessarily containing, (version B) being constituted by, or (version C) invariably being associated with certain enforcement mechanisms, aka 'elements of control'. These elements are in fact different types of legal enforcement and waiver powers. The Control View thus holds that the idea of a wholly unenforceable, passive legal 'right' is no right at all. (It takes no explicit stance on the enforceability of moral, social, or game-based rights, however). There are different versions of the Control View, and some of its differences will be explained in Section II. Of predominant concern is that some versions make conceptual necessity claims about the concept of a right itself: that it necessarily contains, or is constituted by, enforcement powers. Other versions, however, reject that claim. They instead claim that it is a conceptually necessity of *legal systems* that the legal

[1] See, e.g., Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press 1997) at 118, 189.

rights therein are invariably enforceable, even though the elements of control may be independent of (i.e., not features of) the rights themselves.

Section III argues that, howsoever construed, the Control View is erroneous. A legal RCTD could exist without any elements of control – legal enforcement and waiver powers – also obtaining. Many scholars have attempted to demonstrate this before. However, their efforts were inadequate or question begging. This is because they only argued for the conceptual contingency of one or two elements of control. Contending that a given enforcement mechanism is not 'necessary', i.e., is not an essential feature of the concept of a legal RCTD, does not demonstrate that *other* elements of control are too.

Successfully demonstrating the conceptually contingent nature of the relationship between legal RCTDs and legal enforcement powers is difficult because, as HLA Hart points out, rights can have 'fuller' of 'lesser' measures of control.[2] A given right may have one, some, or all of the various elements. According to certain versions of the Control View, moreover, given their dynamic nature, rights may lose or gain some of the enforcement mechanisms over time – but not *all* of them. This chapter is unconcerned with the relative strength or weakness of any given element of control, or combinations thereof.[3] Instead, it focuses on the idea of there being fuller or lesser elements of control (i.e., individual enforcement powers), the possibility of there being no magic number of such elements that a given legal right must have, and the claim that that number of elements can fluctuate given changing circumstances. This renders the Control View a moving target, as it were; for it

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[2] See *infra* § III Argument 1 and Chapter 2's Appendix 2 on Hart's private law rights model.

[3] In advancing his version of the Will Theory (which includes a rights model that constitutes an instance of the Control View), Nigel Simmonds argues that the quantum of control over a right is not strictly determinable by the number of (constitutive) elements alone. Nigel Simmonds, 'Rights at the Cutting Edge' in Matthew Kramer (ed) *A Debate Over Rights* (OUP 1998) at 229-30, quoted in Chapter 5 at Footnote 13 and accompanying text in the body.

need only defend the proposition that any given legal right must bear at least one element of control, but without purporting to be able to identify which one it must be.

Section III therefore attempts a more comprehensive tack. By analysing the elements of control in terms of primary, secondary, and tertiary rights it aims to establish the conceptual contingency of any and all *power*-based modes of legal rights enforcement. That analysis then allows for an abductive inference to be made: if all the elements of control are indeed conceptually contingent, then it should be possible to construct legal RCTDs that lack, or are not associated with, any of them.[4]

Section IV nevertheless questions how philosophically valuable the conceptual analysis and subsequent abductive inference might be. As mentioned in Chapter I, conceptual analysts' claims of being able to present concepts' 'necessary' features – even of culturally and/or historically contingent concepts – has been under attack for some time. The weight one should lend to an analysis predicated upon the existence of first-order logical counterexamples used to cleave off what is 'contingent' from what is 'necessary' to a concept is therefore debatable. That methodological issue is not as pressing in this chapter, though, because the worry about essentialism actually runs the other way round here: instead of trying to show what is conceptually necessary to either the concept of a legal RCTD, or to the concept of a legal system, the analysis aims to undermine the Control View's essentialist claims of there being a necessary relationship between legal RCTDs and enforcement mechanisms.

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[4] There are several modes of *secondary* rights enforcement (e.g., self-help efforts, commencing litigation, arbitration, or mediation), but perhaps an indefinite number of *tertiary* rights enforcement techniques (e.g., getting the police to enforce a court order). Still, if it can be shown that no secondary rights exist in a given case, there is no need to also demonstrate the non-existence of tertiary rights in that case too. Argument 6 below, regarding tertiary rights, is nevertheless put forward just in case that assumption is mistaken.

The analysis nevertheless generates a second concern. Even some of the Control View's opponents believe there is something 'wrong' with the idea of wholly unenforceable legal RCTDs. Such cases are dubbed 'defective', 'imperfect', 'degenerate', or merely 'nominal' cases. What makes them so? Section IV provides a functionalist answer: unenforceable legal RCTDs are 'imperfect' because they lack the means for securing officials' binding determinations of their existence, content, and/or scope. Hence, right-holders (and correlative duty-bearers) might lack sufficient information and guidance about what their respective normative positions mean and entail.

## § II. The Control View

There is almost universal agreement that legal rights are typically enforceable.[5] This section, however, offers an analytical reconstruction of a popular view held scholars and ordinary people alike, which is stronger: that legal rights are *invariably* enforceable in some way or other. While many people might hold this view about all rights, this chapter only focuses on legal rights – and more specifically, on legal RCTDs – because legal systems present the clearest examples of enforcement mechanisms, the 'elements of control'. While the label 'Control View' is novel, scholars should find it congenial, especially as rights theorists often discuss the various enforcement mechanisms in terms of measures of control.[6]

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[5] Even Interest Theorists agree. They just think that (some) rights *need* not be so.

[6] Markus Stepanians uses 'Control View' to simply re-label the Will Theory. Markus Stepanians, *Rights as Relational Properties—In Defense of Right/Duty Correlativity* (Habilitatation Thesis: University of Saarland 2005). There is merit in this, especially as most contemporary Will Theorists no longer hold robust metaphysical views about 'the will'. Further, the most famous twentieth century Will Theorist, HLA Hart, was keen to use the word 'control' to explain his view. Even so, there is greater value in using the label for this rational reconstruction, which covers a wider group of scholars and ordinary persons than the Will Theory does, and which, as a model (in contrast to a theory), avoids the some of their 'theoretical' difficulties in ways that shall be discussed below.

**§ II.1 Modelling the Elements of Control**

The Control View [hereinafter "**CV**"] reflects philosophical, legal, and lay beliefs about legal rights, and particularly about the relationship between legal RCTDs and the elements of control. But what is it to 'control' a right? What, moreover, delimits and marks off the relevant sort of Control View accounts? CV holds that some or all of the following are either essential features of, or essentially tied to, RCTDs: means by which to try to seek a correlative duty's fulfillment, for alleviating that duty, and by which to seek (or forego seeking) the right's vindication in light of the correlative duty's non-fulfillment. Various versions of CV nevertheless differ over:

1, the total number of elements of control that must be part of, or available to, a right;
2, whether:
    (2a) Passive RCTDs (e.g., Hohfeldian claims, or something akin to them), must be *included in* the tally of total elements; or
    (2b) Whether RCTDs should instead be directly *identified with* certain enforcement and waiver powers;
3, If (2a), whether enforcement powers are constitutive of rights *qua* components of a right complex, or are merely ancillary to such complexes (albeit invariably co-obtaining);
4, whether it is helpful and important to distinguish between primary, secondary, and tertiary rights; and
5, whether rights are functional or modal kinds.

CV considers the most relevant and typical sorts of control measures to be capacities to enforce and waive rights. While extinguishment (nullification) of a right and its correlative duty features in at least one CV account as an element of control, it is usually ignored. Further, the capacities to enforce, waive, and nullify rights are generally understood in terms of legal powers. While all CV proponents agree that rights must include, or be associated with, at least one element of control, i.e., a power allowing for enforcement *or* waiver, over the right,[7] they disagree amongst themselves about how many elements are necessary. Here

[7] For examples of the minimalist account, see, e.g., Simmonds, *supra* note 3 at 115 ('The modest

is a brief list of the 'elements of control':

-Powers to waive, extinguish, or demand a second party's duty;
-Powers to initiate third party dispute resolution processes (e.g., a court, an administrative body, etc.), or to undertake self-help measures.
-Powers to waive undertaking such processes, and to cease prosecuting them once commenced.
-Powers to either enforce a prescribed remedy (e.g., a court order), or to waive it;
-Supporting liberties to exercise or forego exercising each of the above-listed powers (lest there be duties proscribing or mandating those powers' usage);
- Supporting immunities protecting the powers from being nullified by other parties.[8]

CV proponents also disagree amongst themselves about whether or not the elements of control must form part of 'the right' itself, e.g., as part of a right complex. This is partly because they also divide over whether rights are, or include, a passive conception of a RCTD. Some deny the need for such a component because they hold that RCTDS are actually powers, i.e., either 'a right' should be identified with one or more of the above-listed powers, or Hohfeldian claims should be construed as a species of power. (This option shall be discussed in greater detail below in Section II.4). The CV majority, however, believes that 'rights' are combinations of: (*component type A*) a position marking an entitlement to receive a duty from other parties – understood as a Hohfeldian claim or otherwise – and (*component type B*) enforcement powers, with supporting liberties and immunities.

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version of the Will Theory treats rights as powers of waiver *or* enforcement over legal duties'.) (Emphasis added); L. Wayne Sumner, *The Moral Foundations of Rights* (Clarendon Press 1987) at 43 (The 'one indispensable measure of control' is a primary-power to self-extinguish both the right and correlative duty, which 'requires no institutional mechanism').

[8] As mentioned above, however, CV adherents believe that the number of elements available for any given right can vary. Further, the list is not necessarily exhaustive, e.g., one might think there must be immunities protecting the liberties required to exercise the powers. Yet those liberties and immunities do not seem to be *invariably* available legal positions – even on a CV account. For example, what if someone makes a contract with the right-holder stipulating that the latter cannot use such powers? (On the other hand, right-holders may still use those powers with effect if the other parties do not raise the matter in court, say). See this chapter's Appendix 1.

**§ II.2 The Primary-Secondary-Tertiary Rights Distinction**

All rights scholars divide over the accuracy and utility of the Primary-Secondary-Tertiary rights distinction [hereinafter "PST"]. This usually, but not necessarily, construes the different stages of rights enforcement as being the function of distinct rights. 'Primary' rights are substantive entitlements, e.g., a right to free speech, or to purchase some land. 'Secondary' rights usually enable their holders to initiate (or waive the initiation of) dispute resolution processes (litigation, arbitration, mediation, etc.) when primary rights have been violated, or seem threatened to be. 'Secondary rights' additionally covers entitlements to undertake self-help remedies. 'Tertiary' rights help enforce or waive the binding prescriptions or remedies authorised by third party dispute resolution processes, e.g., court orders.

For example, *A* and *B* enter into a contract. *A*, for $100, will buy 10 widgets from *B*. Both have created primary legal rights and duties. *A* holds a *primary* right to receive 10 widgets from *B*, and bears a primary duty to pay *B* the money. Additionally, *B* has a primary right to be paid the money and *A* has a duty to pay it. If *B* either threatens not to deliver the goods, or simply fails to do so, then *A* gains *secondary* rights to either undertake self-help action, or to sue *B*. If the court decides in *A*'s favour, then *A* gains a *tertiary* legal right to enforce the court order, while *B* get a new duty to comply with said order.

Even on this distinction, though, rights enforcement is not restricted to secondary and tertiary rights. There are cases of right-holders being able to waive or extinguish their rights even without the counter-party breaching his or her duty, or even threatening to do so. In such cases, these capacities must either be considered as features of the primary right itself, or as associated normative positions.

There are two kinds of critics of the PST distinction. The first holds that, instead of

there being distinct rights, one and the same right obtains throughout the entire process of ensuring duty-compliance, seeking a remedy for violations, and trying to secure that remedy. [9] For them, the various modes of enforcement are merely components of the one right complex. In other words, what the PSTD distinction identifies as distinct 'secondary' or 'tertiary' rights are really just the parts of one singular normative construct.

The second kind of critic denies that secondary and tertiary rights are 'rights' at all – this, despite legal and ordinary linguistic practices suggesting otherwise. The reason being that, unlike 'primary ones, so-called secondary and tertiary 'rights' are best identified with powers, (as opposed to RCTDs/Hohfeldian claims/passive normative entitlements, etc.). Thus, for the sake of philosophical clarity, it is best to call powers rather than rights.[10]

PST defenders disagree with the second kind critic, but not necessarily with the first. They also dispute amongst themselves whether duty violations *invariably* give rise to secondary, and/or tertiary rights. CV minimalists are happy to admit both that not all primary rights give rise to secondary rights and that the latter can also be rendered 'ineffective'. (This is because, as will be shown below, CV proponents generally believe that there are enforcement and/or waiver powers in regards to a primary right itself).

To clarify, all rights scholars divide over whether the PST distinction: (A) reflects distinct legal rights; (B) correctly notes the existence of distinct normative positions, but mistakenly presents them as being distinct rights when they should instead be construed as

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[9] For example, HLA Hart's later model of a RCTD seems to waiver on this point. For while he suggests that the elements of control can be fuller or lesser for 'a right correlative to an obligation', he also notes that 'secondary' duties arise in other parties upon violation of their primary duties. HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 183-4, 186 ["Hart (1982)"]. For other examples of rights modellers who seem to reject the PST distinction, see Immanuel Kant, *Metaphysics of Morals* (Mary Gregor tr, CUP 1996); Ernest Weinrib, *The Idea of Private Law* (OUP 1995).

[10] See, e.g., Matthew Kramer, 'Rights Without Trimmings" in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 13-14, 34 ["Kramer (1998)"].

mere components of one right complex; or (C) is altogether erroneous because it presents secondary and tertiary enforcement mechanisms as being kinds of 'rights'. Most CV advocates generally endorse view (A), but some are amenable to (B).

For a full picture of CV conception of a legal RCTD with all the attendant elements of control (i.e., the relevant powers, liberties, and immunities), see this chapter's Appendix 1. The matrix in Appendix 2 presents CV's variances, e.g., between passive RCTD models versus rights-as-powers models on the one and, and those employing the PST distinction versus those presenting a unified conception of a right (complex) on the other.

**§ II.3 Functionalists vs. Modalists**

Proponents also divide over CV's extension: does it apply to RCTDs in all domains, or only certain ones? CV 'Modalists' hold that legal, moral, social, and institutional rights all include or benefit from comparable powers and supporting positions (liberties and immunities). By contrast, CV 'Functionalists' believe that legal rights differ in kind from moral, social, and other rights. This is either because only legal rights invariably benefit from powers, or because legal rights, unlike moral or social ones, simply *are* powers. Some CV advocates go further by distinguishing between kinds of rights within a given domain. For example, HLA Hart says that his account of rights-as-powers only applies to private law RCTDs and certain public law ones, not to all legal rights (e.g., constitutional immunities), which may not always be enforceable.[11]

[11] Hart (1982), *supra* note 9 at 185, 186 and n 90, 189-190, 192-3. Cf. Ronald Dworkin, 'Reply to Critics' in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Rowman & Allenhead 1983) at 259-60, 268-9, who seems to mark functional differences between 'legal' rights (those of the common law), legislative rights, and 'political' rights.

**§ II.4 CV vs. Theories of Rights**

Again, the Control View is an analytical reconstruction of a popular belief that legal rights are invariably enforceable. Despite reflecting philosophical positions of great provenance, the need for an analytical reconstruction is as follows. First, advocates vary over the relevant number of elements of control (aka enforcement mechanisms). Second, they exhibit different conceptions of some of those elements, e.g., is a RCTD a passive position requiring powers to enforce it, or is it instead self-enforcing? Third, the reasons why adherents believe rights are invariably enforceable must be clarified. Some people think it is essential to the concept of 'a right' itself, while others simply hold it to be a function of a legal system, rather than the rights themselves, which explains why the latter can invariably be controlled.

Fourth, CV is not a 'theory' of rights, in the sense outlined in Chapter 2. It neither posits nor relies upon an *ultimate* purpose for all rights, e.g., in terms of the furtherance or protection of right-holders' wills or interests. Proponents might simply be attracted to CV because they believe either that it provides the soundest response to the Redundancy Argument,[12] or that there is no real 'point' to the idea of unenforceable rights. These ideas differ because one might hold that RCTDs are conceptually or semantically equivalent to duties, but still believe that rights must be enforceable via ancillary mechanisms like powers. Moreover, one can attribute a 'point' or purpose to rights without it constituting a raison d'être or explanation for all (legal) rights' existence, or at least without also having an *ultimate* explanation.

Fifth, CV it is nevertheless compatible with both the Interest and Will Theories of rights. The Interest Theory is concerned with what is (purportedly) most essential to rights, e.g., being predicated upon, or protecting, interests or well-being. It can hold that, even if

[12] See Chapter 5 § V.4.

enforcement mechanisms are essential to the concept of a right that is not what is *most* essential to it. It is therefore perfectly consistent for Interest Theorists to hold that rights are always enforceable, so long as they are ultimately understood in terms of the protection or justification of a party's interests or wellbeing. They would simply argue that the elements of control obtain in order to protect the holder's interests. Indeed, early Interest Theorists – including Bentham and von Jhering – appear to have held that rights *are* always enforceable in these ways.[13] Hence, both Interest and Will Theorists can, conceivably, subscribe to the Control View.

Sixth, CV can avoid some of the Interest and Will Theories' biggest problems. Particularly poignant is the Will Theory's difficulty providing a principled explanation for the potential separation and distribution of a right's components (i.e., a passive RCTD from the relevant enforcement and waiver powers) amongst different agents, e.g., a legal guardian holding the enforcement powers for a child's right. While many Will Theorists agree this is possible, as they believe that rights protect a holder's own will (via the use of such enforcement powers), they can neither adequately account for why this is so, nor why they believe that a second party can only serve as the power-holder (a trustee, a legal guardian, etc.) in exceptional cases, rather than standardly so, in a given system.[14] By contrast, being devoid of such 'theoretical' commitments, CV adherents can deem it immaterial whether right-holders personally possess the relevant elements of control, or whether other parties authorised to act on the holder's behalf do, e.g., a trustee, legal guardian, agent, or state

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[13] See Roscoe Pound, 'Legal Rights' (1915) 26 Int. J. Ethics 92, 111; Roscoe Pound, 'Rights', in IV *Jurisprudence* (West Publishing Co 1959). See also HLA Hart on von Jhering's account of enforceable rights that protect interests. Hart (1982), *supra* note 9 at 181 n 76.

[14] See Chapter 5 § III.1.

official. What is important to CV is that rights be enforceable; it does not matter who does the job. Still, *someone* must both have and be able to wield the power.

Even so, a small subset of CV proponents would find the separation of rights possession and the enforcement mechanisms problematic, i.e., those who identify RCTDs as powers, rather than as combinations of positions like Hohfeldian claims and powers. For this minority,[15] separating the right-holder from the power-holder would be nonsensical: if a given right *simply is* a single power (to waive another's duty, say), then it may make no sense to say that *A*, the 'power-holder', holds *B*'s 'right'.[16]

Generally, though, being free of 'theoretical' commitments to the idea that rights protect or effectuate the holder's will, *most* CV proponents may have no qualms with the elements of control being distributed amongst different agents – regardless of their moral assessment of such a state of affairs. Further, even on the rights-as-powers view, separating the components of a right complex could still make sense depending on a given right's composition. For example, a citizen holds the power to waive a duty, while a state official holds the power to enforce it. However, if two or more different agents hold the complex's components, given that such rights are supposedly just powers, one would still have to explain why one party is the 'right-holder' while the other is not, and why they are (not) co-equal holders of a single 'right'. This too is unproblematic for the CV majority, who deny that rights are strictly to be identified with enforcement powers.

Once more, the idea that rights are always enforceable need not depend on the idea that the enforcement mechanisms are necessarily *components* of rights. Such mechanisms

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15 E.g., Nigel Simmonds, a Will Theorist. See, Simmonds, *supra* note 3 at 223.

16 It might still be possible to say that *A* can *wield B*'s right, rather than *possess* it, but that is a slightly different matter. There might additionally be a need to have certain powers to *use* powers, but that seems overly complex.

can instead be understood as ancillary-but-invariably-co-obtaining normative positions. Generally for CV, unlike the Will Theory, distinguishing between a right and its enforcement mechanisms is unproblematic; this, regardless of whether they are (A) all components of one unified, larger construct (a right complex), parts of which are held by different parties, or (B) simply different normative positions held by different parties, (i.e., where the enforcement mechanisms are not part of a right complex) but which for some reason having to do with the nature of normative domains, like law, co-obtain.[17]

Is CV wholly normative in the sense of reflecting a moral or political belief or prejudice? Is the idea, moreover, that rights ought to be enforceable, or that it is invariably the state's (or some other body's) responsibility to enforce all rights? No. The idea, or 'intuition', is that an unenforceable right is no right at all, not that it is a 'defective' case that ought to be transmogrified into an enforceable one.

Indeed, despite deeming all legal RCTDs to be enforceable, CV proponents can also believe there are good reasons why certain rights ought not be enforced, e.g., because they are the product of legal corruption, they lead to bad social results, etc. One rejects CV by holding that there are rights that cannot be enforced. That contrasting view is not the same thing as a judgement about the conceptual contingency of legal enforcement mechanisms being a good or bad thing; opponents need not also believe the some or all rights ought not be enforced. In other words, the dispute with CV is not whether some or all rights ought (not) to be enforced, but the claim about whether they are in fact all necessarily enforceable. Although some philosophers dislike the idea of rights (e.g., classical Marxists), no rights scholar, to my knowledge, takes the stance that rights generally *ought not* be enforceable, i.e., that it would be morally wrong to enforce rights in most or all cases.

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[17] See Chapter 7 §§ III-IV on Perimeters of Protection and Support.

**§ II.5 CV and Rights Enforcement**

Chapter 3 explained the concept of 'rights enforcement' as efforts to try to vindicate a right and/or a party's rights-holding status in the face of (threatened) challenge, infringement, or violation by duty-bearers, or the capacity to waive such efforts. Some CV advocates add that there must be liberties by which to exercise or forego exercising enforcement and waiver powers. The liberties might be needed to *exercise* those powers, even though the powers are used to *enforce* the right.

This presents a possible distinction between two ideas: control and enforcement. There are obviously other ways one could be said to 'control' a right beyond merely enforcing it, e.g., by modifying the right-duty relationship, or creating additional or supplementary rights and duties, etc.[18] Alienation (say, of property, through sale, gifting, transfer, etc.) and nullification seem to be ways to control a right that ought not be characterised as means of enforcing it. Still, almost no CV proponent treats alienation powers as being critical. (HLA Hart is the exception: he lists an element of rights 'extinguishment', but fails to elaborate).

CV's (internally disputed) set of elements of control constitutes the central case(s) of legal rights enforcement. While CV holds that rights are enforceable, it nevertheless does not claim that they are either invariably vindicable or remediable.[19] CV neither endorses the phrase '*ubi ius, ibi remedium*', nor construes rights as guarantees that holders will get what they want – especially as certain versions of CV posit as few as one enforcement or waiver

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[18] For example, Joseph Raz's Dynamic Model – a non-CV one – includes the idea of one right being used as a basis for creating new supplementary rights and duties. See Joseph Raz, *The Morality of Freedom* (OUP 1986) at 168-9, 171, 185-6 ["Raz (1986)"]; Joseph Raz, *Ethics in the Public Domain* (OUP 1994, Revised edn) at 259-61 ["Raz (1994)"].

[19] Even Dworkin's idea of constitutional rights as trumps does not go so far as to say that rights are invariably remediable. Perhaps only legal realist CV proponents, who think rights are either determinable or 'real' only after a judge or other legal official has levied a legal opinion, might take such an extreme stance19.

power. Even according to the most robust version of CV, outlined in Appendix 1, all that the right-holder possesses is a set of normative positions that enable *attempts* to undertake self-help, or to seek third-party-granted remedies or other modes of vindication.

## § III. The Conceptual Contingency of Legal Enforcement Powers

The Control view's position on the invariability of a legal RCTD's enforceability is subject to counterexamples. There are instances of legal rights lacking (associated) primary, secondary, or tertiary enforcement and/or waiver powers (Arguments 1, 2, 5). Further, CV is predicated upon mistaken ideas about the nature of law (Argument 4) and about what makes legal norms 'valid', 'effective', and 'genuine' (Argument 5). Even when such elements of control do obtain, rights may nevertheless be unenforceable because they can conflict with, and be hindered by legal, social, or moral rules (Argument 6).

Prominent legal philosophers originally made arguments 1, 3, and 5. While presenting them I will flag if and where the scholars have gone awry in order to both improve their arguments and to demonstrate how certain issues connect to larger ones in legal philosophy. Even so, it is critical to note that, again, many CV adherents fully acknowledge that certain enforcement and waiver elements may not be available for a given right; there are 'fuller' and 'lesser' measures of control. Thus, it is no argument against CV in general to show that a particular element of control fails to obtain. For any given absence, it is open to proponents to argue that other pertinent elements may be available. Thus, Section III's overall argument is inferential or abductive: if every enforcement mechanism within the CV set is conceptually contingent, then there can be unenforceable legal rights, i.e., rights without *any* (associated) elements of control.

**Argument 1: Primary Waiver Powers**

HLA Hart's (mostly) private law rights model[20] represents a version of the Control View. For Hart, RCTDs entitle their holders, or others acting on their behalf, to various levels of control over another party's duty.

> The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation, or in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.[21]

Hart's model does not explicitly distinguish between primary, secondary, or tertiary rights; all the elements seem to form part of one unified normative construct. Even so, he notes that, as some afford greater or lesser degrees of control, not every right contains every enforcement mechanism.[22] Even so, let us style his 'first' element in the quote above (more accurately, the first component within his Roman numeral i) a ***primary waiver power***. The element appears to apply even in the absence of (the perceived threat of) a primary duty's violation and without the need for commencing legal (or comparable) proceedings.

In attacking Hart's view, Neil MacCormick provides counterexamples to the idea that all rights include a primary waiver power. (His counterexamples form part of an argument that differs somewhat from his more famous Inalienability Argument, which will be addressed below). MacCormick's examples are the inability to waive: one's immunity from being enslaved; duties of non-interference or assault for flagellation by or of a prostitute; and

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20 Hart (1982), *supra* note 9.

21 *Id.* at 183-4.

22 *Id* at 183 and n 85. Cf. Simmonds, *supra* note 3 at 230. On the other hand, Hart refers to some of the correlative duties in element (ii) as 'secondary' ones. Hart (1982), *supra* note 9 at 186.

statutory rights to work safety conditions.[23]

Given Hart's express belief that various rights afford fuller and lesser measures of control, MacCormick is arguing against a straw man. Hart is fully aware that there are unwaivable legal rights, making mention of statutory duties (implying statutory rights, or a subset thereof) as a class that might fall under this category.[24] Still, it is worth adding MacCormick's arguments to the total set of counterexamples to the elements of control.

**Argument 2: 'Primary' Enforcement Powers**

Hillel Steiner provides a Hohfeldian interpretation of Hart's private law rights model. He partitions and identifies Hart's elements into a list of six Hohfeldian powers:

(1) To waive compliance with the duty (ie extinguish it)
(2) To leave the duty in existence (ie demand compliance with it)
(3) To waive proceeding for the enforcement of the duty (ie for the restraint of, or compensation by, the duty-bearer in the face of threatened or actual breach)
(4) To demand proceeding for the enforcement of the duty
(5) To waive enforcement
(6) To demand enforcement[25]

Steiner's explanation does not track Hart's elements accurately. His second element is not that of Hart's listed above. Indeed, they differ in two senses. First, 'leav[ing] the duty in existence' should be counted as the third element (corresponding with the third component in Hart's Roman numeral i) because Hart notes capacities both to waive *and* to extinguish

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[23] Neil MacCormick 'Rights in Legislation', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, (Clarendon Press 1977) at 196-8 ["MacCormick (1977)"].

[24] Hart (1982), *supra* note 9 at 183 n 85. Another problem with some of MacCormick's counterexamples, at least insofar as they concern Hart's particular model, rather than CV or the Will Theory generally, is that they ignore Hart's stipulated domain limitations for his model. Hart admits that immunity-rights, such as the immunity against being enslaved, fall outside of the scope of his private law rights model, which concerns RCTDs. *Id.* at 189-92. The question then becomes whether statutory rights fall under his private law rights model, and whether there are unwaivable private law rights. Further, Hart denies that there are substantive criminal law rights for victims, on the basis that criminal law concerns absolute, as opposed to relative, duties. *Id.* at 183-4.

[25] Hillel Steiner, 'Working Rights' in Matthew Kramer (ed) *A Debate Over Rights* (OUP 1998) at 240 ["Steiner (1998)"]. Steiner rightly adds a 'sixth' enforcement power to Hart's list for the sake of 'logical completeness'. *Id*. at 240 n 14.

the duty, which are distinct. Thus the tally of total Hartian enforcement mechanisms should thus be *at least* seven.

Second, Steiner conflates the idea of leaving a primary duty in place with a demand for compliance. Although he is correct to list both as features of Hart's view, these are distinct capacities. Matthew Kramer criticises Steiner for 'treat[ing] "leave the duty in existence" and "demand compliance with it" as interchangeable predicates'.[26] For Steiner's is an affirmative act or capacity over and above one of simply maintaining the status quo. Nevertheless, Hart does suggest something like what Steiner says – although it ought to be counted as a distinct element:

> In most cases where *public* duties are thought of as having correlative rights, the duty to supply the benefits are conditional upon being demanded and the beneficiary of the duty is free to demand it or not. Hence, though he has no power to waive or extinguish the duty he has a power by presenting a demand to substitute for a conditional duty not requiring present performance and unconditional duty which does, and so has a choice.[27]

What kind of power might this 'compliance demand' element be? With both the PST distinction and Hart's abstract exposition in mind, I will call these ***Primary Enforcement Powers***. However, I cannot think of any legal examples. Neil MacCormick also suggests that normal, adult right-holders are usually free to demand or forego demanding observance of one's passive right even before (threatened) breaches.

> For one [mentally sound, healthy adult usually] is free in one's own unfettered discretion to [I] choose whether to demand or forego demanding observance by another or others of one's passive rights. [II] Similarly, when rights have been infringed, it is normally a matter of free choice whether to demand a remedy from the

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[26] Matthew Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 Ethics 245, 255-6 ["Kramer (2013)"].

[27] Hart (1982), *supra* note 9 at 186 (emphasis added). Hart has in mind public welfare rights: public assistance, unemployment relief, farming subsidies, etc. *Id.* at 185.

> infringer, or to let the matter pass. [III] If the demand is made and rejected, or ignored, one has the right and power to take legal action before a court, calling for it to impose a suitable legal remedy.[28]

I added Roman numerals to MacCormick's text. Demanding observance in numeral I constitutes a primary enforcement capacity. (Numeral II concerns secondary rights, even if they do not involve governmental dispute resolution apparatuses). We could quibble over whether MacCormick equates 'demanding' with powers. However, it suffices for our purposes simply to note that he too thinks it to be a common feature of rights possession, howsoever characterised or identified *qua* normative position.[29]

As Hart notes, rights can sometimes be enforced even if duties have not been violated, i.e., when there is the threat of breach. He correctly assigns such enforcement capacities to his second stage (his Roman numeral ii) because they are used to try to remedy matters, by triggering institutional involvement in order to try to prevent or stop the threatened breach. Howsoever characterised – as secondary or 'remedial' rights, secondary powers, or the element(s) of a unified right complex – there are discernible examples. Private law ones include injunctions for anticipatory breach of contract and a trust beneficiary's efforts to prevent another party (e.g., a trustee, a person presently living on an estate, etc.) from causing waste.

Yet those are examples of secondary rights. What, then, is a *primary* enforcement

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[28] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2008) at 129 ["MacCormick (2008)"].

[29] Chapter 7 will argue that there are different ways to claim or invoke rights. Some involve using liberties to make claims of right. It would seem odd, though, to characterise the sorts of demands suggested by MacCormick's quote along those lines. Imagine that *A* and *B* enter into a contract whereby *A*, for $100, must deliver ten widgets to *B*, and that both the money and widgets are due by the end of next week. Ten minutes after the contract has been finalised, *A* calls *B* on the phone and says: 'You best fulfil your duty', or 'you owe me money'. Is *A* really demanding his rights with such remarks? In a sense perhaps he is, in terms of liberties to claim. But it is doubtful that this is what MacCormick has in mind. He simply seems to be emulating Hart's model.

power? Is this capacity a regular feature of rights? Why is it not a commonly recognisable phenomenon that a right-holder use enforcement powers *pre-duty-violation* (or the threat thereof)? What would the powers actually do? Notice too that going to a court to stop the threat of breach does not seem to be the same thing as either demanding compliance *absent* some perceived threat of breach, or going to court after a breach. Without examples, the idea of a legal primary enforcement power appears to be spurious.

**Argument 3: Inalienable Rights**

Alienation seems to be a means by which to control a right. It also differs from rights waiver. Take the following example. *A* owes *B* $100 by next Friday. *A* has a duty, while *B* has a correlative right. *B* may be able to relieve *A* of its fulfilment either temporarily or for the indefinite future (waiver), or *B* can terminate the duty (and the correlative right) altogether (alienation). For example, *B* may tell *A* not to worry about paying the debt for Friday, and allow for payment to be made the following week. By contrast, *B* can say 'I relieve you of the debt altogether' (a performative utterance terminating the duty).

The Inalienability argument is a staple of the Interest-Will Theories debate. Aside from Hart, though, few if any other Control View proponents consider the capacity to alienate as integral to their accounts of rights. Moreover, Neil MacCormick, the argument's most famous expositor, fails to distinguish between alienation and waiver, and it is unclear whether his arguments do not really all concern the latter.[30]

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[30] MacCormick (1977), *supra* note 23 at 196-99. I am uncertain that the fault is really MacCormick's own, rather than scholars' subsequent characterisation of his work as providing 'the Inalienability argument'. The other unique feature of MacCormick's argument is that, *pace* Hart and the Will Theory, the less control there is over the normative position, the less of 'a right' the Will Theory will deem it; this, even though such modes of control are removed from what are deemed to be more important rights, and that removing these means are actually deemed to strengthen, secure, or protect the right. *Id*. at 198. It is to this argument that Nigel Simmonds' quote presented in this chapter's introduction is responding. Regardless, the Control View is not as vulnerable as the Will Theory to MacCormick's charge. First, it is open for most CV proponents to suggest that inalienable rights are *otherwise* enforceable. Second, being free of theories about ultimate purposes, CV is

Even so, CV proponents other than and Hart and Simmonds have no response to the fact that some rights are inalienable. Probably no one, though, believes that the *only* relevant element of control a legal right might have (under a minimalist version of CV) is alienability. Speaking to the merits of the Inalienability argument, it is true that you cannot, for example, sell your constitutional rights to other parties, or permanently contract your way around them in many jurisdictions today. While you can forfeit your citizenship and lose constitutional rights afforded by your former jurisdiction, *some* of those rights (or analogues) will nevertheless remain inalienable under international law.[31]

**Argument 4: Secondary Rights as Contingent Distributions**

In a recent paper on tort law, John Gardner explains some of his views about rights. He believes that many if not all legal rights are 'institutionalised' moral or customary ones. Unlike moral or customary ones, conferring or imposing primary and secondary legal rights and duties is done as a matter as matters of distributive justice or injustice.[32] In part, this is because legal rights, unlike their moral or social analogues, are entitlements subject to distribution. For example, some rights require the use of state resources: courts of law, their officers, their time and efforts, public funds to cover part of the costs of such institutions'

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uncommitted to the idea that the more modes of control available, the more of 'a right' it is. Third, it is conceivable that some inalienable rights may sometimes be waivable.

[31] One might be tempted to respond that international law might not really be law, or that it may be ineffective within given regimes, or that one can imagine the current international law regime collapsing, leaving the possibility of local legal systems that do not treat any of their incorporated versions of its legal rights as being inalienable. If so, then all inalienable rights are conceivably alienable in a sense. This probably misses the thrust of the Inalienability argument, however, which might charitably be taken to be jurisdictionally bounded, i.e., there are legal rights in certain existing jurisdictions that are inalienable so long as one is subject to their laws.

[32] John Gardner, 'What is Tort Law For? Part 2 The Place of Distributive Justice', in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (OUP 2014) 335, 339-40.

operations, etc.[33] These relatively scarce, expensive resources are subject to allocation considerations. Most importantly for our purposes, Gardner holds that the existence of secondary legal rights and duties is not logically entailed from primary ones.

> If one locates the primary duties in the law of torts, as we saw, one inevitably includes a secondary duty of corrective justice as part of the 'tort law' package. But one need not use the law of torts, and more generally one need not grant a secondary duty of corrective justice. One may choose a different (non-corrective) legal response to some legal wrongs, or indeed no legal response at all. So there are always two questions for the court or legislature: which 'initial entitlements' to include in the law, and how to respond – correctively or otherwise – to their violation. It follows that the corrective duties are not mere automatic implications of the initial entitlements… they are distinct entitlements that also need to be distributed by the law.[34]

Gardner is silently adopting Guido Calabresi & Douglas Melamed's account of rights here. They picture the construction of legal rights in two 'stages'. In the first, legal officials generate entitlements, understood as titles to resources. In the second, the officials determine the modes of protection, if any, the right-holder is to enjoy.[35]

> The state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected and to whether an individual is allowed to sell or trade the entitlement. In any given dispute, for example, the state must decide not only which side wins but also the kind of protection to grant.[36]

'Wins' here is slightly ambiguous between victory in: (a) a dispute over who should be initially entitled, or (b) in dispute resolution-oriented legal proceedings (courts, arbitration, etc.). If the latter, Gardner would probably part company with Calabresi and

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33 *Id*. at 340-341.

34 *Id*. at 344-345.

35 Guido Calabresi & Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard L. Rev. 1089, 1090-1.

36 *Id.* at 1092.

Melamed for thinking that mere possession of the primary right determines the outcome of any legal proceedings regarding that right. His articulation of this view helps emphasise the contingency of secondary rights: not only their very generation, but also in only constituting one possible mode of protecting rights, or basis for helping to resolve disputes generally.[37]

Not everyone accepts this two-stage analysis, whether understood as temporally or conceptually distinct processes, or both. For example, Pavlos Eleftheriadis argues that segregating the two notions into two 'questions' or 'stages' renders the first devoid of content. For Eleftheriadis, if the modes of protection are not specified at the same time as the initial assignation, then the entitlement will be indeterminate.

> The problem with the idea of entitlement is that it specifies the winners but not the losers. It gives [an entitlement, e.g., to property] without specifying who is excluded and how… The problem lies with the apparent distinction between the two stages: the stages of recognizing the entitlement and specifying its protection. The distinction is false. And if it is false, the simplicity of entitlement is also false. Winners and losers must be defined at the same time. If exclusion is left to the stage of remedial enforcement, then the first stage has not resolved anything at all. If so, the allocation of entitlements at that stage is an empty and useless process. So if legal rights are to be standards whose general rationale is to resolve conflicts of interests they must guide the action of all sides.[38]

*Pace* Eleftheriadis, exclusion is not left to the second stage. It is constitutive of the first. Winning or losing can be understood in terms of entitlement to, or exclusion from, resource usage itself – regardless of how winners enforce their entitlements. *A* may have a

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[37] Cf. John Finnis on the specification of rights. 'Employing a useful contemporary jargon, we can say that people (or legal systems) who share substantially the same concept (e.g. of the human right to life, or to a fair trial) may none the less have different conceptions of that right, in that their specifications [the features and contents of specific rights, duties, and related positions] differ, partly because the circumstances they have in mind differ and partly because specification normally involves choices, *by some authoritative process*, from among alternatives that are more or less equally reasonable'. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) at 218-9 (emphasis added). See also Raz (1994), *supra* note 18 at 266-7 on secondary rights not being based on primary ones, but on a second, distinct *moral* judgement.

[38] Pavlos Eleftheriadis, 'What is a Legal Right?' (2007) pg 6-7, available at http://www.oxford-jdg.net/2010/09/michaelmas-term-2007.html (last accessed March 2, 2015).

legal duty to stay off of *B*'s land without anyone knowing how *B* or anyone else could remedy *A*'s potential transgressions, if at all.

Moreover, holding that entitlements are indeterminate absent specific means of *remedy for breaches* constitutes a form of Sanction Theory of law. Sanction theories go awry by ignoring the distinct conceptual and normative role of duties as requirements to act or forbear. They – usually – reduce or collapse the concept of a duty into a sanction: a punishment issued by authorities for non-compliance. Such theories also tend to reduce or replace the normative sense of duty (a belief in the requirement to comply) with motivations to conform out of fear of, punishment or other undesirable repercussions.[39] CV does not do that exactly, though. Instead, it can be accused of reducing or collapsing duties into Hohfeldian liabilities (particularly, to compelled participation in dispute resolution processes), and hence the reducing of the correlative rights into enforcement powers.[40]

CV proponents may rebuff the Sanction Theory label. First, holding that rights and duties are invariably enforceable need neither constitute nor entail a Sanction theory, because it does not necessarily entail that other sorts of powers, liberties, etc., are tied to sanctions. Second, to hold that rights are invariably enforceable does not entail that right-holders must always emerge victorious from such processes; not only may they lose, but, given the fluctuating measures of control, a given right may not even involve the power to commence a remedy-seeking process. For minimalist versions of CV, the 'sanction' in question here is not even necessarily the duty-bearer's liability to compelled participation in such legal

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[39] See, e.g., HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997); Anthony Woozley, 'Legal Duties, Offences, and Sanctions' (1968) 77 Mind 461; PMS Hacker, 'Sanction Theories of Duty', in A.W.B. Simpson (ed) *Oxford Essays in Jurisprudence* (Second Series) (OUP 1973). Joseph Raz *Practical Reason and Norms* (OUP 1999, 2nd edn) at 156-61 ["Raz (1999)"].

[40] See, e.g., Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 OJLS 123, 131 ["Raz (1984)"].

processes, let alone a requirement to provide a remedy, to compelled performance, or subjection to punishment. It might instead simply be the duty-bearer's liability to primary enforcement (if any), waiver, or alienation powers.

Third, according to some CV proponents, RCTDs can correlate with both duties and Hohfeldian liabilities concurrently.[41] Indeed, on the CV approach, a duty-bearer's liability to the duty potentially being waived (to the duty-bearer's own advantage, perhaps) is best understood as one norm (the liability) being required for the modification of (the duty). The concept of a duty is thus logically prior to a liability to waiver, enforcement, etc., and thus indispensable to the overall account.

Fourth, as there are no established, shared criteria for what counts as 'a right', why hold that the Calabresi-Melamed view counts as an argument rather than a mere stipulation? For example, why hold that *B*'s mere entitlement to *A's* exclusion from some resource, absent specific means for modifying the parties' relationship in terms of the entitlement's enforceability counts as 'a right'? People can benefit from legal rules without necessarily having 'a right'.[42] Is their account thereby put under pressure?

In Chapter 5 I rejected the 'theoretical' criteria for determining what counts as 'a right', and I do not think comparable tests can or should replace them. Instead, let us imagine that *B* is legally entitled to enter some land, to use it, and to live there. No one else may move there, live there, use the land, or sell it, etc. But *B* cannot sue *A* for entering the land, waive *A*'s duty from refraining to traverse the land, etc. Nor can anyone else do so on *B*'s

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41 E.g., Simmonds, *supra* note 3 at 223; Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985) (as Wellman thinks only complexes are real rights).

42 See, e.g., Chapter 3 § IV at Footnote 12 on adverse possession and dishonest transferring, and Chapter 5 § IV.3 on von Jhering's domestic manufacturer case.

behalf. Are we then to say that *B's* entitlements fail to count as a set of property rights? That unless the capacities to at least commence institutional dispute resolution processes obtain, if not ones to procure particular remedies, people in *B*'s situation are inaptly styled 'right-holders'? Is it a mistake to claim that *B* has the right to live there? If it ought not count as 'a right', what other label would be appropriate?

As concerns Calabresi & Melamed, it would be erroneous to criticise their two-stage view based on the claim that, historically, legal officials do not actually think of rights as being anything other than enforceable. We can doubt whether officials in any given legal regime generally think about whether or not to include accompanying enforcement powers for rights they are creating, or to withhold waiver powers. But that does not demonstrate the absence of two *conceptually* distinct stages. MacCormick provides us with a specific example whereby the British Parliament, having learned about the deleterious effects of statutory right-holders waiving their rights (e.g., to safe work conditions), subsequently stripped the waiver power from the law.[43] Is it farfetched to think that the legislature could make that sort of judgement *ex ante*, particularly for similar sorts of rights? Furthermore, it does not matter whether agents engaged in the social practice personally conceive of these processes in a given instance; it suffices that such processes are embedded into the practice. For example, Section 5 of the American Constitution's Fourteenth Amendment authorises Congress to try remedy violations of the rights embedded in the Amendment's earlier clauses by drafting future legislation.[44] While this feature is not found in the thirteen antecedent amendments, it was open to their drafters to conceive of such 'remedial' measures.

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43 MacCormick (1977), *supra* note 23 at 197-8.

44 US Constitution Amendment XIV (1868).

**Argument 5: Genuine Rights and Law's Effectiveness**

How should rights scholars explain legal rights that lack secondary rights as modes of protection/enforcement? How can such rights be squared with the notion of legal validity? This argument places the idea of rights enforcement in the context of a greater debate about the nature of law: what makes something a legal system, must laws be 'effective' in order to count as rules of a system, and what makes something a 'valid' legal norm of a system? (In case you are holding your breath, this sub-section does not try to answer these questions).

According to many legal philosophers, for a legal system to continue as 'a going concern' its rules must 'have force' and be 'effective'. Laws in turn must be effective in order to maintain their status as norms of the system. Without offering an in-depth analysis of the concept of 'effectiveness', suffice it for our purposes here that many take it to mean a state of affairs of general conformity with some critical mass of a system's norms by those subject to them. Effectiveness is often established through sanctions, punishments, liabilities, and other forms of rule enforcement and conformity measures. Despite lessons learned about the failings of Sanction Theories of law, at least some (if not most) legal philosophers remain stalwart that some form of liability must accompany a critical mass, if not all, of a *human* legal system's duties.[45] If legal rights and duties must be enforceable in order to ensure (i) duty fulfillment and (ii) that the rules grounding the duties continue to be viable parts of a legal system, then institutional mechanisms must exist for their enforcement and validation. In other words, legal duty-bearers must be liable to compelled participation in effective institutional dispute resolution procedures.

To clarify, these philosophers believe there must be an integral association or

[45] See, e.g., Frederick Schauer 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 (1) Ratio Juris 1; Matthew Kramer, 'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties' (1999) 109 Ethics 375.

relationship (*not* an identity) between some critical mass of legal duties and liabilities in the sense of punishments, fines, etc., and not merely subjection to institutional processes. They agree that duties and liabilities serve distinct conceptual and normative roles, and will therefore rebuff the Sanction Theory label as inappropriately applied to them. Moreover, this belief about law's effectiveness is not necessarily related to the Control View. CV merely holds that legal RCTDs must be, in some way or other, enforceable; it need not take a stance on whether the rest of a legal system's rules must also be so. By contrast, these other philosophers would say that many, but not all, legal rights are enforceable.

For example, although he rejects CV, Matthew Kramer thinks laws must generally be enforceable if a legal system is to subsist. He divides legal rights and their correlatives into genuine and nominal varieties. 'Genuine' legal rights are Hohfeldian claims accompanied by enforcement and waiver powers, while 'nominal' ones are claims without associated powers.[46]

Kramer also believes that a legal right may be either 'operative' or 'inoperative'. An **'**operative' right is one that is regularly enforced. For every operative right there exist enforcement powers by which to respond to (anticipated) breaches of duties. An 'inoperative' right is either (Class A) *unenforceable* for a want of any such associated powers, or (Class B) regularly *unenforced* – or would be if duty violations were to occur – by

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[46] Kramer (1998), *supra* note 10 at 8-9, 34, 46, 63-65, 100, 106; Matthew Kramer, 'On the Nature of Legal Rights' (2000) 59 Cambridge L. J. 473, 476-7, 481-482 ["Kramer (2000)"]. In his more recent work, however, Kramer may have changed his mind about what makes a right 'genuine'. If this is the case, he has done so without explanation. His cursory remarks on the matter now suggest they might only involve claims protected by immunities. See Matthew Kramer, 'Rights in Legal and Political Philosophy', in Gregory A. Caldeira et al (eds) *The Oxford Handbook of Law and Politics* (OUP 2008) at 417, 418; Legal and Moral Obligation', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2007) at 187; 'Refining the Interest Theory of Rights' (2010) 55 Am. J. Juris 31, 33; Kramer (2013) *supra* note 26 at 247; Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281, 297. As shall be discussed in Section IV, Kramer is not the only scholar to maintain a Genuine-Nominal distinction based on rights enforceability. His being the most sophisticated treatment of the matter, however, I shall employ his account for elucidatory purposes.

the relevant power-holders. Class B inoperative rights are nevertheless 'genuine': while it may go unenforced and thus be inoperative, such a right may still be genuine because it is potentially enforceable (i.e., the relevant powers obtain). This generates three classes: (I) operative-genuine rights; (II) inoperative-yet-genuine rights; and (III) inoperative-nominal rights.[47] Kramer's view therefore contradicts CV because it holds that some legal rights are simply unenforceable, i.e., inoperative-nominal ones.

Kramer's account is problematic. It entails much more than the idea that some 'critical mass' of a system's norms must be enforceable. For him, a right is 'genuine' only because of such powers. In other words, it is immaterial that Kramer appeals to an integral relationship between *some* critical mass of rights and certain sorts of powers in order to explain law's effectiveness, because on his view *no* genuine right lacks associated powers.

While Kramer does not explicitly identify legal validity with enforceability his Genuine-Nominal distinction seems to get us there nonetheless. To what extent is this merely stipulative? Why must legal RCTDs be enforceable in order to count as 'genuine'? On the one hand, if they are valid norms of the system, as Kramer suggests, then it is inapt to construe unenforceable rights as 'nominal'.[48] On the other hand, if inoperative-nominal rights are not valid norms of the system after all, then Kramer's distinctions have not modelled unenforceable *legal* rights; if they are rights at all, those of the inoperative-nominal class are instead moral or social ones.

A rejoinder to those charges may turn on what makes something a norm of a legal system. A Legal Positivist like Kramer might say that the tests of legal validity or rules of

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47 Kramer (2000), *supra* note 46 at 482-4.

48 There are other senses of 'nominal', e.g., as used by engineers and pilots when they say 'all systems nominal'. But that cannot be the sense Kramer employs. How would it contrast with 'genuine'?

recognition are norms held by system officials.[49] Being deemed 'valid' presumes an institutional context wherein legal officials *qua* officials apply the law. Rules may regularly go unenforced for considerable periods of time. Applying Kramer's account to all legal norms, though, those are still only inoperative-yet-genuine (applications of) norms of the system. But, per Positivist strictures, rights, like other elements of law, must be stamped with that official imprimatur in legal proceedings of some sort. Such proceedings are usually predicated upon the procedural bases for their initiation: i.e., modes of enforcement.[50]

Not only does Kramer fail to explain why every token of the type (every instance of a legal right) must be susceptible to this process, he also does not justify a focus upon enforcement powers as the exclusive means of establishing a right's genuineness. Even if (i) officials' potential employment or recognition of normative positions and (ii) correlative duty-bearers' general compliance with their duties are both indispensable for RCTDs to count as valid elements in a legal system, why is the use of enforcement powers the only way by which to render them effective? Kramer might be begging the question about their being 'unenforceable' by narrowly construing enforceability to one narrow set of powers, used in very specific ways. Are there no other means by which legal officials can validate rights, save via litigation or comparable remedial dispute resolution processes? The account, like

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[49] Legal Positivism holds that law can be determined simply by looking at its social sources (e.g., legislation, precedent, etc.), without need to assess its merits (moral, political, intellectual, etc.). See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) at 47-8 ["Raz (2009)"]; John Gardner, 'Legal Positivism: 5 ½ Myths', in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012).

[50] Recall that the CV conception of 'rights enforcement' does not entail that legal right-holders must win a lawsuit (or a comparable proceeding) or gain a remedy. It suffices that someone simply be able to waive a right, or be able initiate or waive legal proceedings. On Kramer's story, too, some mechanism is required to commence any such institutional process in order for legal officials to be able to give a norm their imprimatur of validity. In a sense, then, Kramer's view might even be bolder than CV: for while the latter makes a claim about the concept of enforceability being integral to the concept of a legal right in some way, Kramer agrees on the basis that enforceability is integral for the right's *legal validity* (something CV has no express view about, although many proponents might agree).

most of rights scholarship, ignores the possibility that there might be other ways to use rights in order to make laws 'effective' or have the relevant 'force'. For example, would it suffice if judges or other legal officials simply referenced them periodically, without claimants having to specifically mention or imply their rights in pleadings? (This invites larger questions about theories of law, which are beyond this chapter's purview. However, we will re-tread on this theme of alternative modes of rights usage in the next chapter).

One could claim that, while sanctions are not conceptually necessary for a system of law to obtain over time, they are for legal rights. There is no reason to think so, though. Instead, it is better to salvage Kramer's view by noting that certain rights are or can be: (**Type I)** enforceable via powers, or (**Type II)** unenforceable for a want of associated powers. **Type I** divides amongst the typically enforced variety and those that are typically unenforced but nonetheless enforceable. Being enforceable, Type I are not problematic for CV adherents, but the possibility of Type II rights (unenforceable for want of associated powers) is very much so.

Kramer does not establish that Type II rights do in fact exist. Instead, he provides the grounds for an argument about rights being able to meet validity conditions despite being unenforceable. We can imagine a legal system where the state will never enforce a party's rights, but where officials acting *qua* officials make mention of them, laud them, or broadcast their status as rights all the time merely as showpieces. In that vein, let us return to Nigel Simmonds' Dystopia argument from Chapter 5 § V.1, but add a new element. Imagine a system replete with corrupt officials who perennially deny proceedings to hear legal disputes for reasons unique to each case. Yet each time they do so they nevertheless officially affirm the legality of one party's right. Whether the subjects of that legal system

have ‘a right’ thus depends on a theory of law, and particularly the notion of what makes something legally valid (e.g., to Legal Positivism, its Sources Thesis, and its notion of validity).

**Argument 6: Tertiary Rights**

Tertiary rights are not logically entailed from secondary ones. As CV proponents well know, just because you have the power to sue it does not follow that you will invariably win. Moreover, even if you win, you may not get what you want. Just because a legal official orders a remedy for a rights violation, it does not follow that the right-holder will be able to secure that remedy.

There are, moreover, a number of reasons why even in legitimate, just, and efficient legal systems a given right will not always be enforceable. In an adversarial legal system like the Common Law parties lose legal cases (and administrative hearings, and in arbitration, and in other sorts of legal proceedings, etc.). There is a legion of reasons why parties might not emerge victorious. Sometimes it is because their claims are spurious. Other times their claims, although valid, are outweighed by other considerations, as shall be discussed below. In still other cases, the decision-making officials make mistakes or are corrupt.

Legal rights may also conflict directly with certain laws, other rights, or even government policies. One right may be outweighed by another in certain circumstances, or deemed limited in its application vis-à-vis some other party’s (contrary to the first right-holder’s wishes or expectations).[51] Of course, someone has to weigh the competing norms (a law vs. a right, one right vs. a second) in order to adjudge their respective extensions, relative

[51] Far too much ink has been spilled debating whether rights conflict is possible, or whether rights are instead ‘compossible’ (the view that conflicts between competing rights claims are merely ephemeral, and serve only to demonstrate a right’s true scope). Subscribers to the latter view, however, are few and far between these days. See, e.g., Steiner (1998), *supra* note 25.

weaknesses, capacities for being trumped, or inapplicability in a given case. While an official must weigh and balance such matters, it seems unnecessary that a private party be the only one capable of initiating such a process, or that it be done simply in response to a 'case and controversy'. Regardless, the powers requisite for commencing such institutional processes, whether essentially related to rights or not, are not sufficient to warrant the idea the rights include or entail the existence of tertiary rights (or components).[52]

## § IV. Imperfect Legal Rights

What is the payoff of this analysis? Does it prove that enforceability is not a constitutive feature of the concept of a legal RCTD? If this means either potentially *or* invariably vindicable by the holder personally, or someone acting on his or her behalf, then the answer is 'yes'. If by 'enforcement' we instead mean mechanisms by which to trigger self-help or third party dispute determinations of the content of legal rights and correlative duties then the answer is only a qualified 'yes'.

As mentioned in Chapter 1, real and imaginary counterexamples are important for determining a concept's features, but they do not leave 'necessary' or 'essential' ones as the only relevant residual. And as stated in this chapter's introduction, one must take the above six arguments in aggregation and then decide whether they show if it is conceivable for a legal right to be posited that lacked *any* of the above-mentioned modes of enforcement.

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[52] Rights enforcement can also be prevented indirectly, by legal, moral, or social rules and circumstances. Right-holders may be financially incapable of initiating or sustaining a legal action, e.g., being able to pay lawyer's fees. Many legal systems have rules concerning filings, proceedings, and even minimal monetary amounts for asserted damages in order to have standing (e.g., in American federal courts for diversity cases)52, which make litigation sufficiently expensive and lengthy as to be prohibitively costly for many right-holders. Additionally, for a host of reasons, right-holders may also face social pressure from friends, family, peers, etc., not to pursue a legal dispute. Opposition to commencing litigation could also be based on social, religious, or moral requirements. Sometimes parties are deterred from pursuing their rights out of fear of physical or other forms of violence or retaliation. Of course, none of these exigencies proves that the agent in question lacks either a bona fide legal right or enforcement mechanisms.

For various – often unarticulated or underdeveloped – reasons, even some Control View opponents agree that there is something wrong with the idea of unenforceable legal rights. Such instances are deemed 'imperfect',[53] 'degenerate or vitiated',[54] 'nominal',[55] or conceptually parasitic upon enforceable ones.[56] Why think so? This 'defect' view probably reflects a deeper belief about rights expressed in the following question: 'What is the *point* of rights if they cannot be claimed or enforced'? Adherence to the –unenforceable-legal-rights-are-pointless perspective view does not cut neatly across pro- or anti- Control View lines. Moreover, as shown in Chapter 5, the idea of rights being invariably enforceable is not exclusive to Will Theorists. Hence, the 'point' of rights in question need not be reducible to will vindication or protection per se.

One response is that rights still have a point even in the absence of enforcement capacities. For example, one might instead believe that a legal right need only ground a duty in others, or mark a party as the intended beneficiary of that duty, regardless of whether the duty and correlative right are enforceable. These (alternative or conjunctive) purposes are neither rendered useless nor defective simply for want of invariably associated enforcement features. That they are deemed less potent normative or juridical tools than they might otherwise be (i.e., were they always married to elements of control) is no argument against the idea that rights are nevertheless *not* legal tools.

That response is inadequate because there is something to the idea of unenforceable

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53 See, e.g., John Salmond, *Jurisprudence, or The Theory of the Law* (1st edn, Stevens & Haynes 1902) at 223; MacCormick (2008), *supra* note 28 at 122-3, 129.

54 Rex Martin, *A System of Rights* (Clarendon Press 1993) at 82-3.

55 See Matthew Kramer, *supra* my footnote 46.

56 Raz (1994), *supra* note 18 at 256-257.

legal rights being imperfect or defective. Even so, this is not to claim that no such cases do not or cannot exist. Joseph Raz provides the beginnings of one potential answer about why unenforceable legal rights should be deemed 'defective'. He thinks that the very concept of an unenforceable legal right is parasitic upon an enforceable one because the law is primarily concerned with enforceable norms.[57] Rex Martin thinks nominal rights 'fail to function as rights' because they give zero normative guidance to other parties: they do not take the (correlative) right as a basis for acting as the right directs.[58] Although he is correct to look to functions, Martin's explanation probably goes too far. He probably exaggerates the extent to which enforcement mechanisms, rather than the predicate (primary) RCTD, serve as normative guidance function for duty-bearers.

**§ IV.1 A Functionalist Answer: Rights as Action Guiding**

The section offers a superior explanation of why unenforceable legal RCTDs ought to be deemed imperfect. Particularly, there is a need for the content and contours of legal rights and duties to be determined and shaped by the binding opinions of legal officials, though the reasons for their doing so will only arise when the right-holders and duty-bearers are unclear about, or dispute, their legal positions. Both Raz and Martin's answers point in the same direction about the function of RCTDs and duties as action-guiding and/or reason-providing normative positions. Deeper reasons for construing normal legal rights to be enforceable are to be found in the idea of law's effectiveness, as addressed in Argument 5 above. To undermine Sanction Theories of law, Raz provides an argument about a legal system for a society of angels. Given the nature and disposition of the community members, legal duty-

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57 *Id*.

58 Martin, *supra* note 54 at 83.

bearers will not require (the fear of) punishments to motivate their conformity (if not compliance) with their duties. Raz's argument endeavours to show that sanctions are 'inessential' to the (or 'our') concept of law.[59]

If a society of angels needs law, it would be because it needs to resolve (at least) certain coordination problems, if not also distribution issues. Even so, the conceptual possibility of legal subjects with purer-than-human motivations and dispositions does not resolve the question about the nature of the relationship between primary and secondary legal rights. For even sincerely motivated, morally superior, non-omniscient agents might still have conflicts about what their rights and duties entail. They will still require, if not (amicable) dispute resolution processes of the variety found in human legal systems, then they at least still require authoritative binding decisions and answers to their queries about what their right entitle and their duties require. Angel *A* may think his legal duty requires him to take action φ. Correlative right-holder Angel *B* thinks that *A*'s duty is instead to do both φ and ψ. *A* wants to fulfil his duty, but disagrees with *B* about what it entails. Alternatively, imagine that both the right-holder and correlative duty-bearer are simply uncertain about some critical aspect of their right and duty, without having disputed the matter, and together seek out guidance as to their meaning. Some legal official must decide what the right and duty really are and entail.[60] Thus, the reason why unenforceable rights are

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59 See Raz (1999), *supra* note 39 at 157-61.

60 See Raz (2009), *supra* note 49 at 108:

> Courts and tribunals have the power to determine the rights and duties of individuals. But cannot any person do the same? Cannot John determine whether he owes 100 pounds to Alan or whether Paul owes money to Jack? He may be ignorant of the facts but like a court he may investigate them. He may be ignorant of the law but like a court he may study it. The difference between a court and a private individual is not merely that courts are provided with better facilities to determine the facts of the case and the law applying to them. Courts have power to make an *authoritative* determination of people's legal situation. Private individuals may express their opinion on the subject but their views are not binding.

defective or imperfect follows from the need to clarify the right's content and extension. If it is impossible for both a legal RCTD and its correlative duty' existence or contents to be officially determined and/or clarified, then both are defective.

**§ IV.2 Objections**

Does a functionalist account of RCTDs not take us back the *theories* of rights? Second, even assuming arguendo that the lack of means for providing binding determinations of what some of its rights and duties are constitutes a defect in a legal system, it does not follow that the rights or duties *themselves* are defective for failing to contain, or be associated with means for triggering such official determinations. Third, some scholars distinguish between general, 'abstract' rights and 'concrete', determinate rights derived from the former.[61] It does not seem to make sense to say that because the general right is indeterminate in certain cases (e.g., about the total set of concrete, derivative ones follow) that it is 'defective'. Fourth, Fred Wilmot-Smith suggested to me in private conversation moral people just follow their legal duties. They do not need to be compelled via enforcement mechanisms.

**§ IV.3 Rejoinders**

One can posit functionalist accounts of rights without subscribing to the Interest or Will Theories, or any such 'theory' of that sort. An account of rights as action guiding or reason giving need not be explained in terms protecting or fulfilling right-holders' wills, choices,

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Raz is partially mistaken because private persons can create, modify, or terminate each other's legal positions in binding ways. They can make contracts; sell their property; give gifts; etc. If these legal positions (powers) are not binding because not 'authoritative' until given a legal official's imprimatur, then Raz would be guilty of the same "Kelsenian twist", i.e., Sanction Theory view, he attributes to Hart's account of rights and duties. Raz (1984), *supra* note 40 at 131. Cf. Hart (1982), *supra* note 9 at 157-60, 266-8.

[61] For example, Pavlos Eleftheriadis thinks Hohfeldian claims form part of *legal relations*, rather than constituting rights as such. For him, rights are general reasons that inform practical (including legal) reasoning, whereas legal relations are particular conclusions of law. He also seems to suggest that legal relations are tools to help effectuate rights. Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) at 1, 123-8.

interests, or well-being, or to protect their role-bearing status (e.g., as property owners, as citizens, etc.). The problem becomes when this functionalist answer is taken as (A) the starting point for a theory of rights, or worse still, (B) the all-encompassing aim for theories.[62]

Second, it is difficult to see what grounds there are to distinguish a legal system's failure vis-à-vis a RCTD from that legal right's own imperfection. If certain legal RCTDs and duties cannot even in principle be clarified, which is needed to give guidance to their respective holders about what is owed and when, what actions to take, etc., then those normative positions are themselves defective, and not just the system.

Third, as far as I am aware, discussion of defective or degenerate cases of rights concerns concrete, particular ones. If, however, the abstract general legal rights gave absolutely no guidance to legal officials, rather than merely vague or conflicting guidance, about what concrete ones were entailed, then they too would be defective. Further, the idea of making them determinate through binding decisions does not make sense, given the very Abstract-Concrete distinction: only the concrete ones would be made determinate through an official's say-so.

Fourth, even if a legal right in question is a prima facie morally acceptable one, duty-bearers might still not comply for failure to comprehend their duties' full nature or implications. They might disagree with right-holders about their duties' applications/entailments (albeit honestly disputing them), or simply not know what they actually entail. Law therefore needs a way to determine the normative position's content in

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[62] Furthermore, even if social practices or concepts are to be interpreted in light of their purpose or function that does not take us all the way to the Normativist's (e.g., Dworkin and Finnis) claim that one must engage in *moral* evaluation and justification in order to explain that function. See Julie Dickson, 'Methodology in Jurisprudence: A Critical Survey' (2004) 10 Legal Theory 117, 142-3.

order to guide the parties.[63]

This neither answers the question of who should have the capacity to trigger legally binding official guidance or clarification of rights and duties, nor entails that the right-holder must be the one who is authorised and competent to do so. But we can we see why a legal system lacking *any* means for determining the existence, meaning, and scope of its rights and duties would be a defective one. *Some* such official determinations are indispensible to any legal system, or at least those with rights, howsoever initiated.

Argument 5 suggested that a legal system does not have to rely on a 'case or controversy' method for raising rights matters before legal officials. It is imaginable that a system could authorise officials to unilaterally raise the issues. However, that approach would rely on their being able to discover or learn about those issues in order to undertake some procedure by which to determine the right's content. Barring omniscient legal officials, much of the time the parties themselves will be in a better position to determine the need for such official determinations. Thus, regardless of who wields the power, rights enforcement helps assists determine the content and contours of the RCTD; and without such means, a right would be defective.

If this is correct, then the conceptual chasm between duties and Hohfeldian liabilities is not as big as one might suppose from the Raz's Angel argument. Of course, this does not bring us all the way to a necessary conceptual connection between rights and enforcement mechanisms à la secondary rights, which CV requires; and nor does it presume that litigation or some analogous process is the sole means by which to bring one's right and duties before

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63 *What if the legal right in question is not a moral one*? A person who finds a given legal RCTD morally repugnant might not follow it. Whether legal duties are exclusionary reasons or merely weighty ones, there may be overriding moral or prudential reasons not to conform to them. This may also be true even if the duty is a moral(ly acceptable) one.

legal officials in order to seem them deemed valid.

## § V. Conclusion

Legal rights (RCTDs) are typically enforceable by legal powers. However, they are not invariably so. This chapter presented an analytic reconstruction of a popular belief amongst lawyers, ordinary people, and many legal philosophers, that they are – at least via powers. While many adherents do treat them as such, this 'Control View' is not necessarily committed to the idea that all the 'elements of control' (i.e., enforcement and waiver powers) must serve as components of a legal right. Instead, the right's enforcement can be the function of distinct rights, i.e., 'secondary' and 'tertiary' ones.

The chapter then provided a series of arguments showing why each possible mode of rights enforcement may or may not obtain in a given case. First, primary rights are unwaivable. Second, there is no such thing as a 'primary enforcement power'. Third, some rights are inalienable. Fourth, secondary and tertiary rights are not logically entailed from the existence of primary ones. Fifth, it is erroneous to identify a norm's genuineness or validity with its enforceability. Indeed, rights validation need not be accomplished *exclusively* by (associated) enforcement powers. Sixth, right-holders do not always win in lawsuits, let alone get awarded remedies.

If each element of control (power-based enforcement mechanism) is only related to legal rights in conceptually/logically contingent ways, then it is possible that rights exist, or could at least be constructed, without *any* such (associated) elements. Legal rights can do specified jobs, like coordinate property relations, without such powers anyway. (They might to do a terrible job without them, though). Thus, enforcement powers are, at best, essential to, or constitutive of, secondary and tertiary rights (understood as distinct rights, perhaps

themselves comprised of different elements), but not all legal rights-correlative-to-duties (RCTDs). Rights do not always come equipped with the means to commence, let alone triumph, in legal processes. Moreover, they are not necessarily 'trumps' over social policies or the will of others, and nor do they necessarily start off as trumps that shed (associated) powers over time, e.g., in the face of statutes of limitation, etc. They are better understood as *generally* having (associated) potent-but-defeasible capacities.

Nevertheless, there is something to the idea of unenforceable legal rights being 'imperfect' or 'defective'. The idea of rights enforcement is tied up with the idea that only legal officials can give authoritative, binding determinations of what rights and duties mean and entail. People often dispute what their rights and duties are and require. If no means exist by which to trigger official determination processes (regardless of who holds such powers: private parties, legal guardians, government agents, etc.), then the rights and duties might fail to give determinate guidance to the parties.

# Appendix 1. The Elements of Control

**PRIMARY RIGHT**

1, A Hohfeldian **claim** to a second party's correlative duty to act or forbear
- 2-3, **Immunities** from the *claim* being nullified by the duty-bearer or a third party
- 4, A **Power** to enforce the duty through private means even before (threatened) breach*
  - 5-6, Liberties to use or not to use the enforcement power
  - 7, An Immunity from someone other than the right-holder nullifying the enforcement power
- 8, A **Power** to waive the duty
  - 9-10, Liberties to use or not to use the the waiver power
  - 11, An Immunity from someone other than the right-holder nullifying the waiver power
- 12, A **Power** to nullify the duty
  - 13-4, Liberties to use that powers or to refrain from doing so
  - 15, an immunity from having that power being divested by others

**SECONDARY RIGHT(S)**

16 A **claim** to the primary duty-bearer's duty to acquiesce to the right-holder's self-help measures
- 17+, **liberties** to undertake relevant self-help actions

18, A **claim** to a remedy – devised by the duty-bearer personally, or as demanded by the right-holder – for breach of the primary duty*
- 19, A **Power** to waive the other party's duty to provide a remedy
  - 20-1, Liberties to use or not use the waiver power
  - 22, An Immunity from someone other than the right-holder nullifying the power

23, A **claim** to a second party's duty to participate in the a third party dispute resolution process
- 24, A **Power** to enforce the duty through ***public*** means in light of a (threatened) breach (e.g., commencing a lawsuit, an administrative hearing, etc.)
- 25, A power to waive commencement of the third party dispute resolution process**
  - 26-7, Liberties to use or not to use the enforcement power
  - 28, An Immunity from someone other than the right-holder nullifying the power
- 29, A **Power** to end the public remedial process before an official determination is issued
  - 30-1, liberties to use or not use those powers
  - 32, an immunity from having that power divested by others
- 33-4, **Liberties** to *claim* a remedy from the duty-bearer, or to forbear from doing so†
- 35-6, **Liberties** to *invoke* one's right to third party to solicit support for rights violations†

**TERTIARY RIGHT*****

37, A **claim** to a second party's duty to comply with a remedial order ††
- 38, An **Immunity** from the *claim* being nullified by someone other than the right-holder
- 39, A (set of) **Power(s)** to enforce the results of the remedial process
  - 40-1, Liberties to use or not to use the enforcement power
  - 42, An Immunity from someone other than the right-holder nullifying the power
- 43, A **Power** to waive the duty to comply with the remedy
  - 44-5, Liberties to use or not to use the waiver power
  - 46, An Immunity from someone other than the right-holder nullifying the power
- 47, A **Power** to nullify the duty to comply with a remedial order
  - 48-9, liberties to use or not use those powers
  - 50, an immunity from having that power divested by others

* Although presented by prestigious scholars, these candidate types of normative positions are probably spurious. For example, #4 Hart (1982); # 18 Hohfeld (1909)

** This is a genuine power because one can imagine a legal system where duty violations automatically give rise to dispute resolution processes, whether the right-holder desires the process or not.

*** Enforcing a court judgement may involve getting the police to procure goods, banks to comply with money transfers, etc. Hence, the set of total elements for any given case probably exceeds the number listed here.

† These liberties are explained in Chapter 7.

†† The duty-bearer's duty to participate in the third party dispute resolution process may be owed to the state, rather than to the right-holder.

## Appendix 2. Varieties of Control View

| | PRIMARY-SECONDARY-TERTIARY DISTINCTION | UNIFIED CONCEPTION OF A RIGHT |
|---|---|---|
| **A RIGHT = A POWER, OR A SET OF POWERS** | View 1: A right is the power to waive a primary duty<br>View 2: A right is the power to enforce a primary duty<br>View 3: A right is a complex of both primary powers ['**Cp**']<br>View 4: A right is **Cp** + the power to enforce a secondary duty<br>View 5: A right is **Cp** + the power to waive a secondary duty<br>View 6: A right is **Cp** + the powers to enforce and waive the secondary duty [**Cp** + the two powers = **'Cps**']<br>View 7: A right is **Cps** + a power to enforce a tertiary duty<br>View 8: A right is **Cps** + a power to waive a tertiary duty<br>View 9: A right is **Complex PS** + the power to enforce and waive a tertiary duty. [**Cps** + the two powers = **'Cpst**']<br>View 10: A right is the power to enforce a primary duty + an immunity for that power<br>View 11: A right is the power to waive a primary duty + an immunity for that power<br>View 12: A right is **Cp** + an immunity for one of the powers<br>View 13: A right is **Cp** + an immunity for both of the powers<br>ETC. | A right-holder uses different powers to enforce the same right at different stages |
| **A RIGHT = COMPLEXES COMPOSED OF CLAIMS, POWERS, IMMUNITIES, AND LIBERTIES** | The same iteration, but with claims added to every view | A right-holder uses different powers to enforce the same right at different stages |

# Chapter 7: Alternative Ways to Enforce Rights

## § I. Introduction

Having a legal right does not necessarily entail that you also have the power to commence litigation, arbitration, or comparable proceedings, or undertake self-help remedies – let alone that you will succeed in such endeavours. There is nevertheless a life of legal rights outside of institutional proceedings, one that need not depend upon legal powers for their enforcement. This chapter explains two particular kinds of way to do so: making liberty-based (i) claims and (ii) invocations of right. These involve the use of legal liberties by which to enforce and support RCTDs in private and social settings.

Unfortunately, the philosophical literature on the concept(s) of 'a right' fails to account for these sorts of legal phenomena. This is for at least three reasons. First, it is mostly concerned with institutional proceedings: courts of law, arbitration, administrative hearings, etc. Second, even when the literature does look beyond such contexts, it focuses almost exclusively on powers by which to waive duties or undertake self-help remedies (and it never really explicates the latter in detail). This focus stems in part from the fact that philosophers have long debated whether to define or conceive of rights as containing, or being constituted by, enforcement powers. Third, the few scholars who do address comparable matters (nonetheless without identifying them in terms of liberties-based modes of rights enforcement) mistakenly categorise them as being extra-legal.

The rights literature's myopic focus on (i) legal enforcement powers and (ii) their employment in institutional contexts is problematic. It grossly underrepresents the ways in which legal rights afford their holders options for shaping their lives. This chapter aims to begin to broaden our horizons. Claims and invocations of right can concern legal normative positions because the claimant or invoker must legally be permitted to both (i) communicate

to other parties via a particular means and (ii) convey the kind of content that comprises the communication. While not particularly potent means for getting right-holders what they want, these claims and invocations nevertheless bear legal significance.

## § II. Previous Accounts

This chapter explains two kinds of legal liberty-based claims of right. These liberties can help enforce and support rights-correlative-to-duties ('RCTDs') despite being made outside of institutional settings. While these two modes have not been previously analysed, it has nevertheless long been understood that there are different senses of rights 'claiming'. For example, Carl Wellman says:

> There are in the recent literature two paradigms of legal claiming. Hohfeld, and probably most practicing lawyers who reflect upon the matter, take suing in a court of law as their model of claiming. Feinberg, on the other hand, takes claiming a checked umbrella by presenting a chit or demanding payment of a note payable on demand as paradigms.[1]

This section addresses the philosophical literature's treatments of moral and legal rights claiming. It also raises the following questions – some of which have gone unnoticed in the literature. What are claims of right? What is the relationship between rights claiming, demanding, and enforcing? Are they wholly different things, is one or more a subset of another, or is there an identity? How are rights claimed? With which normative positions can they be claimed? Where, furthermore, can *legal* claims of right be made?

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[1] Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985) at 204 ["Wellman (1985)"]. Wellman also suggests there is a necessary connection between rights and claiming, and that claiming is the exercise of a normative power. *Id*. at 206-7. For the Feinberg reference, see Joel Feinberg, 'The Nature and Value of Rights', in *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) at 251 ["Feinberg (1980)"].

**§ II.1 What is a Claim of Right?**

Joel Feinberg's account of claiming is perhaps the most widely cited in the literature. He distinguishes amongst: (I) 'making claim to'; (II) 'claiming that'; and (III) 'having a claim'.[2] *Making claim to* something is 'to petition or seek by virtue of *supposed* right; to demand as due'.[3] *Making claims to* are legal performances (performative utterances) that have direct legal consequences, and which admit of two types: (Ia) to require to be given that which is already due to the claimant, and (Ib) to be granted a right in the first place.[4]

By contrast, *claiming that* concerns assertions that something is the case, e.g., that the sky is blue. They are 'propositional' rather than 'performative'.[5] 'To claim that one has rights', for example, 'is to make an assertion that one has them, and to make it in such a manner as to demand or insist that they be recognized'.[6] In contrast to *making claim to*, however, *claiming that* assertions are 'often' or 'characteristically' without legal consequence or force.[7] They are mere 'demands'[8] – though Feinberg also says that bona fide rights can be claimed, demanded, insisted upon, etc.[9] *Having a claim* 'consists in being in a

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2 Feinberg, *supra* note 1 at 149-51. Cf. Alan White, 'Rights and Claims' (1982) 1 L. and Philosophy 315, 316-23; Neil MacCormick, 'Rights, Claims and Remedies' (1982) 1 L. and Philosophy 337, 350-6; Alan White, Reply to Professor MacCormick' (1982) 1 L. and Philosophy 359.

3 Feinberg, *supra* note 1 at 149-50 (emphasis added).

4 *Id*. at 150. Both types, he thinks, are the function of normative powers. 'The legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right. A right to which one could not make claim (i.e., not even for recognition) would be a very "imperfect" right indeed!'. *Id*.

5 *Id*.

6 *Id*.

7 *Id*.

8 *Id*. at 152.

9 *Id*. at 151. Feinberg's inconsistent language here reflects the fact that he has not clearly distinguished between claiming and demanding.

position to claim, that is, to *make claim to* or *claim that*'.[10]

While is true that one can claim to either have one's existing right be recognised, or to seek the grant of a right, it is unclear how clean a distinction can really be made between what Feinberg calls 'making claim to' and 'claiming that'. Moreover, it would be a mistake to believe that all instances of what he calls 'claiming that' must be without legal effect or consequence – and not just for issues regarding rights. Consider, as an obvious example, the potential legal effects of assertions made under oath. (Below, this chapter will aim to show that *invocations* of right can be legally significant too).

**§ II.2 Claiming vs. Demanding vs. Enforcing Rights**

What, then, is the relationship between claiming and demanding rights? Some philosophers are adamant that demanding, referencing, discussing, requesting, or pleading for rights are not, or need not be, forms of rights enforcement.[11] Relatedly, Joseph Raz distinguishes between directives and requests. Directives, he thinks, possess a binding quality that requests lack.[12] Are the legal demands or claims made by ordinary subjects of a legal system (as opposed to officials acting *qua* officials) more like directives or requests? Raz's remarks elsewhere seem to suggest the latter.

> Primary organs are concerned with the *authoritative* determination of normative situations in accordance with pre-existing norms. Consider judicial bodies. Courts and tribunals have power to determine the rights and duties of individuals. But cannot

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10 *Id*. (emphases removed). Feinberg also endorses the definition of 'a right' as a valid claim, as opposed to a justified one, on the grounds that a right-holder might have a claim without ever claiming it (and without even knowing he or she has it), and because non-right-holders can put forward invalid claims. *Id*. at 151-2. 'The Nature and Value' piece was originally written as an article in 1970 and republished in 1980. In 1973, however, Feinberg seems to have revised his view of *having a claim* to simply being in a position to *make claim* to. See Joel Feinberg, *Social Philosophy* (Prentice Hall 1973) at 65; George Rainbolt, *The Concept of Rights* (Springer 2006) at 76.

11 See, e.g., Wellman (1985), *supra* note 1 at 207-11.

12 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2d ed. OUP 2009) at 21-3 [hereinafter Raz (2009)].

> any person do the same? Cannot Jack determine whether he owes £100 to Alan or whether Paul owes money to Jack? He may be ignorant of the law but like a court he may study it. The difference between a court and a private individual is not merely that courts are provided with better facilities to determine the facts of the case and the law applying to them. Courts have power to make an authoritative determination of people's legal situation. Private individuals may express their opinion of the subject but their views are not binding.[13]

Raz goes awry here. While courts are often needed to provide binding determinations of normative positions' content and scope, it is untrue that private parties express mere opinions when making claims of right, when creating contracts, when buying and selling property, etc. They are engaged in performative utterances and activities. Is Raz hereby reducing all such activities to mere *prima facie* cases of rights and duties, ones rendered non-binding (or non-existent even) until a court reaches a decision about them? If so, then he is guilty of the same 'Kelsenian Twist', i.e., Sanction Theory of law error, he accuses Hart of making when the latter explains the nature of private law rights as variable sets of enforcement powers.[14]

Are claims or demands of right modes of rights enforcement, then? Chapter 3 argued that 'rights enforcement' concerns efforts to try to protect or defend either the content of a right, or (some)one's rights-holding status, in the face of (threatened) challenge, infringement, or violation by another party, by seeking to procure a remedy, some other form of vindication, or a correlative duty's fulfillment.[15] Such efforts are of course no guarantees that right-holders (or other parties enforcing the right on its holder's behalf), will get what they want. While making claims of right falls squarely within this conception of rights

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13 *Id*. at 108.

14 Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 OJLS 123, 131 ["Raz (1984)"].

15 See Chapter 3 § IV.

enforcement, a stable analytic distinction probably cannot be made between *claiming* and *demanding* rights (as opposed to, say, having or making a claim versus making a demand).

One of the few scholars to explicitly address the matter, Onora O'Neill nevertheless cuts a distinction between rights *claiming* and rights *enforcement*. However, she fails to explain the difference. To uncover her view it helps to note that she also distinguishes between two sorts of rights. The first, 'rights that demand non-interference' (e.g., 'liberty-rights') can be *claimed* of others without relying on institutional bodies (courts, the police, etc.). This is because everyone bears duties that correlate with these sorts of rights. By contrast, rights to 'a specific performance' (e.g., 'welfare rights') depend on legal institutions in order to even be claimable, because only such bodies can set and determine the identity of the correlative duty-bearers.[16] The idea is that if you do not know who the relevant duty-bearer is, then it would be both useless to try to claim it. Doing so otherwise would, at best, be a mere rhetorical gesture. O'Neill nevertheless believes that both rights requiring non-interference and rights to specific performance rely on the existence of institutional structures for their *enforcement*.[17]

O'Neill's would-be Claiming-Enforcement distinction is untenable. First, it is untrue that institutional bodies are always required to determine or fix specific duty-bearers for all 'positive' duties (correlating with rights to specific performance). If the correlative duty-bearer's identity is determinable, why would claiming one's right from that person privately be impossible, save if by 'claiming' one *exclusively* meant successful remedy procurement via institutional proceedings (an unduly narrow view of 'rights enforcement')? Second, her

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16 Onora O'Neill, 'Structure: Obligations and Rights', in *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP 1996) at 129-32, especially 130 n 4.

17 *Id*. at 131.

view seems incapable of accounting for self-help 'remedies' – unless, that is, she thinks all such actions ultimately rely upon the implicit backing of legal officials. O'Neill would therefore need to explain why claiming fails to count as a form of rights enforcement if she wishes to maintain the Claiming-Enforcement distinction.

### § II.3 The Structure of Claiming

The philosophical literature on the concept(s) of 'a right' overwhelmingly focuses on enforcement powers,[18] rather than explore other means of enforcement and other modes of rights exercise. As discussed in Chapter 6, HLA Hart, Neil MacCormick, and Hillel Steiner list various ways by which to enforce *legal* rights, explaining them in terms of legal powers by which to: waive a correlative duty; commence and prosecute institutional proceedings in the face of that duty's breach (or the threat thereof); and undertake self-help remedies.[19] They also suggest that there is a power to 'demand' compliance or observance with one's legal right, even in the absence of a threatened breach of the correlative duty.[20] (The right-holder presumably uses the power by confronting the duty-bearer personally).

*Moral* rights scholars' accounts of claiming and otherwise enforcing rights are

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[18] There are at least two different conceptions of a normative power. One is that it changes two or more parties' normative positions (creating, modifying, or terminating parties' relations). The second is that a power can additionally preserve the status quo. See, e.g., Matthew Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 Ethics 245, 255 and its n 17.

[19] HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 183-6 [Hereinafter, "Hart (1982)"]. ('These legal powers (for such they are) over a correlative obligation…'. *Id.* at 184); Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2008) at 129; Hillel Steiner, 'Working Rights', in Matthew Kramer (ed) *A Debate Over Rights* (OUP 1998) at 240 and 240 n 14.

[20] Hart (1982), *supra* note 19 at 186; MacCormick (2008), *supra* note 19 at 129; Steiner, *supra* note 19 at 240. As discussed in Chapter 6 § III Argument 2, this seems to concern a conception of normative power capable of preserving the status quo, as opposed to one that changes parties' (other) normative positions. This 'primary enforcement power' was also deemed there to be spurious.

usually in terms of powers as well.[21] There are a few exceptions, though. Stephen Darwall and Margaret Gilbert, for example, identify the capacity to claim as being the function of a *Hohfeldian* claim.[22] Their view, however, requires an 'active' interpretation of Hohfeld's concept, per the Active-Passive distinction explained in Chapter 3. As shall be explained below in Section V, this understanding of a Hohfeldian claim simply renders it into a power.

One notable exception to this legal and moral power-centricity is John Finnis. He suggests there are also certain legal *liberties* by which to enforce legal rights.

> In the law, such conjunctions of a liberty with a [Hohfeldian] claim-right are often supplemented by further conjoined rights; for example, by the claim-right to compensation in the event of wrongful (i.e. duty-breaking) interference with the liberty, and/or by the ancillary liberty to resort to self-help or to approach the courts in defence of one's substantive liberty, and/or by the power to institute legal proceedings or to waive compliance with the duty, etc.[23]

Finnis is correct to note that liberties can be used to buttress rights. However, one may question whether recourse to courts is to be explained exclusively in terms of *liberties* (e.g., without legal *powers* by which to impose a duty on the court to hold hearings, etc.). Both legal and moral rights can be claimed using liberties, powers, or combinations thereof – and in ways different from than any of those listed above, including those mentioned by Finnis. William Galbraith Miller presents several examples, two or more of which, I think,

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[21] Susan James, 'Rights As Enforceable Claims' (2003) 103 Proceedings of the Aristotelian Society, New Series 133; Onora O'Neill, 'Structure: Obligations and Rights', in *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP 1996) at 128-36; John Skorupski, *The Domain of Reasons* (OUP 2010) at 309-13. Their views therefore all count as instances of the Control View, elucidated in Chapter 6, if not also the Will Theory.

[22] Stephen Darwall, *The Second-Person Perspective: Morality, Respect and Accountability* (Harvard University Press 2006) at 18; Margaret Gilbert, 'Giving Claim-Rights Their Due', in Brian Bix (ed), *Rights: Concepts and Contexts* (Ashgate Pub. Co. 2012) at 308.

[23] John Finnis, 'Rights', in *Natural Law and Natural Rights* (2nd edn, OUP 2011) at 201 ["Finnis 2011)"]. Cf. Ernst Bierling's (undeveloped) concept of *Forderndürfen*. Ernst Bierling, *Zur Kritik der Juristischen Grundbegriffe*, vol 2 (Friedrich Andreas Berthes 1877-83) 39-40, 40 n (§ 141) and Chapter 2's Appendix 2.

ought to be understood in terms of legal liberties, rather than powers, Hohfeldian claims, or combinations of the latter two.

> The word "claim" comes to us from "clamor" through the Normans. It signifies "a complaint," "a hue and cry," as will be seen from the authorities referred to hereafter. As "action" points to self-help, so "claim" refers to a "calling out," either to a wrongdoer to do right, or to society to help. "Stop thief" serves both purposes. So Glanvill (i. 5), "Cum clamat quis Domino regi aut ejus Justiciis de feodo," &c. "Quhen anie man compleins to the King," &c. This mode of asserting and enforcing a private right is referred to in the Twelve Tables, and, if we may coin a word from the obsolete term there used, we may describe it as "**obvagulation**," when the creditor on every second day (*tertiis diebus*) was allowed to make a disturbance before the door of his debtor. It is known in India, where sitting **dharna** before the door of a debtor until the creditor perhaps died of starvation, so that his ghost might haunt the unjust debtor, was a recognised mode of procedure until it was forbidden by the 508th section of the Criminal Code (Stokes I 281. Fn 2: Balfour's Cyclopedia of India (3rd ed, sv. Sharna; *Code of Gentoo Laws* London 1777 pg 19. **Fasting** was also known in the ancient Irish law to enforce claims particularly against persons in high position (Senchus Mor, i. 113 (Rolls Ser.)). The creditor waited before the door of his debtor for a certain time, and if he did not receive a pledge he got double the debt and double food. These modes of enforcement were an indirect appeal to public opinion.[24]

Moreover, many (but not all) philosophers define legal and/or moral rights as capacities to make claims or demands.[25] Those who reject such definitions believe that claiming and otherwise enforcing rights must instead be explained in terms of multiple normative positions. In the existing literature, this usually takes the form of an enforcement power and a RCTD. However, rights enforcement can also involve: a liberty and a RCTD; a liberty + power + RCTD; etc. Liberties or powers by which to make claims of right, or by which to enforce RCTDs in other ways, can either (a) serve as components in right

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[24] William Galbraith Miller, *The Data of Jurisprudence* (W. Green & Sons 1903) at 58-9 (emphases added and paragraph breaks removed). For still other senses of claiming, see *Id*. at 59-62; Wellman (1985), *supra* note 1 at 136, 204; Gilbert, *supra* note 22. Miller's Latin quote translates roughly as: Whenever anyone complains to the King, or to his Justices, concerning his Fee, or Freehold, if the complaint be such as be proper for the determination of the King's Court…

[25] E.g., Feinberg, *supra* note 1 at 150-1; Darwall, *supra* note 22 at 18; Skorupski, *supra* note 21 at 311-2.

'complexes', or (b) constitute distinct rights. Hence, if (at least certain) powers and liberties count as kinds of 'rights', then claims of right can also *be about* other rights.

**§ II.4 Where Can Legal Rights Be Claimed?**

Much of the literature assumes or argues that claims of right made outside of official proceedings do not count as forms of *legal* claiming. They are instead deemed to be moral or social claims, ones incapable of producing legal consequences or effects. For example, Susan James thinks that claims of right made in the absence of legal enforcement powers to back them up are effete.[26] Similarly, Margaret Gilbert states:

> I take it that, outside the legal context, verbal acts, such as demanding performance and rebuking someone for non-performance, count as a kind of *enforcement* of [Hohfeldian] claims. Indeed, these things constitute an important special class of *non-legal* enforcement mechanisms. One of their important aspects is that they do not in and of themselves involve more than verbal address.[27]

*Pace* Gilbert and James, the set of legal contexts is not restricted to those involving institutional proceedings, bodies, or actors. When a right-holder turns in a chit, a receipt, an I.O.U., a check, an insurance policy, or a deed,[28] to another private party, both parties' legal positions are at play. These are performative acts with legal force and significance, not mere rhetorical gestures. Again, only on a Sanction Theory of law or certain extreme versions of Legal Realism are 'legal consequences' restricted to legal officials' actions (judges, administrators, etc.).[29]

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26 James, *supra* note 21 at 135-6.

27 Gilbert, *supra* note 22 at 308 (latter emphasis added).

28 Feinberg, *supra* note 1 at 150.

29 On Sanction Theories of law see Chapter 6 § III Argument 4.

## § III. Perimeters of Protection

Having already touched upon the idea that valid claims of right involve the relationship of two or more normative positions, this section now addresses the concept of a 'perimeter of protection'. It does so in order to present: (1) a kind of indirect relation between RCTDs and liberties; (2) the issue of whether such relationships *invariably* obtain; and (3) a steppingstone for understanding the inverse relationship: Perimeters of Support.

Normative positions can be connected to one another due to the overlapping application of various rules governing a given situation, transaction, or state of affairs. For example, RCTDs and duties often provide a liberty with a modicum of protection. However, this neither entails that the liberties necessarily gain comprehensive protection nor that they are inviolable. HLA Hart famously calls the guardianship of RCTDs over liberties 'perimeters of protection',[30] but his account waivers on whether such perimeters *invariably* obtain. In explicating and evaluating Jeremy Bentham's conceptions of liberties, Hart notes the former's Vested-Naked distinction. 'Vested' liberties are those that, however weakly, are directly or indirectly protected by at least one legal RCTD. For example, one has the liberties to eat or not eat, to stand or sit down, to go inside one's house or out. These are protected because it is an offence for others to use violence to prevent one from so acting. Hart deems protect cases to be 'liberty-*rights*'.

As an example, students have liberties to park their bicycles in one of the lots beside the University of Oxford's Law Faculty. They are not guaranteed a spot, and it may be that on any given day a student cannot park there because the lots are full. Nevertheless, the legal

[30] The idea of a perimeter of protection has long been recognised. Hart asserts that Bentham presents the idea. Hart (1982), *supra* note 19 at 172-3. See also John Salmond, *Jurisprudence, or The Theory of the Law* (1st edn, Stevens & Haynes 1902) at 231-2; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions As Applied In Judicial Reasoning' (1917) 26 Yale L. J. 710, 748.

liberty to park there is protected by legal RCTDs against a bicycle's wrongful removal, against its theft, against others trying to assault a student in order to lock their own bikes in a spot before the student can, etc.[31]

'Naked' liberties, by contrast, are not protected by RCTDs.[32] Hart does not seem to deny their existence, only that they (unlike vested ones) count as 'rights'. Neither lawyers nor anyone else, he suggests, would consider naked liberties to be 'rights' because they are unprotected by RCTDs and correlative duties.[33] Nevertheless, Hart prefaces his discussion of perimeters of protection by saying that *all* legal liberties are protected in some such fashion.[34]

It is difficult to reconcile Hart's various remarks on the matter. He might have been unwittingly inconsistent about whether protection perimeters invariably obtain for legal liberties. (He may additionally be begging the question about whether lawyers or others treat the idea of other parties bearing duties as an essential criterion of 'a right' – one he himself seems to discard when discussing constitutional immunity-rights). Hence, it might be unfair to attribute to him an invariable protection view. Nevertheless, for various reasons, other scholars think such perimeters do invariably obtain, i.e., that in any actual legal system, at

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31 This is a modified example adopted from Rainbolt, *supra* note 10 at 7, quoting Carl Wellman, *Welfare Rights* (Rowman and Littlefield 1982) at 8-9.

32 Hart (1982), *supra* note 19 at 172.

33 *Id.* at 173-4. For Hart, then, the set of all liberties is larger than the set of all liberties that qualify as kinds of rights.

34 'Those who have doubted the importance of liberties or mere absence of obligation for the analysis of legal rights have felt that so negative a notion without some positive correlate is not worth a lawyer's attention. This is a mistaken way of presenting the important fact that where a man is left free by the law to do or not to do some particular action, the exercise of this liberty will *always* be protected by the law to some extent, even if there is no strictly correlative obligations upon others not to interfere with it. This is so because at least the cruder forms of interference, such as those involving physical assault and trespass, will be criminal or civil offences or both, and the duties or obligations not to engage in such modes of interference constitute a protective perimeter behind which liberties exist and may be exercised'. *Id.* at 171 (emphasis added).

least some legal RCTDs will partially protect (i.e., not comprehensively) any legal liberty.[35] The possibility of naked liberties thus constitutes a challenge to the Invariable Protection view. Are there really any legal liberties lacking *any* such legal protection e.g., against torts or criminal interferences, howsoever mediate or indirect in their scope of coverage?

Whether inevitably obtaining or not, the idea of a perimeter of protection raises the following questions. First, how is such a relationship between a given RCTD and a liberty to be established? Second, what counts as 'protection'? Is the RCTD really 'protecting' the liberty, or is it doing something else? Third, would it matter if all explanations of protection perimeters are and must be content-dependent or circumstantial? For example, Bob has a legal right (liberty) to cross the street. He also has a legal right (RCTD) against being assaulted. Hence, one cannot impinge upon Bob's right to cross the street *by* assaulting him. Yet what does that RCTD have to do with that liberty, other than both being possessed by, or simply concerning, Bob? In other words, just because the RCTD concerns the same person why also think that it concerns his or her other normative positions?

To answer the third question, it seems fair to say that the relationship between the RCTD and the liberty is not one of logical entailment. The relationship arises simply by virtue of both normative positions being members of the same system. Perimeters of protection, moreover, reflect an important feature of legal rights modelling: their concern for the aggregative effect of all legal materials (norms, rules, etc.) on a particular relationship between parties, even if garnered from diverse areas of the system, e.g., from both tort and

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[35] See, e.g., Andrew Halpin, *Rights and Law: Analysis and Theory* (Hart Publishing 1997) at 37-41 ["Halpin (1997)"]; Matthew Kramer, 'Review of Rights and Law: Analysis and Theory by Andrew Halpin' (1999) 62 Modern L. Rev 314, 316; Matthew Kramer, 'Rights Without Trimmings" in Matthew Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 12 and n 3 ["Kramer (1998)"].

contract law.[36] This condition is constitutive of legal rights. The protection of Bob's liberty to cross the street by his RCTD against being assaulted arises given the totality of legal norms governing a particular person and situation. Further, Bob's ability or willingness to exercise his legal liberty to cross the street might be hindered or deterred if those sorts of RCTDs did not also obtain or were ineffective. While perhaps inessential for establishing the liberty's legal validity (i.e., its legal status), rights against being assaulted nevertheless seem to facilitate its utilisation. Whether this relationship ought to be styled the 'facilitation' or 'protection' of the liberty, or something else, seems less important than being able to identify some sort of relationship between the positions; this, even if it is impossible to know that a particular RCTD facilitates or protects a liberty save circumstantially. Of course, this does not resolve the matter of whether these sorts of relationships *inevitably* obtain for any and all liberties, or how one would go about trying to establish the existence of naked liberties save by searching for examples.

## § IV. The Inverted Relationship: Perimeters of Support

This section outlines the inverse relationship: instead of RCTDs protecting or facilitating liberties, liberties can protect or facilitate RCTDs. I will call such relationships 'Perimeters of Support'. Any accurate rights model must be able to account for these normative capacities and relationships. Legal liberties can be used to: (i) *invoke* one's RCTD publicly and (ii) *claim* rights directly from duty-bearers or others. Rights are often brought into people's considerations in these ways. Further, these liberties neither rely on institutional or

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[36] See, Halpin (1997), *supra* note 35 at 39. Joseph Raz says something similar when discussing the law more generally. 'It can be said that all the investitive, divestitive, and constitutive laws concerning one legal right, all the laws instituting one legal right in one legal system, define that right in that legal system'. Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) at 177. He also states that '[w]e should not conceive of the law as a set of isolated norms each having its own separate and independent function, but as a set of (potentially conflicting or reinforcing) reasons which together determine what is required by the law'. Raz (2009), *supra* note 12 at 33.

authoritative agents (courts, administrative tribunals, tribal leaders, etc.) nor the threat of their involvement or participation for their employment.

Here is an example of ***claiming*** rights directly from a duty-bearer. Sally lends her next-door neighbour Peter her lawnmower for a couple of weeks. Two weeks later, Sally calls a forgetful Peter on the telephone and says 'You must return my mower…'. This remark is neither a mere request nor simply an imperatival command. This is because it reminds Peter of what he *already* owes Suzy, and it might provide him with an incentive to fulfill his duty (i.e., to return the item) sooner than he might otherwise have done.

Here is an example of ***invoking*** rights. Peter has not returned Sally's lawnmower for several months. Sally would like it returned, but has been unsuccessful in getting the item back from him. Frustrated, she sends an email to their whole neighbourhood stating: 'Peter from Logic Lane will not return the mower I lent him a few months ago. Can you tell him to return it to me if you see him? Be wary of lending him anything of yours!'.

Why do claiming and invoking rights in these fashions differ? Are there actually two distinct concepts represented here? When is something a case of invocation rather than claiming, and vice versa? Moreover, what can these accomplish?[37] Not only are the two modes communicated with different goals in mind, but their content also differs. This kind of *claim* of right directly asserts that something is due to the claimant, or another party. Its content concerns that which is due. By contrast, an *invocation* of right asserts that, because something is due, some further thing ought to be done, believed, or understood.

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[37] This section only aims to provide a rough outline of the two modes. Even so, the following questions are important for further investigation. Question 1: Are there not rather *four* kinds of rights usage being discussed here: two ways to invoke and two to claim, each with one directed to the duty-bearer and another to some other group of people? Question 2: When you communicate your rights to a legal official, must you claim it, or is it possible just to invoke it? Does the answer differ if the communication is posed to a judge/arbitrator/mediator in a legal case, rather than posed to sorts of officials, like a police officer?

Invoking and claiming rights in these ways can influence other people's attitudes, views, and actions. They enable someone to *try* to demonstrate an entitlement to receive something that is *already* due. Claiming a right may instil in the duty-bearer a renewed sense of obligation. Invoking a right may instil a sense of correctness, appropriateness, or validity (e.g., that the duty-bearer should do φ for the right-holder) in those who hear or learn about the claim. In turn, duty-bearers can be persuaded to act simply by bringing rights to their attention in these ways.[38]

*Claims* of right can have legal consequences because they can influence duty-bearers' legal reasons to act. They can trigger a 're-cognition' of their legal requirements. For example, duty-bearers may believe that while the claims are morally dubious, and that the system of property and contract law is abominable, etc., that there are nevertheless good legal reasons for responding and conforming. *Invoking* legal rights – your own or another person's – can also help shape other people's views, e.g., a given community's. It can influence recipients' judgements about: what the right-holder is entitled to receive or do; how other parties ought to act; and whether certain people should be praised or blamed for their behaviour.[39]

The impact of such invocations upon (i) a duty-bearer's sense of obligation and (ii) the duty-bearer or other parties' sense of the correctness of the communication and their resulting inclination to act fall on a spectrum of degrees of forcefulness. As mentioned in

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[38] Duty-bearers may act out of a sense of obligation, out of self-interest, social, political, or legal pressure, or from a combination of these factors. This is akin to what is sometimes styled the Any Reason Thesis: allegiance to a legal system (and conformity with its norms) can be for any reason, e.g., calculations of long-term interest, concern for others, tradition, a desire to conform, etc. See HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) at 203.

[39] Of course, these need not be the only aims behind claiming or invoking rights. For example, a claimant might also be seeking public recognition or validation of other sorts. See Chapter 3 § IV.1.

Chapter 4, however, accounting for the quality of 'force' or 'weight' in a philosophical model of rights is notoriously difficult.[40] This is for at least two reasons. First, it does not seem possible to determine or quantify a given agent's subjective sense of the normative force of an invocation or claim of right. A communication to Peter may have a tremendous impact upon him, leading him to re-deliberate about his future actions, and to conclude that he must fulfil his legal duty as soon as possible. Yet the identically worded communication made to Betty, a similarly situated duty-bearer, may have a negligible impact upon her thinking and actions. Similarly, Peter might respond differently to Sally if presented with same claim at a different time. Second, it is unclear how to weigh rights, or claims of right, abstractly, let alone against known or unknown countervailing considerations, e.g., in relation to other laws, rights, or a given moral, legal, or social conflict. Despite these difficulties, claims and invocations of right can have normative force: again, it is conceivable that some people can be influenced by such remarks and that they would not have been motivated to modify their plans and actions but for such communications.

## § V. Characterizing the Two Modes

There are two issues regarding these sorts of claims and invocations of right. First, with which normative positions ought they to be identified? Second, how can we be certain that they are *legal* ones? Putting aside the second issue for the moment, good starting points for the first inquiry about normative positions seem to be ascertaining whether such claims and invocations can modify parties' positions and whether they possess or entail compulsory force vis-à-vis duty-bearers or third parties. For, as will be explained below, if these claims and invocations of right lack modificatory capacities or compulsory qualities, then it would

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40 Chapter 4 § II.

be a mistake to identify them with RCTDs, powers, or combinations thereof.[41]

Modifying the lawnmower example, imagine that Sally and Peter live in a Common Law jurisdiction with civil and criminal law statutes of limitations governing actions concerning personal chattels (for theft, conversion, actions for replevin, detinue, trover, etc.) of six years, but no adverse possession rule for chattels. Peter has the item at his house, but Sally retains superior title. Six long, cruel years of mowerlessness pass for Sally. Even so, she cannot successfully sue Peter to get her property back, and nor can the state convict him of theft, if he raises the relevant statutes of limitations as defences. Undeterred, Sally calls Peter on the phone, claiming the chattel back. She reminds him that the mower is her property and that it was only loaned to him. Does Sally's communication have any *legally* compulsory quality? If so, how should it be explained and characterised?

Here are some possible explanations. Option I: Sally uses a legal power to create a new duty for Peter, one differing from his original duty to simply return the mower. In Hohfeldian terms, Sally used a power to create for herself a new claim (a RCTD) – albeit one that *might* be irremediable in the courts given the statutes of limitation – and a new correlative duty in Peter. This does not, however, nullify the pre-existing claim or duty. Option II: Sally uses a power to modify Peter's original duty and her own correlative Hohfeldian claim (RCTD). Option III: Sally uses a Hohfeldian claim to *make* a claim reaffirming Peter's duty. Option IV: Sally uses liberties to assert or reaffirm Peter's duty.

**Options I-II**: The first two candidates are powers. Does Sally's phone call alter the parties' legal relations, either by adding new positions, or by modifying the parties' original

[41] This preliminary standard of assessment should not be taken as confusing *normative* and *physical* powers. The analysis presumes a duty's compulsory quality in normative terms. The matter under consideration here, rather, is whether issuing a communication – an invocation or claim – to fulfil a duty *also* has a compulsory quality.

ones? How exactly would either an additional duty, or a modified one, differ from the original? On the one hand, it might be thought that the communication alters the timeframe for the chattel's return. Perhaps Peter's duty is modified from being required to return the item in, say, a reasonable period of time (even given his tardiness till now) to instead returning the item forthwith. As Sally's ownership status has not been altered (again, there is no adverse possession rule regarding personal chattels in this hypothetical jurisdiction), there seems to be no reason why she could not unilaterally alter Peter's relationship to her vis-à-vis the mower.[42]

These power-based explanations are unconvincing because there is no reason to think that Sally's communication changes the parties' legal positions in either of these ways. Peter's duty to return the item is already well past due. As he already ought to return the mower forthwith as a matter of the original duty, there seems to be no need to understand Sally's communication as altering the content or nature of his legal duty in this regard. Of course, this does not evidence the absence of powers. If Peter already must so act, however, then even if they do obtain, such powers would be explanatorily superfluous in this case.

**Options III-IV**: Alternative explanations are that Sally's attempt to catalyse Peter's duty compliance reflects something already inherent in Peter's existing duty: he already owes her the mower. So, Sally uses either (III) her existing Hohfeldian claim, or (IV) liberties in order to press for the item's return. In turn, Peter is either bound to accede to Sally's communication as a function of his existing duty to return the mower, or he additionally bears some normative incapacity or lack of entitlement (e.g., Hohfeldian 'no-rights') to prevent her from making such communications to him.

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[42] This, if we assume her property rights track something like Tony Honoré's eleven incidents of ownership. Anthony Honoré, 'Ownership', in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (OUP 1961).

Assessing these two options depends in part upon how one understands a *Hohfeldian* claim. It is actually a contested concept. Here is why. As mentioned in Chapter 3, scholars often employ an Active-Passive distinction to help explain different kinds of normative positions. However, they dispute whether a Hohfeldian claim is active or passive.[43] On the 'active' view, a claim-holder is not only entitled to another party's duty-based action or forbearance, but he or she can also use the Hohfeldian claim to *make* a claim of right – where 'claiming' generally means initiating a legal proceeding. Those who interpret a Hohfeldian claim thus sometimes deem it to be a mere species of power.[44] On the 'passive' view, by contrast, a Hohfeldian claim simply marks a party as the intended recipient of a correlative duty-bearer's action or forbearance. Hohfeldian claims do not entitle or authorise their holders to act; you cannot *make* claims using a Hohfeldian claim. John Finnis explains the notion in this way:

> A [claim] is always either, positively, a right to be given something (or assisted in a certain way) by someone else, or, negatively, a right *not* to be interfered with or dealt with or treated in a certain way, by someone else. When the subject matter of one's claim of right is one's own act(s), forbearance(s), or omission(s), that claim cannot be to a claim-right, but can only be to a liberty or, in the case of juridical acts, to a power.[45]

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43 Proponents of the 'passive' view of Hohfeldian claims include: Albert Kocourek, 'The Hohfeld System of Fundamental Legal Concepts' (1920) 15 Illinois L Rev 24, 25; Glanville Williams, 'The Concept of Legal Liberty' (1956) 56 Columbia L Rev. 1129; Wellman (1985), *supra* note 1 at 65; Andrew Halpin, 'More Comments on Rights and Claims' (1991) 10 Law and Philosophy 271, 293; Kramer (1998), *supra* note 35 at 13-14, 22 n 8; Vivienne Brown, 'Rights, Liberties, and Duties: Reformulating Hohfeld's Scheme of Jural Relations?' (2005) 58 Current Legal Problems 343; Rainbolt, *supra* note 10 at 32-3.

Proponents of the 'active' view include: Nigel Simmonds, 'Rights At the Cutting Edge' in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 223 and 223 n 137; Pavlos Eleftheriadis *Legal Rights* (OUP 2008). The American Legal Realists interpreted Hohfeldian claims as not only active, but invariably *enforceable* (if not also invariably *remediable*). See e.g., Max Radin, 'A Restatement of Hohfeld' (1938) 51 Harvard L. Rev. 1141 1148, 1152; Karl Llewellyn, *Bramble Bush: On Our Law and its Study* (Oceana Pub 1996) at 96. The active view of a Hohfeldian claim has roots in the German concept of 'anspruch', which was often taken to mean both an entitlement to another's duty and the capacity to claim. See Chapter 2's Appendix 2 for some examples (e.g., on Ernst Bierling)

44 E.g., Simmonds, *supra* note 43 at 223.

45 Finnis, *supra* note 23 at 200.

Finnis says that a claim of right concerning the claimant's own behaviour cannot be 'to a' Hohfeldian claim. Instead, he should have said that such claims of right are neither made by utilising Hohfeldian claims, nor undertaken simply for the sake of garnering for oneself a Hohfeldian claim (for claimants, in Finnis' cases, want not only the liberty or power to act, but probably also Hohfeldian claims against non-interference by others).

The best reason to endorse the 'passive' interpretation over the 'active' one is that adding the capacity to claim as a feature of the concept of a Hohfeldian claim renders it subject to decomposition into more basic components. A Hohfeldian claim then becomes a composite of: (i) the entitlement to another's required action or forbearance and (ii) the capacity to claim. Not only does this mean that a Hohfeldian claim fails to be 'conceptually basic' (a meta-theoretical desideratum Hohfeld thought his conceptions should meet), but the capacity to claim is also *better* explainable in terms of other normative positions, i.e., liberties and powers. This interpretation of a Hohfeldian claim, and any comparable conception of an 'active' RCTD, eliminates Option III. Concerning Option IV, *Hohfeldian* liberties lack modificatory or compulsory qualities. A liberty alone cannot bind another party. So a liberty to claim could neither modify parties' normative positions, nor compel another party to act or forbear from acting.[46]

The key to accurately characterising the two specified modes of claiming and invoking rights outlined above, and identifying to which normative domain (law, morality, etc.) they belong lies in the fact that Sally's very entitlement to communicate with Peter, and not just its normative force, itself requires an explanation. The very act of communicating requires a normative capacity to be undertaken. This serves as the strongest basis for

[46] There are of course alternatives to the Hohfeldian conception of 'a liberty', including ones positing that liberties can directly correlate with other parties' duties, e.g., against interference. See, e.g., Hart (1982), *supra* note 19 at 172; R.E. Robinson et al, 'The Logic of Rights' (1983) 33 U. Toronto L.J. 267, 269.

identifying the types of rights usage in question with liberties.

Many rules place limits on communications, or allow for such limitations to be generated. Some laws ban certain kinds of communication based on content (hate speech, libel laws, gag orders, etc.), or impose time, place, or manner restrictions (e.g., prohibiting telemarketers from telephoning private residences at certain times of the day). Other laws make it is illegal and/or tortious to contact people at all e.g., restraining orders. Still others allow parties to make contracts with duties requiring one or both parties' silence (duties against making certain sorts of communications) on specific matters. Parties' legal positions can also be changed through *what* is said, e.g., by soliciting someone to enter a contract the parties can become and offeror and offeree.

To make a claim of right, one must be entitled both to communicate with the other party and to convey the relevant kind of speech. Thus, at least two liberties are required to explain Sally's communication to Peter about the lawnmower: one normatively enabling her to undertake some means of communication, and a second allowing her to convey certain content. In turn, Peter's position reflects Sally's lack of duties to avoid: (I) attempting to contact him via the specific medium (whichever it is) and (II) communicating that kind of speech to him. If this characterization is apt, then there are ways to claim rights that only involve liberties, and which constitute alternative modes of legal rights enforcement.

## § VI. Objections and Responses

### § VI.1 Objections

*Objection* #1: There seem to be cases of rights invocation that would be inappropriate to identify as rights exercise or enforcement. For example, imagine that Lord Bob walks into a bar. Eager to impress, Bob invokes the fact that he owns Downton Abbey (which is true). He proves his ownership by showing patrons the deed, photos of him in the house, etc., which he

always carries around on his person for just such purposes. While Bob has, in a sense, 'invoked' his property rights to the others, it seems odd to say that he 'exercised' his *property* rights here, let alone 'enforced' them. If this involves a different sense of 'invoking' rights than that outlined above, what is the distinguishing basis? If it is the same sense, what makes it a token instance of exercise or enforcement?

*Objection* #2: The idea that claims and invocations of right can have varying degrees of normative force does not contradict the idea of duties being either exclusionary or weighty reasons. Still, some legal philosophers may object that identifying these sorts of claims and invocations as modes of rights enforcement is part of a misguided effort to identify or construct legal, moral, and social analogues to standard or paradigmatic legal enforcement mechanisms. Joseph Raz, for example, believes it is erroneous to hold that there are invariably moral or social powers by which to protect or enforce moral rights. Treating enforcement mechanisms as being constitutive of the concept of a legal right, he furthermore thinks, reduces the latter to such capacities, and likewise duties to liabilities – in either the Hohfeldian sense of 'liability' to punitive actions, or to the punitive actions themselves. Once again, that sort of account constitutes a Sanction Theory of law and morality.[47]

**§ VI.2 Responses**

The particular senses of claiming and invoking rights outlined above differ based on the intended addressees and the reasons why each communication is made. A liberty-based *claim* of right is made in order to motivate a duty-bearer to fulfil his or her duty. An *invocation* of right aims to influence other parties, perhaps in order to gain their support or assistance, and perhaps as indirect way to motivate the duty-bearer. Claiming and invoking

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[47] See, e.g., Joseph Raz, 'Legal Rights', in *Ethics in the Public Domain* (OUP 1994, Revised edn) at 241-2; Raz (1984), *supra* note 14 at 131.

rights in these ways are normatively governed actions undertaken on behalf of some predicate RCTD. All such liberty-based forms of rights claiming, again, are instances of rights enforcement efforts so understood. It is less clear whether all liberty-based rights invocations must be, though. Nevertheless, distinguishing Lord Bob's case from the sense of invocation outlined above is not too difficult. Lord Bob has 'invoked' his property rights, but not in the particular sense discussed in this chapter, because he has done so for the sake of something else (i.e., to impress others), and not on behalf of his rights (e.g., the use of his property, to vindicate his title, etc.).[48]

Concerning the second objection, whatever its merits when aimed against rights models and theories holding that rights in any domain include or are enforcement *powers*, it is ill-placed when considering *liberties* to claim or invoke rights. Such communications are not sanctions for rights violations, but rather legal, moral or social techniques for supporting rights. These conceptions neither posit nor entail the ideas that: trying to trigger or influence public judgement must be akin to (the threat of) a sanction; that duty-bearers will be motivated primarily by fear of sanction; or that duty-bearers are motivated primarily or solely out of fear of liability more generally, rather than out of a sense of duty – the staples of a Sanction Theory. The idea is simply that such communications *can* be the normative – including legal – basis for motivating an action or belief in the public at large, or some smaller group of recipients of the information, including duty-bearers personally. Perhaps some duty-bearers do sometimes fear a group's judgement and act on that basis (e.g., modifying their course of actions in order to fulfil their duties), perhaps not. Even if they did,

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[48] Must rights be used solely for the sake of furthering their contents? No. Again, people can use their rights to extort or punish others, to seek publicity or recognition, etc., and not because they are primarily concerned with either their right's content or vindicating their right-holder status. Must all forms of claiming or invoking rights always be done for such purposes, though? No. Even so, there are *distinct senses* of claiming and invoking rights which do serve such ends, aims, or roles.

that is no reason to deny alternative bases or motivations for their actions, such as a desire to comply with the law.

Furthermore, the very idea of a claim or invocation of right forming a perimeter of support by a second normative position means that any accusation that the view reduces 'a right' to a capacity to claim or invoke would be nonsense. (Hence, these conceptions also neither entail nor require denying that duties are conceptually distinct from other positions, e.g., a liability, or that they bear a unique normative force).

Invocations and claims of right cover a large variety of actions. They are also not restricted to the right-holder's personal actions. Other parties can claim and invoke on a right-holder's behalf. Just as trustees, legal guardians, and state officials can sometimes commence legal proceedings in the name of another party's rights, so too can one sometimes invoke or make claims on behalf of another person's rights.

Of course, not all communications referencing another's rights are instances of the two modes of rights enforcement at issue here. Additionally, it seems plausible that one could also invoke or claim one's immunities, powers, or other liberties, and not just RCTDs. For example, *A* gives *B* an on-going license to cross the former's land, Blackacre. *A* forgets and chastises *B* upon seeing the latter on Blackacre. *B* reminds *A* of the license having been granted, changing *A*'s tune. Furthermore, claims and invocations of right do not necessarily determine outcomes. Claiming is simply a means by which to *try* to get a right recognised, remedied, or otherwise vindicated. Legal enforcement mechanisms, generally, are only tools by which one can attempt to effectuate a right. Just like the powers to enforce or waive a RCTD, liberties to claim or invoke are not tickets to a guaranteed remedy, but mere means by which to try to vindicate rights.

## § VII. Conclusion

There are alternative ways to try to vindicate legal rights other than by commencing third party dispute resolution processes like lawsuits or arbitration proceedings. Rights can be invoked to others or claimed directly of duty-bearers. Although less potent tools than enforcement or waiver powers, legal liberty-based claims of right need not be devoid of normative force or potential. Such communications can renew duty-bearers' sense of legal obligation and remind them of what is due. They can stimulate duty-bearers' deliberations about how to act and when, e.g., to return a borrowed item sooner than they otherwise might. Invocations of right can also influence other parties' beliefs about what is due to a right-holder, about a duty-bearer's (inappropriate) conduct, and about whether they ought to assist the right-holder.

# Chapter 8: The Conceptual Contingency of Perimeters of Support

## § I. Introduction

This chapter investigates whether liberties by which to make claims or invocations of right must obtain whenever a right (RCTD) does. It might be thought that such liberties are either constitutive features of rights, or invariably associated with them. Alternatively, it might be held that such liberties are essential features of, invariably associated with, legal rights exclusively. Whereas most of the philosophy of rights analyses the relationship of enforcement *powers* to rights, this chapter analyses the relationship of such legal enforcement *liberties* to rights.

Section II addresses certain Hohfeldian arguments: ones aiming to show that relationships between claims and liberties are always conceptually or logically contingent. If correct, they would entail that all perimeter of support and protection relationships are merely contingent. However, the Hohfeldians' arguments suffer from two kinds of flaws, which make it impossible for them to make their case. Section III therefore presents novel arguments to establish the conceptually contingent nature of any relationship between rights and liberties used to claim and invoke (i.e., to form 'perimeters of support' for rights). These arguments overcome the Hohfeldians' difficulties because they concerning rules proscribing *all* potential liberties of support, and not just a given token.

There are a couple of ways to respond to the new arguments. One is a standard anti-essentialist critique – buttressed here by dubiousness about (what might be deemed) wildly implausible hypothetical cases (ones not according with our 'intuitions'). A second way, which will only be touched upon, is to suggest that connections between rights and liberties invariably obtain because these normative positions can be used across different normative domains or systems.

## § II. *Pace* Invariable Support Perimeters Part I: Hohfeldian Arguments

Most Hohfeldians explicitly endeavour to show that any connection between claims and liberties is for contingent, rather than logically/conceptually necessary, reasons. Hohfeld himself suggests there are no such necessary connections amongst *any* of the schema's eight positions, save for that of being correlatives and 'opposites' (logical contradictories).[1] Even so, neither he nor his adherents demonstrate this general proposition for all possible relationships amongst normative positions (e.g., between a liberty and an immunity, between a claim and an immunity, etc.). If, though, all such relations are conceptually contingent, then all Perimeter of Support relationships are too. Let us now address the Hohfeldian arguments. The first three are Hohfeld's own.

**Case A: Hohfeld's Salad**

Liberties can obtain without associated Hohfeldian claims. You can be free to undertake an action (or to forbear from acting) without being free from interference, say, while doing so. For example, there is a difference between having a claim to a salad and the liberty to consume it. One may have a liberty to eat the salad without also having a claim 'to do' so.

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[1] Wesley Newcomb Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale L.J. 710, 745-7. ["Hohfeld *FLC #2*"]. '(d) A multital right, or claim, (right in rem) should not be confused with any co-existing privileges [liberties] *or other jural relations* that the holder of the multital right or rights may have in respect to the same subject-matter'. *Id*. at 745 (emphasis added). See also Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L.J. 16, 35-7. ["Hohfeld *FLC #1*"]. All of Hohfeld's examples concern either relationships between claims and liberties, or powers and liberties by which to exercise them. See, e.g., Hohfeld *FLC #1* at 52; Hohfeld *FLC #2* at 756-7. In 1909, before he had worked out his schema of jural relations, Hohfeld suggested that breaches in private law primary rights and duties invariably give rise to secondary rights and duties (more accurately, a necessary relationship between primary claims, secondary claims, *and* powers on the one hand, and primary duties, secondary duties, *and* liabilities on the other). Wesley Newcomb Hohfeld 'Nature of Stockholders' Individual Liability For Corporation Debts' (1909) Columbia L. Rev. 285, 293-4.

Hohfeldians rarely discuss other relationships. On the connection between duties to act and liberties to undertake the actions necessary to carry out the duty, see, e.g., Hillel Steiner, *An Essay on Rights* (OUP 1994) at 74-85 ["Steiner (1994)"]; Nigel Simmonds, 'Rights At the Cutting Edge' in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 162, 183-6 ["Simmonds (1998"]. On immunities purportedly being necessary for claims to count as 'genuine' ones, see Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281, 2957. For the notion of duties delimiting the usage of powers ('directed powers') by an anti-Hohfeldian, see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994, Revised edn) at 241-4.

For example, *A* offers *B* some salad. *A* makes the offer on the condition that, while *B* can consume what he can of the food, *A* does not promise to refrain from interfering with *B*'s consumption of that salad.[2] It being *A*'s property, *A* can rightfully grab the salad bowl from under *B*'s nose, i.e., legally interfere with *B*'s salad eating. *B* thus has a liberty to eat the salad but no claim to do so without interference.

**Cases B & C: Blackacre and Whiteacre**

One can also have a Hohfeldian claim without a corresponding liberty. Hohfeld's remarks on the matter actually cover two cases. The first concerns someone having a claim but not a liberty, while the second is about the possibility of having a liberty to φ and a 'no-right' to φ concurrently.

> *A*'s privileges [liberties] are strikingly independent of his rights or claims against any given person, and *either might exist without the other*. Thus *A* might, for $100 paid to him by *B*, agree in writing to keep off his own land, Blackacre. *A* would still have his rights or claims against *B*, that the latter should keep off, etc.; yet, as against *B*, *A*'s own privileges of entering on Blackacre would be gone. On the other hand, with regard to *X*'s land, Whiteacre, *A* has, against *B*, the privilege of entering thereon; but, not having possession, he has no right or claim, that *B* shall not enter upon Whiteacre.[3]

**Case B** concerns *A*'s land, Blackacre. *A* has a claim against *B's* entrance, but does not have a liberty vis-à-vis *B* to personally enter Blackacre. **Case C** concerns a third party's land, Whiteacre. There, *A* has a liberty vis-à-vis *B* to enter the third party's land, but does not have a claim against *B*'s entering Whiteacre. Why, in Case C, does *A* have a liberty? For Hohfeld, the answer is because *A* does not owe *B* a duty to forbear from entering Whiteacre, even though *A* owes such a duty to *X*, the landowner. For Hohfeld, the absence of a duty entails

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[2] Hohfeld *FLC #1*, *supra* note 1 at 35.

[3] Hohfeld *FLC #2*, *supra* note 1 at 747 (emphases added). Cf. Hohfeld *FLC #1*, *supra* note 1 at 32-3, 52.

the existence of a liberty, and the *A-B* relationship does not define the *A-X* relationship, or vice versa.

**Cases D & E: Kramer & Singer's Remaindermen**

The following Hohfeldian arguments continue in the same vein. They involve a remainderman and trespassers.[4] Joseph Singer provides the first one, our **Case D**. Having the right to keep trespassers off some land does not entail that you also have a liberty to use the land yourself. For example, a remainderman may have no liberty to enter the land, but may have a Hohfeldian claim to keep trespassers off.[5]

Matthew Kramer thinks Singer's point is a glib one because the rights in question have different contents: keeping people off the land versus going on it oneself. (This criticism applies equally to Hohfeld's Blackacre case). Singer, he believes, ought to have gone farther by demonstrating that a right to be free from interference with *one's own* entry onto some land does not entail that one also has a liberty to enter the land.[6] While Kramer does not offer examples, Hohfeld's **Case C** seems to fit the bill: *A* has a liberty vis-à-vis *B* to enter Whiteacre, but no liberty to do so vis-à-vis *X*, Whiteacre's owner. It satisfies Kramer's suggested improvement of an identity of contents for the different normative positions (here, of entering land).

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[4] A remainderman is someone designated by a trust or will to inherit property after another person, who is also named in such a legal instrument, ceases to have a right to (part of) it. For example, a husband may stipulate in his will that, after he dies, his wife may live in his house until she herself dies, after which his son may inherit the property. The son here is the remainderman.

[5] Joseph Singer, 'The Legal Rights Debate from Bentham to Hohfeld' (1982) Wisconsin L. Rev. 975, 988.

[6] Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer (ed), *A Debate Over Rights* (OUP 1998) at 16-17 ["Kramer (1998)"].

**Case F: Rainbolt's Lake**

George Rainbolt aims to show that: (I) singular ('atomic') Hohfeldian claims can exist independently of any other normative positions; (II) that such independent claims constitute genuine 'rights'; (III), and that rights are neither necessarily enforceable nor exercisable.[7] His main argument is as follows. *A* is going to visit Squam Lake. That particular lake is of sentimental value to *B*. *A* promises *B* that, when he gets to the lake he will dip his feet in the water. Thus, *A* has a duty to *B* to do so while *B* has a correlative Hohfeldian claim that the dipping be done. This is all that is required for *B* to have 'a right'. *B* need not additionally possess a power to sue *A* for failing to perform, since *B* may waive the power. Nor must *B* possess an immunity from *A*'s unilaterally extinguishing the duty by some means.[8]

Why does *B* have 'a right', despite lacking additional positions? Why does a singular, passive Hohfeldian claim count as 'a right'? At first, Rainbolt seems to punt to Hohfeld for the idea that it is a right *because* it correlates with a duty. *A* has a duty to act (to dip his feet in the lake), and duties are the "invariable correlative" of rights.[9] Why is *that* relevant or

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[7] George Rainbolt, *The Concept of Rights* (Springer 2006) at 42-44 ["Rainbolt (2006)"]. Rainbolt's main argument against all rights necessarily being 'enforceable' is on page 43, but he goes on to mention that rights are not always 'exercisable' either on page 44. Even so, he does not distinguish the two ideas. Indeed, his latter argument actually suggests an identity because he specifically aims to rebut Hillel Seiner's view that all rights are exercisable and quotes Steiner's equation of exercise and enforcement. *Rainbolt* (2006) at 41, 241, citing Steiner (1994), *supra* note 1 at 56-7.

[8] *Rainbolt* (2006), *supra* note 7 at 43. Rainbolt's argument is superficially flawed. While it aims to show that a singular Hohfeldian claim can be 'a right' without reliance on associated normative positions (liberties, powers, etc.), his argument presumes, without need or warrant, the existence of a waiver power. One cannot show that an 'atomic' claim is 'a right' by positing the existence of a distinct power (to waive). That only helps buttress the *opposite* view: the idea that rights are always enforceable, and thus aggregations of different Hohfeldian positions ('complexes'). Let us improve Rainbolt's argument, then, by assuming that *B* has neither enforcement nor waiver powers.

[9] *Id*. at 43, *quoting* Hohfeld *FLC #1*, *supra* note 1 at 31. Rainbolt seems to contradict himself on the matter, though. Despite the Squam Lake example being an argument in favour of 'atomic' claims, he nevertheless holds that '[n]o actual rule system gives people a single claim all by itself'. *Id*. at 43. These propositions do not seem reconcilable, e.g., by framing one or the other as a conceptual claim and the other as an unsubstantiated empirical assertion, since Rainbolt considers the example to be a bona fide *legal* one. If the lake example is sound, then it is conceivable that a legal system could recognise the agreement as a legal contract, even if the parties could not enforce it (and if other legal considerations, such as consideration, are

required for something to count as 'a right'? Hohfeld gives no answer, but Rainbolt does. His 'theory' of rights is that, by their nature, rights impose justified, normative constraints on other parties. All that is required for one party to have 'a right' is for a second person to (justifiably) bear a normatively constraining position correlating to the first party's, and where that normative constraint is justified by being predicated upon *some* feature or other of that first person. A duty is one kind of normative constraint. While not all duties have correlative positions, for those that do such correlative positions are 'rights'.[10]

### *Pace* the Hohfeldians

All the Hohfeldian arguments listed above suffer from at least one of two flaws. **Flaw 1**: They fallaciously assume that, because a token of one type of normative position does not obtain, that no other tokens of that same type obtain either. This is of course inadequate to make the case (of relationships between type positions always being conceptually/logically contingent). Just because a right-holder lacks, abandons, or forfeits (e.g., by contracting it away) a given liberty, it does not follow that he or she lacks others.[11] This is like trying to demonstrate that no birds live in Europe by showing that there are no American bald eagles there.[12]

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required and met, e.g., *B* giving *A* something in return for the toe-dipping).

[10] *Id*. at xiii, 118.

[11] For a similar view, see Andrew Halpin, *Rights and Law: Analysis and Theory* (Hart Publishing 1997) at 38 ["Halpin (1997"].

[12] To be fair, Hohfeldians are not simply trying to establish the lack of logical connections or entailments here. Their arguments aim to serve several goals concurrently. **Goal I**: To show that possessing a right against one ligation-bearer does not entail possession of rights *against additional parties* in order to buttress the first one — in part, because the right does not necessarily hold against everyone. One's possession of multiple rights in a given state of affairs does not entail that the right will obtain against anyone other than the specific ligation-bearer. This forms part of the interpersonal view of jural relation that Hohfeld endorses, along with the strictly bilateral view of such relations (i.e., right and duties only obtain between two people. *A*'s right that *B* stay off his land differs from *A*'s duty that *C* stay off. The rights are similar in content, but distinct.) Hence, having a right does not guarantee a particular social outcome; just because one has a right does not mean one's aims

**Flaw 2**: Hohfeldians try to demonstrate the conceptual contingency of such relationships by showing that party *A* may have one kind of right against party *B*, but not against party *C*. However, the structure of such arguments entails that they will invariably fail to make their case. To succeed, they must instead show that party *A*'s various positions vis-à-vis one party, *B*, are all contingently related. Let us address the specific examples.

**The Salad Example**. Hohfeld says someone can have the liberty to eat a salad but not claim to do so without interference. His argument thus wrongly implies that, because some means of interfering are available to *A* by which to reclaim the salad from *B*, all possible means are available. As HLA Hart, Andrew Halpin, and Matthew Kramer argue, this is technically false.[13] While the salad owner *A*, who gives *B* the liberty to eat it, can try to take the salad back, *A* cannot assault *B* in order to do so. *B* has claims against that. For example, *A* cannot punch *B* and then grab the salad. Hence, *B* has *some* right to consume without interference – although not, of course, against all possible means of interference.

One might object that this argument trades on an ambiguity in the notion of 'a right against interference' and that there is no claim to consume without interference here. Instead, there is simply a right against being assaulted. *A* owes *B* no duty to forbear from interfering with the salad eating per se; the duty not to assault *B* has nothing to do with the particular

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cannot be thwarted. **Goal II**: As already mentioned, to show that no Hohfeldian position is logically entailed from the possession of any other kind of Hohfeldian position (be it a right or ligation). **Goal III**: To resolve certain paradoxes about the usage of the term 'right' in certain cases: (***Paradox Type A***) where it might be said that one has a right but does not have a right at the same time; and (***Paradox Type B***), where it might be said that one has a legal right to do wrong. See, e.g., Kramer (1998), *supra* note 6 at 4, 19, 4-5, 17 n 6, 62-3, 64-5, 68-72, 82-3, 99-100, 106; Simmonds (1998), *supra* note 1 at 152-5, 220, 223 and 223 n 137; Hillel Steiner, 'Working Rights' in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) at 242 n 16, 245 n 20.

[13] HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982) at 171 [Hereinafter, "Hart (1982)"]; Andrew Halpin (1997), *supra* note 11 at 37-41; Kramer, (1998), *supra* note 6 at 12 and 12 n 3; Matthew Kramer, 'Review of Rights and Law: Analysis and Theory by Andrew Halpin' (1999) 62 Modern L. Rev 314, 316.

activity of salad consumption. Thus, it is mistaken to characterise that duty (or a more specified version of it, if construed as a general duty) as correlating with a right to non-interference with salad consumption.

The objection is unconvincing. The claim against being assaulted indirectly protects *B*'s liberty to eat the salad. The 'non-interference' in the claim to uninterfered with consumption concerns, at least, assault (but not *A*'s snatching the salad without touching *B*). The claim bears some sort of a relationship (one of protection) to the liberty, howsoever mediate.[14]

**Case B**: **Blackacre**. Although vis-à-vis *B*, *A* cannot go on to his own land, Blackacre, *A* has not necessarily lost any of the other liberties usually associated with ownership. For example, the right to alienate the property includes liberties: if *A* can sell Blackacre legally, for Hohfeldians it means that *A* has no duties not to do so. Of course, this does not prove that other liberties, including the one just mentioned, exist for logically necessary, rather than contingent, reasons either. Even so, such a demonstration either way is not required for the more limited goal of undermining Hohfeld's argument.

**Cases C & D**: **Whiteacre & the Remaindermen**. These cases reflect the second kind of flaw outlined above. Singer's Remainderman argument is indeed unhelpful because it concerns one's party's normative positions vis-à-vis two distinct parties. The same holds for Hohfeld's Whiteacre case, where two trespassers wish to enter a third party's land. In Hohfeld's view, *A* has a claim against interference whilst interloping by one party, but no liberty to actually interlope vis-à-vis the landowner. As these concern different legal

[14] See Kramer, (1998), *supra* note 6 at 16-17 n 6 on the issue of characterising rights and duties against interference. Kramer notes that, for such arguments, one need only show that one's characterisation of the parties' positions is accurate, not that it is *uniquely* accurate.

relationships, however, what is the significance?

At best, the Whiteacre example shows that you can possess a liberty vis-à-vis one person yet not have one vis-à-vis a second. *A* has a liberty to go on to Whiteacre vis-à-vis *B*, but not vis-à-vis *X* (because *A* owes a duty to *X* not to go on the land). This says nothing about the general nature of the relationship between Hohfeld claims and liberties.[15] *A* has a claim against *B* not to interfere with the former's entering *X's* Whiteacre, not simply a liberty, because *A* has a tort law right against being assaulted, even though *A* has no liberty vis-à-vis *X* to enter the land. This is a perimeter of protection relationship.

According to Nigel Simmonds, these sorts of Hohfeldian arguments are meant to show that rights are neither inviolable, and nor are they composed of logically necessary parts. The components are simply the product of (historically contingent and perhaps also erroneous) judgements of policy and justice. Breaking up rights into distinct normative positions (e.g., claims and liberties) was meant to be an argument against those, like Kantians, who either denied the difference, or thought they invariably co-obtained.[16] But Hohfeld's predecessors never denied that one person might have distinct legal relationships with different parties. Probably no one ever really disagreed that you could have a right against *B* but not against *C* (and indeed have a different relationship with *C*).

The Remainderman argument also suffers from the first flaw (no birds because there

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[15] Notice, furthermore, the ambiguity in Kramer's 'right to be free from interference' with one's entry onto some land: is it one Hohfeldian kind of normative position or multiple? Kramer thinks it is only a claim against interference, where the liberty forms the content of that claim: a claim against one's interfering (physically, etc.) with the RCTD-holder's entrance on to the land. That content (claim against *physical assault*) shapes the claim's extension, for there may be other legally permissible ways by which to interfere with the attempted ingress, e.g., by calling the police, warning the landowner, etc. Some scholars object that a claim alone cannot suffice to explain such '*freedom* from interference'; freedom from interference whilst doing activity φ without *being entitled to do* φ is, for them, a conceptual error. See, 15e.g., R.E. Robinson et al, 'The Logic of Rights' (1983) 33 U. Toronto L.J. 267, 269.

[16] Simmonds (1998), *supra* note 1 at 172, 180, 194 (Simmonds himself, though, rejects the idea of rights complexes. *Id.* at 220). Cf. Hohfeld *FLC #1, supra* note 1 at 27 n 21, 36.

are no bald eagles). All Singer shows is that the party fails to possess all the elements of a 'full' property right. One might assume that property owners usually possess both a claim against entrance to the land and the liberty to enter it oneself vis-à-vis the whole world *(in rem*). However, *if* remaindermen can try to vindicate their claims against trespassers, which Singer's argument presumes, they also have both the liberty and the power to commence proceedings, even if they lack a 'full' property right. Remaindermen may additionally have liberties to style themselves as remaindermen, to contact the trustee regarding the trust, etc.

**Squam Lake**. Rainbolt's argument about the promise to go to the lake fails to meet all of its goals. It fails to prove a negative: that no other positions obtain, rendering the Hohfeldian claim (that the other party dip his toe into a lake) an independent, 'atomic' position.[17] Again, exposing this inadequacy does not *ipso facto* demonstrate that any other positions do, let alone must, obtain.

Hohfeldians generally also fail to explain why one party's bearing a duty suffices to establish that another party has 'a right'. Even if *A* owes *B* a duty to touch a lake, even if it is 'directed' toward *B*, why does that suffice to establish *B as a right-holder*? This is simply assumed or stipulated without warrant or adequate justification – especially for those Hohfeldians who are open to the idea that there are absolute duties.

Rainbolt's Justified Normative Constraint theory fails to explain this issue too. First, Rainbolt does not show why rights must impose normative constraints. The closest he comes to a justification of the view is an appeal to both Hohfeld and Hillel Steiner for the idea that

[17] Rainbolt offers a second example wherein a right-holder is owed money but also bears a duty not to accept it from the debtor. For Rainbolt, it does not follow that the creditor lacks a right. The party has a claim to the money, despite having no liberty to receive it. *Rainbolt* (2006), *supra* note 7 at 44. For the same sort of reason, this argument also fails to prove that the right-holder only has an isolated, 'atomic' claim (a single position). The creditor might be able to contact the debtor, to communicate with him or her about the debt, and to direct the debtor to give the funds to other parties, etc.

it is simply an 'uncontested' feature of the concept of 'a right' that it imposes normative constraints on others.[18] This is disputable, though. There are many important ordinary legal counterexamples to Rainbolt's view, e.g., rights to solicit for and enter contracts, to sell one's property, and to offer to buy property. None of these involves normative constraints upon other parties. Second, discovering that one party bears such constraints does not necessarily identify correlative right-holders. Once again, the nineteenth century scholar Rudolph von Jhering presents the following example in order to show that not all legal advantages count as 'rights'. A domestic manufacturer, through political or financial pressure, or corruption, gains the government's favour. He convinces it to pass a law imposing tariffs on certain foreign goods that compete with his own. The domestic manufacturer has an interest in the new law being enforced (indeed, it was grounded in his interests), which also directly benefits him – and intentionally so, in a sense. The tariff harms his foreign competitors and bestows upon him an advantage. According to von Jhering, the law bestows upon the manufacturer an advantage, but not necessarily 'a right'.[19] Rainbolt's theory cannot explain why the monopolist fails to have 'a right' when the government imposes tariffs (justified normative constraints in the form of duties to pay) on his competitors solely for the monopolist's benefit.

The Hohfeldian arguments all suffer from the same structural difficulty: being unable to prove a negative. They aim to show that, because one token of one type of Hohfeldian position does not obtain while a token of some other type does, neither other tokens of that first type, nor tokens of any other types, obtain. By design, however, their arguments cannot

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[18] *Id*. at 27, citing Steiner (1994), *supra* note 1 at 55, 59.

[19] Rudolph von Jhering, III *Der Geist des Romischen Rechts auf den verschidenn Stufen seiner Entwicklung* at 351-3 (1924 edn), *cited in* Hart (1982), *supra* note 13 at 180.

demonstrate the non-existence of any additional normative positions (liberties, powers, etc.), let alone whether such positions are either logically entailed or merely contingent connected to the one obtaining token normative position. For any recalibrated arguments to succeed Hohfeldians would have to undertake a comprehensive process of elimination, showing the non-existence of any other token positions.

## § III. *Pace* Invariable Support Perimeters Part II

### A Simpler Approach

There is a simpler approach for trying to establish the conceptual contingency of all *liberties-to-claim*-based perimeter of support relationships, at least: by establishing that any given means of communication, requisite to provide the relevant 'support' for a right, might conceivably be unavailable.[20] Right-holders *may* have a liberty to contact duty-bearers (to telephone them, to email them, to visit them, etc.) or otherwise communicate with either them or other parties in order to inform them about their rights, or to try to persuade any of them to act. Still, these require particularised means of communication, i.e., normative entitlements or authorisations to use those means. However, I can think of no reason why a given right-holder must *invariably* be privileged to undertake any or all such actions.

Liberties to claim are conceptually independent from Hohfeldian claims, because nullifying the claims would not necessarily thereby eradicate those liberties. Being authorised to communicate with duty-bearers or others – both in terms of being able to contact and to express the content of those communications – is not necessarily predicated

[20] Another alternative would be to try to show the absence of particular means of communication in given cases and then making an abductive argument about the total set of means of communications being unavailable for a given right. This technique was employed in Chapter 6 to show the potential unavailability enforcement and waiver powers for a given right under a conceptual analysis. In this case, however, it will probably fail. For while the number of modes of legal enforcement and waiver *powers* is fairly determinate and limited, the set of modes of support for claims via *liberties* is indeterminate if not also unlimited. The approach would then suffer the same fate as the Hohfeldians of only showing the non-existence of some means, not all. The reason why the approach undertaken below differs is that it (i) discusses a distinct *rule* authorising communications from those granting rights, and (ii) different rules prohibiting all forms of communication.

upon possession of a valid claim held against them. To return to our example from Chapter 7, Sally may be entitled call Peter on the telephone and tell him to return her mower even though he does not actually have it (e.g., she was mistaken about whom she lent it to, he had already returned it to her, etc.).

Moreover, the 'support' relationship between any such liberty and a Hohfeldian claim in part concerns the *content* of the communication. However, *X*'s liberty to communicate to *Y* need not be based upon *X*'s claim; it can be to communicate about a great many things. One could model a Hohfeldian claim as incorporating such liberties, but liberties to do such things are not necessarily reliant upon those claims.

Given their content-dependence for being identified as the bases for claiming and invoking rights, the relationships of liberties to claim with Hohfeldian claims themselves could not be systematically formalised in a philosophical model of rights in the way one can do for Hohfeldian claims and powers in terms of the determinable conceptual features of primary, secondary, and tertiary rights.[21] For example, *X*'s liberty can be about being free to talk to *Y*, who in turn has a no-right that *X* (not) try to communicate. Yet one cannot add to '*X* has a claim that *Y* do φ' that '*X* also has the liberty to claim that *Y* do φ' *without specifying the particular ways* by which *X* can make the claim: to call, to write, to visit *Y*'s home, etc.

### *Some Hypothetical Cases*

**Case A: Secret Contracts with Blackout Clauses**

Per the Method of Hypothetical Cases, the following scenarios suggest the possibility of wholly unclaimable and uninvocable rights. Here is the first. As part of a making a contract, *A* tells *B*:

[21] See Chapter 6's Appendix 1.

> "I, *A*, will give you, *B*, the right to φ if and only if you never claim it of me or anyone else, and never broadcast its existence to anyone – including to yourself – through any form of communication, even to say that you possess such a right, at least so long as I fulfil my contractual duty to provide you with φ. This includes communications to legal officials, including courts, for the sake of trying to vindicate your rights. This duty to forbear from making any such communications obtains so long as I have not conspicuously breached my duty, as opposed to either merely having seemed to do so, or appearing to threaten to breach."

Let us assume that the contract is for legally valid purposes, and that the above quote is included in it as an agreed-upon clause. Would *B* have a valid right to φ despite lacking accompanying liberties by which to claim or invoke it, at least so long as *A*'s end of the bargain is kept? In other words, would *B* not have a Hohfeldian claim to receive φ, but also duties to neither invoke nor claim it to or from *A*, the legal system, or anyone else? *A*'s (conspicuous) breach would change the parties legal relations: it would replace *B*'s duties to refrain from communicating with liberties to claim and invoke and a power to sue. Still, what happens in the scenario where *A* does not breach? Is there any perimeter of support here?

**Case B: Statutory Prohibitions**

Imagine that a statute provides a jurisdiction's poor with a right to potable water from their municipal government. The municipal government bears a duty, while certain people are said to have correlative rights. However, the statute specifically proscribes judicial review, other forms of appeal, or any other way of trying to seek legal remedy for breaches of this particular duty. (The prohibition does not apply to any other rights in the system). The statute explicitly states that courts shall take no judicial cognizance of such claims, and that right-holders are themselves duty-bound to avoid trying to remedy breaches by the government. The statute furthermore holds that right-holders cannot invoke, claim, or even make reference to their rights to the duty-bearers (the municipal government) or anyone else. The

jurisdiction's highest court has upheld all of the statute's provisions, deeming it consistent with all of the country's constitutional rights (freedom of speech, due process, etc.).

Additionally, consider **Case B′**: Abe owes a contractual duty to Bob. But a statute, which has been upheld by the courts, says that parties to contracts have a duty not to invoke or claim their rights of duty-bearers, the government, or anyone else.

**Case C: Games**

This example takes us beyond legal claims and liberties to those found in games. At the beginning of a fictional board game, players must be assigned different roles. The roles are allocated by picking cards out of an opaque bag. Each card contains information assigning a player a specific role. Each player is then obliged to identify his or her role to the others. However, by design, one of the cards assigns a single player two distinct roles. (Assume that the game can only be played by a minimum number of people, and that one, and only one, player is able to pick a card of this sort every time the game is played). One of the two roles is both secret and integral to the game. Hence, the player with two roles may only disclose information about his or her other role. *Qua* secret role bearer, he or she is entitled to undertake certain discreet actions throughout the game without interference from the other players – but such actions must be undertaken in ways that do not betray his or her being the secret agent. This involves, for example, reorganising game pieces in ways that are detrimental to others when, during set intervals, all the players are sent to different rooms or areas out of vision or hearing distance of one another, must close their eyes, etc. By design, the secret role-bearer's identity is kept hidden from the other players, although everyone is aware that someone amongst them fulfils it. If the other players suspect the secret-role-bearer's identity, they are duty-bound not to reveal it.

The dual-role comes with exercisable entitlements: to act in ways the secret game player is meant to do. However, these game-based rights seem to be incommunicable to the other players without violating the rules of the game. The secret agent must not invoke or claim the right to fulfil the role (e.g., to reorder the game pieces), to demand non-interference with his or her other actions in furtherance of the role, etc.[22]

**Responses**

The first two cases (along with the second's variant) seem implausible. Even though **Case A** concerns a contract for legally valid purposes, it seems unlikely that courts would actually uphold a 'total blackout of communications' clause. Most modern legal systems would not want to enable or encourage parties to be able to shirk their legal duties by making the other party contract away every capacity to communicate, let alone commence legal proceedings, even when the duty is generally perceived to be going fulfilled. On the other hand, the contract in question explicitly allows for communications upon conspicuous breach. Hence, it is not a total blackout: if party *A* does not fulfill the duty, then communications and legal proceedings are contractually permissible.

Even so, what if there is a dispute between the parties about what the contractual duty actually entails? What if party *B* merely requires clarification about an issue? Would legal systems really allow (let alone want) people to contract out of the possibility of seeking private clarifications of what their rights and duties entail, save in the face of conspicuous breach – where elucidations must be procured *in* courts (even if not provided by legal officials but by the parties)?

**Cases B and B′** are equally dubious. Again, could the parties (the government and

[22] One might be tempted to analogise this case to secret courts or proceedings. This would be inapt because those legal situations involve institutional or governmental agents who may communicate such rights and duties amongst themselves, whether it is done *in camera* or otherwise.

private agents) fulfill their duties in silence? The statutory requirements here add an additional problem to those found in Case A: unlike contractual obligations, these forms of communication would have to be carved out of the system's constitutional and statutory rights on a case-by-case basis. Moreover, what happens if the contractual or statutory silence requirement is systematically transgressed, ignored, or violated?

Despite their implausibility, the rules and states of affairs exemplified in cases A, B, and B′ are not inconceivable. Their violation of certain norms and policy concerns of contemporary courts and legal systems does not mean they are conceptually incoherent or that no jurisdiction could adopt them. Hence, they suggest that perimeters of support relationships between legal claims and liberties are conceptually contingent. Nevertheless, one might be tempted to say that where such relations fail to obtain, not only is something missing but that something is wrong with those rights. Chapter 6 § IV argued that wholly unenforceable legal rights constitute 'imperfect' or degenerate cases. This is because their meanings cannot be affixed by officials' authoritative binding decisions. Here too, wholly unclaimable or uninvocable legal rights might also be defective because their meaning or content cannot be determined via interlocutory means (i.e., the parties communicating with one another to settle or confirm such matters).

**Case C**, about the game with the secret-role-bearer, is a little different. The other players have game-based duties not to inquire about the role-bearer's identity. These duties are not simply owed to the player with the secret role – especially as they do not know who he or she is. Rather, the duties not to inquire are owed by all players to one another; they all have game-based ('absolute' or 'imperfect') duties not to ask.[23] Still, it is easy to imagine a

[23] The case thus also raises the following issue: can one owe correlative, 'directed' duties without knowing (with any certainty, at any rate) to whom they are owed?

player going on a fishing expedition, asking indirect questions in order to bypass the rule and sniff out the secret role-bearer. If this happens, both the secret agent (hopefully in a manner that does not betray the secret role) and everyone else may demand that the inquirer still his or her tongue in order to protect the integrity of the game. This is not the right of the secret role-bearer *qua* secret role-bearer, but of all players. Even so, that would be an *invocation* of right on behalf of that player, even if done by the secret role-bearer on his or her own behalf, or by others without knowing the person's identity.

**Trans-Systematic Norms**

There is an alternative way to try to defend the idea of there invariably being *some* perimeter of support of liberties over claims. At least some rights and ligations can have normative effect across different systems or domains. For example, in the name of freedom of speech, legal liberties can be used to advocate for moral or social changes. They can be used to promote conformity with moral or social duties, and help change a society's ideas about what are morally best, acceptable, etc., ways of going about things. For example, one can use the legal right to free speech – including by making mention of the right's very legality – to try to convince people to listen to speech they might otherwise find offensive; to try to convince people to abide by Victorian era manners; etc. More controversial is the notion of using moral liberties to claim legal rights. Moral liberties can be understood as normative positions falling under critical morality, or a given society's conventional morality. Here, in response to moral claims of right, recipients of such communications may recalibrate their thinking and be motivated to fulfil their legal duties.

In the last chapter we used the example of Sally calling her neighbour Peter on the telephone to tell him to return her lawnmower. Being legally permitted to do so was a basis

for identifying her capacity to communicate as a legal liberty. Now, let us modify the example slightly. What if she was legally prohibited from making that call? What if Sally nonetheless believes she had the moral right to call Peter because that is the only way she is going to be able to get her property back? Such a phone call may influence Peter's behaviour (e.g., convince him to return the mower), even though the call was made illegally. To take another example, while it is difficult to establish causation, it is possible that acts of civil disobedience catalysed some of the changes to the American legal system in terms of civil rights in the 1960s in the direction the disobedient agents were calling for.

Even if no pertinent legal liberties are available by which to claim legal rights in a given system, or at a given juncture – an implausible scenario provided in **Cases A-C** above, or that by imagining the most oppressive sorts of legal regimes (which might also be too implausible in these regards) – there might still be certain moral liberties by which to do so.[24] *If* legal or moral liberties can invariably be used to claim legal rights, then although rights are not always enforceable (*pace* the Will Theory and the Control View) they are still never 'naked' (in HLA Hart's sense) *or* 'atomic' passive positions either. Instead, there would be a more sophisticated relationship between claims and other positions, and indeed amongst normative positions from various domains (perhaps requiring a far more nuanced way to model them).[25]

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[24] Daniel Lyons argues there are always opportunities to demand moral rights. Daniel Lyons, 'Entitled To Complain' (1966) 26 Analysis 119. Kramer takes the stronger view that moral rights are always enforceable. Matthew Kramer, 'Legal and Moral Obligation', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2007) at 187.

[25] The notion of using moral liberties to claim legal rights leads to problems accounting for: (I) the overall legal or moral permissibility of civil disobedience in given circumstances and (II) conflicts between normative positions belonging to different domains or systems, e.g., having a moral liberty to do what is legally prohibited.

## § IV. Conclusion

Just because a right obtains, it does not necessarily follow that liberties by which to claim or invoke them also do. This chapter establishes the conceptually contingent nature of the relationship between rights and such enforcement liberties. It shows why Hohfeldian arguments to this end are ineffective, though. First, they wrongly assume that a demonstration of one token of a type of normative position (e.g.. a particular liberty) failing to obtain entails that no other tokens of that type also obtain. Second, the arguments show that *A*'s right against *B* does not also hold against *C*, when what Hohfeldians need to show instead is that *A*'s various positions vis-à-vis *B* are merely contingently related. Section II thus presents a superior way to make the case: by presenting hypothetical cases that involve *rules* proscribing all such liberties, and not just tokens of the type.

However, such 'perimeters of support' need not exclusively be formed by two token positions from the same domain or system. Legal positions may be used to exert moral influence, while moral liberties can be used to try to catalyse legal change. The idea of a trans-systemic or domain norm, or the interplay of normative positions across domains is the last hope of those who might think that exercisability and/or enforceability is a necessary feature of the concept of 'a right'.

Of course, the mere suggestion of trans-systemic applicability does not answer whether any such associations *inevitably* obtain. For why must any given normative position be exercisable by one from another domain? There seems to be no strong reason for thinking so. In responding to the arguments against an invariability-of rights-claimability (in *some* way or other) view, completely stifling or nullifying any such liberties would require wildly implausible rules and cases like those presented in Section III. This does not mean they are conceptually impossible, or that stifling the ability to make a claim cannot arise by accident.

Under a conceptual analysis, then, perimeters of support are not essential features of rights or right holding.

The question then becomes how much weight one assigns to this conceptual analysis. On the one hand, while there is good reason for deeming legal rights that are unenforceable via *powers* to be defective (as Chapter 6 argued, legal officials must determine the rights and correlative duties' contents and contours) the case of enforcement-*liberties* does not present an obvious functionalist analogue. On the other hand, it seems reasonable to think that rights would also be defective or 'imperfect' if there were no liberties by which to seek *clarification* (which is not the same thing as claiming or invoking) of their meaning, content, or entailments from duty-bearers or other parties. At any rate, one could simply dismiss the analysis on the grounds that conceptual analyses of this sort rest on unreliable intuitions, or that the search for the necessary (as opposed to contingent) features of concepts (such as 'a right') is itself a spurious enterprise. That is best left for you the reader to decide. I will only suggest that the need to concoct wildly implausible cases in Section III suggests that, generally, liberty-based perimeters of support are normatively significant features of rights, ones that are important to account for when modelling rights and explaining them generally.

## Thesis Conclusion

This thesis aimed to advance the philosophy of rights. Chapter 1 helps situate its methodological issues within those of legal theory and philosophy more generally. It makes a case for ultimate reliance upon scholarly judgement for both concept (re-)formation and selection (which need not be morally or politically evaluative in nature), but questions the utility and feasibility of contemporary appeals to meta-theoretical desiderata for such purposes.

Chapter 2 classifies two types of philosophical accounts of rights: models and theories. It also defends the claim that the term 'a right' refers to different basic concepts. It does so by showing that the bases for Monistic models (those holding that there is but one basic kind of a right) are unmotivated or unsound. However, certain Pluralistic models are also shown to be over-inclusive.

Chapter 3 clarifies and distinguishes the distinct but related concepts of rights exercise, enforcement, remedying, and vindication. It argues that enforcement refers to a subset of modes of exercise. Further, not all rights vindication concerns the procurement of remedies. Hopefully these clarifications will open the literature's horizons to more aspects of rights and their usage, a project I try to help to commence in Chapter 7.

Chapter 4 explains the theories of rights debate, while Chapter 5 discredits its constituent theories. The theories are woefully under-inclusive, their fundamental criteria and candidate ultimate purposes for all rights are superfluous and question begging, and they do an inadequate job justifying their particular analytic reduction of 'a right' to something else (be it an interest, duty, or power).

Chapter 6 further analyses the concept of legal rights enforcement, showing that

rights enforcement involves many more analytical features than previous philosophical accounts suggest. It also advances the literature beyond the 'theories' of rights to tackle the issue of whether legal rights are invariably enforceable or not, and provides the robust reasons to date for deeming unenforceable legal rights to constitute 'defective' or 'imperfect' cases. (Chapter 8 continues in this vein, showing why 'uninvocable' or 'unclaimable' legal rights are also imperfect).

In keeping with the idea of expanding the literature's horizons, Chapter 7 shows that there are more ways to enforce legal rights than simply using third party dispute resolution mechanisms or institutional apparatuses such as courts. There are ways to legally claim or invoke rights in private or social circumstances. These are best understood as the use of legal liberties (rather than powers) in support of legal rights-correlative-to-duties. This analysis also helps show why there is actually a far greater array of means by which to 'support' or 'control' a legal right than simply using enforcement and waiver powers.

Whether such liberty-based capacities to claim or invoke are 'essential' to the concept of a legal right is questionable, as Chapter 8 shows. Even so, it is for the reader to decide what to make of its analyses. The hypothetical cases used to demonstrate the conceptually contingent nature of the relationship between rights and such means of support are implausible. Hence, one might: find the analysis sound but insignificant for the purposes of understanding *human* (as opposed to angelic or alien) legal systems; the *method* of conceptual analysis itself suspect; or simply find the examples insufficient to make the case for these being conceptually contingent (as opposed to conceptually/'logically' necessary) relationships. Assessing the bases and justification for such judgements requires further work in philosophy generally.

# Bibliography

## Works Cited


Anderson A.R., 'Logic, Norms, and Roles' (1962) 4 Ratio 36

Baker G.P and P.MS. Hacker, *Wittgenstein: Rules Grammar and Necessity* (2nd extensively revised edn, Wiley Blackwell 2014)

Barber N, 'The Significance of the Common Understanding in Legal Theory (2015) 35 OJLS 799

Bayles M, *Hart's Legal Philosophy: An Examination* (Kluwer Academic Publishers 1992)

Bierling E, *Zur Kritik der Juristischen Grundbegriffe* (1877-83), Vol II

Bix B, 'Ideals, Practices, and Concepts in Legal Theory', in Jordi Ferrer Beltrán et al (eds) *Neutrality and Theory of Law* (Springer 2012)
—'Raz on Necessity' (2003) 22 Law & Philosophy 537

Brown V, 'Rights, Liberties, and Duties: Reformulating Hohfeld's Scheme of Jural Relations?' (2005) 58 Current Legal Problems 343

Calabresi G & Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard L. Rev. 1089.

Campbell K, 'Book Review of Carl Wellman's *Real Rights* and *The Proliferation of Rights*' (2001) 110 (439) Mind 881.
—'The Variety of Rights', in Rex Martin and Gerhard Sprenger (eds) *Challenges to Law at the End of the 20th Century: Rights: Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy* (IVR), Bologna, June 16-21, (F Steiner Verlag 1995)

Carnap R, *Meaning and Necessity: A Study in Semantics and Modal Logic* (Chicago University Press 1956)

Coleman J, 'Incorporation, Conventionality, and the Practical Difference Thesis' (1998) 4 Legal Theory 381
—'Methodology', in J Coleman and S Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002)

Coyle S, 'Are There Necessary Truths About Rights?' (2002) 15 Can. J. L. & Jurisprudence 21

Cruft R, 'Rights: Beyond Interest and Will Theory (2004) 23 Law and Philosophy 347

Dagger R, 'Rights', in Terence Ball et al (eds) *Political Innovation and Conceptual Change* (CUP 1989)

Daly C, *An Introduction to Philosophical Methods* (Broadview Press 2010)

Darwall S, *The Second-Person Perspective: Morality, Respect and Accountability* (Harvard University Press, 2006)

Dickey A, 'Hohfeld's Debt to Salmond' (1971-1972) 10 U.W. Austl. L. Rev. 59

Dickson J, *Evaluation and Legal Theory* (Hart Publishing 2001)
—'Methodology in Jurisprudence: A Critical Survey' (2004) 10 Legal Theory 117
—'Law and Its Theory', in John Keown and Robert George (eds) *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013)

Duke G, 'The Aristotelian *Spoudaios* as Ethical Exemplar in Finnis' Natural Law Theory'. (2013) 58(2) American J of Jurisprudence 183

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1977)
—'A Reply By Ronald Dworkin', in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Rowman & Allenhead 1983)
— *Law's Empire* (HUP 1984)

Eleftheriadis P, 'The Analysis of Property Rights' (1996) 16 OJLS 31
—'What is a Legal Right?' (2007), available at <http://www.oxford-jdg.net/2010/09/michaelmas-term-2007.html/> Accessed 2 March 2015
—*Legal Rights* (OUP 2008)

Farrell I, 'H.L.A. Hart and the Methodology of Jurisprudence' (2006) 84 Texas L. Rev. 983

Feinberg J, 'The Nature and Value of Rights', in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980)
—*Social Philosophy* (Prentice Hall (1973)

Finnis J, 'Some Professorial Fallacies about Rights' (1972) 4 Adel. L. Rev. 377
—'Law and How I Truly Ought to Decide' (2003) 48 American J Jurisprudence 107
—*Natural Law and Natural Rights* (2nd edn, OUP 2011)

Fitch F, 'A Revision of Hohfeld's Theory of Legal Concepts' (1967) 39-40 *Logique et Analyse* 269

Gardner J, 'Legal Positivism: 5 ½ Myths', in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012)
—'What is Tort Law For? Part 1 The Place of Distributive Justice', in (John Oberdiek ed) *Philosophical Foundations of the Law of Torts* (OUP 2014)

Gilbert M, 'Giving Claim-Rights Their Due', in Brian Bix (ed), *Rights: Concepts and Contexts* (Ashgate Pub. Co. 2012)

Giudice M, 'Analytic Jurisprudence and Contingency', in Maksymilian Del Mar (ed) *New Waves in Philosophy of Law* (Palgrave MacMillan (2011)
—*Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Elgar 2015)

Goble G, 'Affirmative and Negative Legal Relations' (1921) 4 Illinois L. Q. 94

Green L, 'Legal Obligation and Authority', (*Stanford Encyclopaedia of Philosophy* 23 Dec. 2003) <http://plato.stanford.edu/entries/legal-obligation/> accessed 1 January 2016.

Green M, 'Why No Deontic Logic?' (Prawfsblawg 12 October 2007) <http://prawfsblawg.blogs.com/prawfsblawg/2007/10/why-no-deontic-.html/> Accessed 1 September 2015

Grice, HP and P.F Strawson, 'In Defence of a Dogma' (1956) 65 The Phil. Rev. 141

Hacker PMS, 'Sanction Theories of Duty', in A.W.B. Simpson (ed) *Oxford Essays in Jurisprudence* (Second Series) (OUP 1973)
—'Passing by the Naturalistic Turn: On Quine's cul-de-sac', in *Wittgenstein: Comparisons and Context* (OUP 2013)

Grotius H, I *De Jure Belli ac Pacis* (1625)

Halpin A, 'More Comments on Rights and Claims' (1991) 10 Law and Philosophy 271
—*Rights and Law: Analysis and Theory* (Hart Pub. 1997)
—'Methodology' in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2008).

Hanna R, 'Conceptual Analysis', in *Routledge Encyclopedia of Philosophy* <https://www.rep.routledge.com/articles/conceptual-analysis/v-1/> Accessed 26 December 2015

Harel A, 'Theories of Rights', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd. 2007)

Harmon G, 'Doubts About Conceptual Analysis', in *Reasoning, Meaning, and Mind* (OUP 1999)

Hart HLA, 'Definition and Theory in Jurisprudence', in *Essays in Jurisprudence and Philosophy* (OUP 1983)
—*The Concept of Law* (2nd edn, Clarendon Press 1997)
—*Essays on Bentham*: *Jurisprudence and Political Theory* (Clarendon Press 1982)

Himma K, 'Law's Claim of Legitimate Authority', in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to the* Concept of Law (OUP 2001)

Hohfeld WN, 'Nature of Stockholders' Individual Liability For Corporation Debts' (1909) Columbia L. Rev. 285.
—'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L.J. 16
—'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale L.J. 710

Holmgren M, 'Raz on Rights' (1985) 94 Mind 591

Honoré A, 'Rights of Exclusion and Immunities against Divesting' (1960) 34 Tulane L. Rev. 453
—'Ownership' in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (OUP 1961)
—*Ulpian Pioneer of Human Rights* (2nd edn, OUP 2002)
—'Property and Ownership: Marginal Comments', in T Endicott et al (eds) *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006)

Hudson S & Husak D, 'Legal Rights: How Useful is Hohfeldian Analysis?' (1980) 37 Philosophical Studies 45

Huemer M, 'The Failure of Analysis and the Nature of Concepts', in Chris Daly (ed) *The Palgrave Handbook of Philosophical Methods* (Palgrave MacMillan 2015)

Jackson F, 'The Role of Conceptual Analysis', in *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Clarendon Press 2000).

James S, 'Rights As Enforceable Claims' (2003) 103 Proceedings of the Aristotelian Society, New Series 133

von Jhering R, III *Der Geist des Romischen Rechts auf den verschidenn Stufen seiner Entwicklung* (1924 edn)
—'Die Reflexwirkungen oder die Rückwirkung rechtlicher Thatsachen auf dritte Personen', (1871) 10 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 245

Kant I, *Metaphysics of Morals* (Mary Gregor tr, CUP 1996)

Kelsen, H, *Hauptproblem der Menschenrechte: Hobbes – Locke – Kant* (1911)
—*Pure Theory of Law* (2nd edn, Max Knight Tr., University of California Press 1967)

Kocourek A, 'The Hohfeld System of Fundamental Legal Concepts' (1920) 15 Illinois L Rev 24
—'Wanted: Phrase for Legal Capabilities and Restraints' (1923) 9 ABA J 25

Kramer M, 'Rights Without Trimmings', in M Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998)
—'Review of Rights and Law: Analysis and Theory by Andrew Halpin' (1999) 62 Modern L. Rev 314
—'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties' (1999) 109 (2) Ethics 375
—'On the Nature of Legal Rights' (2000) 59 Cambridge L. J. 473
—'Legal and Moral Obligation', in Martin P Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2007)
—'Rights in Legal and Political Philosophy', in Gregory A. Caldeira et al (eds) *The Oxford Handbook of Law and Politics* (OUP 2008)
—'Refining the Interest Theory of Rights' (2010) 55 American J. of Jurisprudence 31
—'Some Doubts About Alternatives to the Interest Theory of Rights –Symposium on Rights and the Direction of Duties' (2013) 103 (2) Ethics 245
— and Hillel Steiner 'Theories of Rights: Is There a Third Way?' (2007) 27 OJLS 281

Laurence S and Eric Margolis, 'Concepts', Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/concepts/#ConConAna/> Accessed 22 December 2015.

Leiter B, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007)
—'Explaining Theoretical Disagreement' (2009) 76 U. Chicago L. Rev. 1215
—& Alex Langlinais 'The Methodology of Legal Philosophy', available at <http://chicagounbound.uchicago.edu/public_law_and_legal_theory/398/> Accessed 1 January 2016.

Lindahl L, 'Stig Kanger's Theory of Rights', in Ghita Holmström-Hintikka et al (eds.) II *Collected Papers of Stig Kanger with Essays on His Life and Work* (Kluwer Academic Publishers 2001)

Llewellyn K, *Bramble Bush: On Our Law and its Study* (Oceana Pub 1996)

Lyons D, 'Entitled To Complain' (1966) 26 Analysis 119

MacCormick N, 'Children's Rights: A Test Case for Theories of Rights', in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982) originally published as (1976) 62 Archiv Für Rechts– und Sozialphilosophie 305
—'Rights in Legislation', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality and Society: Essays in Honour of HLA Hart*, (Clarendon Press 1977)
—'Rights, Claims, and Remedies' (1982) 1 L. and Philosophy 337
—*Institutions of Law: An Essay in Legal* Theory (OUP 2008)

Maier P, *Ratification: The People Debate the Constitution 1787-1788* (Simon & Schuster 2011)

Markby W, *Elements of Law: Considered with Reference to Principles of General Jurisprudence* (Clarendon Press 1871)

Martin R, *A System of Rights* (OUP 1993)
—and James Nickel, 'Recent Work on the Concept of Rights' (1980) 17 Am. Phil Q. 165

McCloskey H.J., 'Rights' (1965) The Philosophical Q. 115
—'Rights—Some Conceptual Issues' (1976) 54 Australasian J of Philosophy 99

Mill JS, *Utilitarianism* (Parker, Son, and Bourn 1863)

Miller W, *The Data of Jurisprudence* (W. Green & Sons 1903)

Mullock P, 'The Hohfeldian No-Right: a Logical Analysis' (1970) 56 Archiv Für Rechts– und Sozialphilosophie 265

Nozick R, *Anarchy, State, and Utopia* (Basil Blackwell 1974)

O'Neill O, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP 1996)

Patterson D, 'Alexy on Necessity in Law and Morals' (2012) 25 Ratio Juris 47

Pound R, 'Legal Rights' (1915) 26 Int J of Ethics 92
—*Jurisprudence* Vol IV (West Pub Co. 1959)

Preda A, 'Rights: Concept and Justification' (2015) 28 (3) Ratio Juris 408

Priel D, 'Jurisprudence and Necessity' (2007) 20 Can. J. L. & Jurisprudence 173

Putnam H, 'The Analytic and the Synthetic', in *Mind, Language, and Reality: Philosophical Papers Volume 2* (CUP 1979)

Quine W, 'Main Trends in Recent Philosophy: Two Dogmas of Empiricism' (1951) 60 The Philosophical Rev. 20.

Radin M, 'A Restatement of Hohfeld' (1938) 51 Harvard L. Rev. 1141

Rainbolt G, *The Concept of Rights* (Springer 2006)

Raz J, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 1980)
— 'Hart on Moral Rights and Legal Duties' (1984) 4 OJLS 123
—*Morality of Freedom* (OUP 1986)
—*Practical Reason and Norms* (2nd edn, OUP 1999)
—*Ethics in the Public Domain* (OUP 1994, Revised edn)
—*The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009)

—*Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009)

Ripstein A, *Force and Freedom* (Harvard University Press 2009)
—'Ethics Discussions at PEA Soup: Leif Wenar's "The Nature of Claim-Rights" with [sic] Critical Precis by Arthur Ripstein', (*PEA Soup* 10 April 2013) <http://peasoup.typepad.com/peasoup/2013/04/ethics-discussions-at-pea-soup-leif-wenars-the-nature-of-claim-rights-with-critical-precis-by-arthur.html> Accessed 19 August 2015

Robinson R.E. et al, 'The Logic of Rights' (1983) 33 U. Toronto L.J. 267

Salmond J, *Jurisprudence, or The Theory of the Law* (1st edn, Stevens & Haynes 1902)

von Savigny F, *System of the Modern Roman Law* (William Holloway tr, J. Higgenbotham Publisher 1867)

Schauer F, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 (1) Ratio Juris 1
—'On the Nature of the Nature of Law' (2012) 98 Archiv. für Rechts- und Sozialphilosophie 457

Schlag P, 'How to Do Things with Hohfeld' (2015) 78 Law & Contemporary Problems 185

Simmonds N, 'Rights At the Cutting Edge', in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998)
—*Central Issues In Jurisprudence* (4th edn, Sweet & Maxwell 2013)

Singer J.W., 'Legal Rights debate in Analytic JP from Bentham to Hohfeld' (1982) 1982 Wis. L. Rev. 975

Skorupski J, *The Domain of Reasons* (OUP 2010)

Spector, H 'Value Pluralism and the Two Concepts of Rights' (2009) 0 RMM 355

Sreenivasan G, 'A Hybrid Theory of Claim-Rights' (2005) 25 OJLS 257
—'Duties and Their Direction' (2010) 120 (3) Ethics 465.

Steiner H, *An Essay on Rights* (OUP 1994)
—'Working Rights' in Matthew Kramer (ed) *A Debate Over Rights: Philosophical Enquiries* (OUP 1998)
—'Moral Rights', in David Copp (ed) *The Oxford Handbook of Ethical Theory* (OUP 2006)

Stepanians M, *Rights as Relational Properties—In Defense of Right/Duty-Correlativity* (Habilitation Thesis, University of Saarland 2005)

Stewart H, 'The Definition of a Right' (2012) 3 Jurisprudence 319

Stoljar N, What Do We Want Law to Be? Philosophical Analysis and the Concept of Law, in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013)

Sumner, L.W., *The Moral Foundations of Rights* (Clarendon Press 1987)

Tamanaha B, *A General Jurisprudence of Law and Society* (OUP 2001)
—'The Mounting Challenge to Assertions About "The Nature of Law"', available at <http://juris.jotwell.com/the-mounting-challenge-to-assertions-about-the-nature-of-law/> accessed 26 December 2015

Tapper C, 'Powers and Secondary Rules of Change', in A.W.B. Simpson (ed) *Oxford Essays in Jurisprudence* (Second Series) (OUP 1973)

Terry H, *Some Leading Principles of Anglo-American Law Expounded with a View Towards its Arrangement and Codification* (T & J W Johnson & Co 1884)
—'Legal Duties and Rights' (1903) 12 Yale. L. J. 185

Tierney B, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press 1997)

Thomson J, *The Realm of Rights* (Harvard University Press 1990)

Thon A, *Rechtsnorm un Subjecktive Rechts: Untersuchungen zur Allgemeinen Rechtslehre* (1878)

Tuck R, *Natural Rights Theories: Their Origin and Development* (CUP 1979)

van Duffel S, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 Pacific Philosophical Q 104

von Savigny F, *System of the Modern Roman Law* (William Holloway tr, J. Higgenbotham Publisher 1867)

Waldron J, 'A Right To Do Wrong' (1981) 92 Ethics 21

Wellman Carl, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Littlefield 1985)
—*Real Rights* (OUP 1995)
— 'Review of *A Debate Over Rights* (2000) 109 Mind 954.

Wenar L, 'The Nature of rights' (2005) 33 Philosophy and Public Affairs 223
—'Rights', (*Stanford Encyclopedia of Philosophy* 2 July 2011)
<http://plato.stanford.edu/entries/rights/> Accessed 1 January 2016
—'The Analysis of Rights' in Matthew Kramer et al (eds), *The Legacy of H.L.A.*

*Hart: Legal, Political, and Moral Philosophy* (OUP 2008)
—'The Nature of Claim-Rights - Symposium on Rights and the Direction of Duties (2013) 103 (2) Ethics 202

White A, 'Rights and Claims' (1982) 1 L. and Philosophy 315
—'Reply to Professor MacCormick' (1982) 1 L. and Philosophy 359

Williams G, 'The Concept of Legal Liberty' (1956) 56 Columbia L. Rev. 1129

Windscheid B, *Lehrbuch des Pandektenrechts* (1867)

Woozley A, 'Legal Duties, Offences, and Sanctions' (1968) 77 Mind 461

**Works Consulted**

Acton HB, 'Symposium: Rights (1950) 24 Proceedings of the Aristotelian Society, Supp Vol 75

Allen C, 'Legal Duties' (1931) 40 Yale L. J. 331

Allen L, 'Formalizing Hohfeldian Analysis to Clarify the Multiple Senses to Legal Right' (1974) 48 S. Cal. L. Rev. 428

Anderson A.R, 'The Logic of Hohfeldian Propositions' (1971) 33 U. Pitt. L. Rev. 29

Andrews M, 'Hohfeld's Cube' (1983) 16 Akron L. Rev. 471

Bayles M, 'What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law' (1990) 1 Philosophical Topics 23

Bingham J, 'The Nature of Legal Rights and Duties' (1913) 12 Mich. L. Rev. 1

Brady J, 'Law, Language and Logic: The Legal Philosophy of Wesley Newcomb Hohfeld' (1972) 8 Transactions of the Charles S. Peirce Society 246

Braybrooke D, 'Abstract of Comments' (1970) 4 Nous 56
—'Three Separable Tests: Reply to Professors Ginsberg and Margolis' (1971) 9 Philosophy Forum (DeKalb) 140
—'The Firm But Untidy Correlativity of Rights and Obligations' (1972), 1 Canadian J. of Philosophy 351.

Brett A, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (CUP 1997)

Brown W, 'Re-Analysis of a Theory of Rights' (1925) 34 Yale L. J. 765

Cassidy L, 'Privilege: Its Past and Present Content' (1929) 2 Miss. L. J. 322

Clark C, 'Relations, Legal and Otherwise' (1922) 5 Illinois L. Q. 26

Coleman J and J Kraus, 'Rethinking the Theory of Legal Rights' (1986) 95 Yale L.J. 1335

Cook W.W., 'The Alienability of Choses in Action' (1916) 29 Harvard L. Rev. 816
—'Hohfeld's Contributions to the Science of Law' (1919) 28 Yale L.J. 721

Corbin A, 'Offer and Acceptance, and Some of the Resulting Legal Relations' (1917) 26 Yale L. J. 169
—'Legal Analysis and Terminology' (1919) 29 Yale L.J. 163
—'Address' – 'Terminology and Classification in Fundamental Jural Relations Terminology and Classification in Fundamental Jural Relations - A Symposium' (1921) 4 American L. School Rev. 607
—'Jural Relations and Their Classification' (1921) 30 Yale L. J. 226
—'What is a Legal Relation?' (1922) 5 Illinois L. Q. 50
— 'Rights and duties' (1924) 33 Yale L. J. 501

Cruft R, 'Why Aren't Duties Rights?' (2006) 56 The Philosophical Q. 175

Cullison A, 'A Review of Hohfeld's Fundamental Legal Concepts' (1967) 16 Clev.-Marshall L. Rev. 559
—'Logical Analysis of Legal Doctrine: The Normative Structure of Positive Law' (1968) 53 Iowa L. Rev. 1209

Dainow, 'The Science of Law: Hohfeld and Kocourek' (1934) 12 Canadian Bar Rev 265

De Slooveere F, 'Analytical Jurisprudence as Related to Modern Legal Methods' (1929) 7 N.Y.U. L. Q. Rev. 88

Dickey A, 'A Fresh Approach to the Analysis of Legal Relations' (1974) 20 McGill L. J. 261

Donnelly J, 'How Are Rights and Duties Correlative?' (1982) 16 J. of Value Inquiry 287

Dowdall H, 'The Present State of Analytical Jurisprudence' (1926) 42 L. Q. Rev. 451

Edmundson W, *An Introduction To Rights* (CUP 2004)

Eidenmuller H, 'Rights, Systems of Rights, and Unger's System of Rights: Part 1' (1991) 10 L. and Philosophy 1

Feinberg J, 'Duties, Rights, and Claims', in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980)

Finan J 'Presumptions and Modal Logic: A Hohfeldian Approach' (1979) 13 Akron L. Rev. 19

Goble G, 'Negative Legal Relations Re-Examined' (1922) 5 Illinois L. Q. 36
—'Terms for Restating the Law' (1924) 10 A.B.A. J. 58
—'The Sanction of a Duty' (1928) 37 Yale L. J. 426
—'A Redefinition of Basic Legal Terms' (1935) 35 Columbia L. Rev. 535

Green F, 'The Relativity of Legal Relations' (1923) 5 Illinois L. Q. 187

Green L, 'Positivism and the Inseparability of Law and Morals' (2008) 83 NYU L. Rev. 1035

Hacker PMS, 'Definition in Jurisprudence' (1969) 77 The Philosophical Q 343
—'Philosophy: A Contribution Not to Human Knowledge, But To Human Understanding' (2009) 6 Royal Institute of Philosophy Supplement 129

Halpin A, 'Fundamental Legal Conceptions Reconsidered' (2003) 16 Can. J.L. & J. 41
—'Rights, Duties, Liabilities, and Hohfeld' (2007) 13 Legal Theory 23

Hart HLA, 'Dias and Hughes on Jurisprudence' (1957-8) 4 J. Soc'y Pub. Tchrs. L. n.s. 143

Hearn W, *The Theory of Legal Duties and Rights: An Introduction to Analytical Jurisprudence* (Ferres 1883)

Hislop D, 'The Hohfeldian System of Fundamental Legal Conceptions' (1967) 53 Archiv Für Rechts– und Sozialphilosophie 53

Holland, T, *The Elements of Jurisprudence* (10th edn, OUP 1906).

Honoré A, 'Property and Ownership: Marginal Comments', in T Endicott et al (eds) *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006)

Hudson S & Husak D, 'A Note on Feinberg's Analysis of Legal Rights in Terms of the Activity of Claiming' (1979) 13 Journal of Value Inquiry (1979)

Hull N, *Roscoe Pound and Karl Llewellyn, Searching for an American Jurisprudence* (University of Chicago Press 1997)

Husick I, 'Hohfeld's Jurisprudence' (1924) 72 U. Pa. L. Rev. 263

James M, 'Bentham and Legal Theory' (1973) 24 N. Ir. L. Q. 267
—'Bentham on the Individuation of Laws' (1973) 24 N. Ir. L. Q. 357

Kamba W, 'Legal Theory and Hohfeld's Analysis of a Legal Right' (1974) 19 Juridical Rev

Kennedy D, 'The Critique of Rights in Critical Legal Studies', in Brown & Halley (eds.) Left Legalism/Left Critique 178 (2002).

Kocourek A, 'What is Liberty? Is it an Act? Is it a Relation?' (1920) 15 Illinois L. Rev. 347
—'Various Definitions of Jural Relation' (1920) 20 Columbia L. Rev. 394
—'Classification of Jural Interrelations' (1921) 1 B.U. L. Rev. 209
—'Nomic and Anomic Relations' (1921) 7 Cornell L. Q. 11
—'Polarized and Unpolarized Legal Relations' (1921) 9 Ky. L. J. 131
—'Reply to Professor Corbin', Terminology and Classification in Fundamental Jural Relations Terminology and Classification in Fundamental Jural Relations -A Symposium (1921) 4 American L. School Rev. 614
—'Tabulae Minores Jurisprudentiae' (1921) 30 Yale L. J. 215
—'Non-legal-content relations' (1922) 4 Illinois. L. Q. 233
—'Non-Legal-Content Relations Recombated (1923) 5 Illinois. L. Q. 150
—'Basic Jural Relations' (1923) 17 Illinois L. Rev 515
—'The Alphabet of Legal Relations' (1923) 9 ABA J 237
—'Juristic Knots and Nots' (1924) 19 Illinois L. Rev 80
—'Attribution of Physical Qualities to Legal Relations Part I' (1925) 19 Illinois L. Rev 435
—'Attribution of Physical Qualities to Legal Relations Part II' (1925) 19 Illinois L. Rev 542

Kramer M, 'Getting Rights Right' in Matthew Kramer (ed) *Rights, Wrongs, and Responsibilities* (Palgrave Macmillan 2001)

Kronman A, 'Hart, Austin, and the Concept of Legal Sanctions' (1975) 84 Yale L.J. 584

Langdell C.C., 'Classification of Rights and Wrongs Part I' (1900) 13 Harvard L. Rev. 537
—'Classification of Rights and Wrongs Part II' (1900) 13 Harvard L. Rev. 659

Llewellyn K, 'Comment' ['Hohfeld As Teacher'] (1919) 28 Yale L.J. 795

Louden R, 'Rights Infatuation and the Impoverishment of Moral Theory' (1983) 17 J Value Inquiry 87

Lyons D, 'Rights, Claimaints, and Beneficiaries' (1969) 6 Am. Phil. Q. 173
—'The Correlativity of Rights and Duties' (1970) 4 Nous 45

Maher F, 'The Kinds of Legal Rights' (1965) 5 Melbourne U. L. Rev. 47

Makinson D, 'On the Formal Representation of Rights Relations' (1986) 15 J. of Philosophical Logic 403

Marmor A, 'Farewell to Conceptual Analysis (in Jurisprudence)', in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013)

Marsh T, 'The Legal Continuum' (1969-1970) 64 Nw. U. L. Rev. 459

Martin R, *On the Theory of Rights as Valid Claims, in* 7 Social and Political Philosophy 175 (1982)

Montague P, 'Two Concepts of Rights' (1980) 9 Phil. And Public Affairs 372

Mullock P, 'The Hohfeldian Jural Opposite' (1971) 13 Ratio 158
—'The Choice Theory of Rights' (1975) 14 W. Ontario L. Rev. 241

Nolan D, & Robertson A, 'Rights and Private Law' in Nolan & Robertson (eds), *Rights and Private Law* (Hart Publishing 2012)

O'Reilly D, Using the Square of Opposition to Illustrate the Deontic and Alethic Relations Constituting Rights' (1995) '45 U. Toronto L. J. 279
—'Are There Any Fundamental Legal Conceptions?' (1999) 49 U. Toronto L. J. 271

Page W, 'Terminology and Classification in Fundamental Jural Relations Terminology and Classification in Fundamental Jural Relations - A Symposium' (1921) 4 Am. L. School Rev. 616

Penner J, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L. Rev. 711
—'The Analysis of Rights' (1997) 10 (3) Ratio Juris 300
— & Henry Smith (eds), *Philosophical Foundations of Property* (OUP 2013)

Perry R, 'Correlativity' (2009) 28 L. and Philosophy 537

Perry T, 'A Paradigm of Legal Phl: Hohfeld on Legal Rights' (1977) 14 Am. Phil. Q. 41
—'Reply in Defence of Hohfeld' (1980) 37 Philosophical Studies 203

Pound R, 'Fifty Years of Jurisprudence' (1937) 50 Harv. L. Rev. 557

Radin M, 'Correlation' (1929) 29 Columbia L. Rev. 901

Rainbolt G, 'Two Interpretations of Feinberg's Theory of Rights (2005) 11 Legal Theory 227

Randall H, 'Hohfeld on Jurisprudence' (1925) 41 L. Q. Rev. 86

Robinson R, 'Entities for Analyzing Legal Relations' (1983) 22 Dialogue 621

Ross A, 'Tû-Tû' (1956-7) 70 Harv. L. Rev. 812

Saunders K, 'A Formal Analysis of Hohfeldian Relations' (1990) 23 Akron L. Rev. 465

Schlegel J, *American Legal Realism and Empirical Social Science* (University of North

Carolina Press 1995).

Shapiro S, 'The Hart-Dworkin Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed) *Ronald Dworkin: Contemporary Philosophy in Context* (CUP 2007)

Simmonds N, 'The Analytical Foundations of Justice' (1995) Cambridge L. J. 306
—'Introduction', in David Campbell and Philip Thomas (eds) *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* (Ashgate Dartmouth 2001)

Simpson, AWB, 'The Analysis of Legal Concepts', in *Legal Theory and Legal History* (The Hambleton Press 1987)

Singer M, 'Abstract of Comments' (1970) 4 Nous 56
—'The Basis of Rights and Duties' (1972) 23 Philosophical Studies 48

Steiner H, 'The Structure of a Set of Compossible Rights' (1977) 74 J of Philosophy 767

Stone R, 'An Analysis of Hohfeld' (1963) 48 Minn. L. Rev. 313

Tur R.H.S., 'The Notion of a Legal Right: A Test Case For Legal Science' (1976) 21 Juridical Rev. 177

Vinogradoff P, 'The Foundations of a Theory of Rights' (1924) 34 Yale L. J. 60

Waldron J, 'Introduction', *Theories of Rights* (OUP 1984)
—'Are Constitutional Norms Legal Norms?' (2006) 75 Fordham L.J. 1697

Wellman Carl, 'The Function of Rights' (2011) 97 Archiv für Rechts- und Sozialphilosophie 169

Wellman Christopher, 'Feinberg's Two Concepts of Rights' (2005) 11 Legal theory 213

White A, 'Privilege' (1978) 41 The Modern L. Rev 299
—'Reply to Professor MacCormick' (1982) 1 L. and Philosophy 359
— *Rights* (Clarendon Press 1984)

Willis H, 'Some Fundamental Legal Concepts' (1926) 1 Indiana L. J. 18

Wilson W.A., 'A Note on the Hohfeld Analysis' (1972) 17 Juridical Rev. 162

Wilson J.G., 'Hohfeld: A Reappraisal' (1979) 11 U. Queensland L.J. 190