TAKING RIGHTS WAY TOO SERIOUSLY: KANT, HOHFE LD, AND EVALUATING CONCEPTUAL THEORIES OF RIGHTS

by

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Abstract

This paper concerns the dominant conceptual or formal accounts of legal rights: the Interest and Will Theories. Section II clarifies the minimal necessary conditions for a rights model to count as a Will Theory. It also explores Kant’s Will Theory of rights and the difficulties posed to it by Hohfeld’s schema of jural relations. Kant has three alternatives: reject the schema’s utility or demonstrate his theory’s compatibility with it via molecularist or basic models of Hohfeldian rights. Although his best option is to disavow Hohfeld, Kant’s theory is ultimately undesirable on other grounds. Section III shall analyze the modern Will and Interest Theories’ biggest weaknesses according to a test proposed in Section I, which should generate bases for preferring one theory to another. It will offer a counterargument to the Inalienability charge levied against the Will Theory, and demonstrate why Interest Theory responses to the Third Party Beneficiary argument are inadequate.
§ I. **Introduction** ..........................................................................................................................1
  I.A: The Paper’s Aims ..................................................................................................................1
  I.B: Background .........................................................................................................................3
  I.C: Second-Order Concerns .......................................................................................................6
  I.D: My Proposed Three-Pronged Test .......................................................................................8

§ II. **Non-instrumental choices: Kant and WT’s minimal conditions** ....................................11
  II.A: Immanuel Kant .................................................................................................................11
  II.B: Rights and Coercion .........................................................................................................13
  II.C: WT’s Minimal Requirement ..............................................................................................15
  II.D: The Hohfeldian Dilemma: WWKD? ................................................................................19
        Option A: Rejecting Hohfeld .............................................................................................21
        Option B: The molecularist Hohfeldian position ...............................................................24
        Option C: The basic Hohfeldian position ............................................................................26
        Assessment ..........................................................................................................................31
  II.E: Rejecting Kant’s WT ........................................................................................................32
        II.E.1: Against the OIR ..................................................................................................32
        II.E.2: Against Compossibility .......................................................................................33

§ III. **Modern IT & WT’s Biggest Weaknesses** ........................................................................38
  III.A: Introducing the Arguments ............................................................................................38
  III.B: WT and Inalienable Rights .............................................................................................38
        The Charges .......................................................................................................................38
        Steiner’s Response .............................................................................................................39
        Contra Steiner ..................................................................................................................40
        Simmonds’ Response .........................................................................................................41
        Partially Defending Simmonds .........................................................................................42
        Possible Backfire? .............................................................................................................43
  III.C: IT and Third Party Beneficiaries .....................................................................................46
        The Charges .......................................................................................................................46
        The IT Responses ...............................................................................................................47
        III.C.1: Problem I: Unenforceable Claim-Rights .................................................................50
        III.C.2: Problem II: The failure to provide a delimiting criterion .......................................53
                Matthew Kramer and Bentham’s Test .........................................................................53
                Joseph Raz’s Theory .................................................................................................56
  Conclusion ....................................................................................................................................59
  Bibliography .............................................................................................................................61
§ I. Introduction

I.A: The Paper’s Aims

This paper concerns two sets of competing conceptual or formal accounts of legal rights. One set is comprised of Immanuel Kant’s model of rights and Wesley Hohfeld’s schema of jural relations, while the other composed of the Interest and Will Theories of rights. Whereas Kant’s model is a version of the Will Theory, Hohfeld’s schema of jural relations is amenable to Interest and Will Theorists alike. Although the relationship between the two sets is not of the type-token variety, the debate between Interest and Will Theorists often tracks and expands upon that between the Kantian and Hohfeldian models.

Section II aims to clarify two matters: what it is to be a Will Theory and why Kant’s model counts as one. It will demonstrate that the only necessary feature a rights model requires to be minimally established as a version of Will Theory is its identifying rights with a specific sort of power: the discretionary control – a choice or function of the will over the right’s enforcement or waiver. A Will Theory need not subscribe to the notion of composibility for the set of all legal rights, which holds that rights are by definition incapable of conflict. Nor must it commit to (or entail) the instrumentalism of rights, where the relevant concern is the facilitation of some goal, such as personal autonomy, which obtains beyond the legal sphere. Instead, a Will Theory need only hold that the relevant sort of choice is that which concerns the enforcement or waiver of a legal right itself. By defining rights as a title to coerce, i.e., the power to hinder wrongful interferences with one’s freedom, Kant’s model meets this minimal requirement.

Section II will also discuss whether Hohfeld’s schema of jural relations undermines Kant’s identification of a legal right with this coercive power. Exploring Kant’s options in response to this problem will serve as a vehicle for explaining and criticizing both his and Hohfeld’s models. Given his definition of a legal right and the requirements of his core legal principles, Kant’s efforts to establish compatibility with all kinds of Hohfeldian rights will probably be unsuccessful. The paper will then explore some additional difficulties with Kant’s version of the Will Theory: its commitment to a foundational natural right and the idea that all legal rights must be ‘compossible’.

Section III will address the modern versions of the Interest and Will Theories of rights. Some think the debate between them has ended in a stalemate. In conformity to a
test outlined in Section I, this paper will evaluate both the strongest charges levied against the candidate theories and each one’s ablest adherents’ responses to those arguments. In this manner, grounds for deciding the competing theories’ relative merits and breaking the standoff will hopefully have been provided. Accordingly, it will be argued that the strongest charge laid against the Will Theory, the Inalienability argument, is not as powerful as it seems. Indeed, it may backfire to some extent. The paper will then demonstrate that no Interest Theory response, explicit or inferable, to the Third Party Beneficiary argument is successful. The paper shall conclude that its relatively larger explanatory gaps, superfluous theoretical entities, and moral failings make the Interest Theory less attractive than the Will Theory.

This paper covers relatively well-established terrain. As shall be explained, it is widely accepted that Kant is the father of the Will Theory. Thus, although not axiomatic given the different permutations of the modern Will Theory, establishing an identity between Kant’s model and the Will Theory is not a difficult task. It is also generally agreed that Hart’s three elements of control constitute the greatest expression of the modern, ‘modest’ version of that theory – one scaling back considerably from the commitments required by Kant’s version. Additionally, efforts to reconcile Kant with Hohfeld through both molecularist and basic (‘atomistic’) models of the latter’s schema are manifold. Further still, much ink has been spilled assessing the charges laid against the Interest and Will Theories.

What this paper hopes to accomplish, then, is the following: first, to explore the Kantian and Hohfeldian rights theories and the clash between them, perhaps in greater detail than previously accomplished in certain regards, e.g., by engaging more thoroughly with Kant’s text, definitions, and principles. Second, to criticize both Kant and Hohfeld where necessary. Third, to help ground a common basis for analyzing and evaluating the modern Interest and Will Theories, at least insofar as they pertain to legal rights. Finally, to contribute to the Interest-Will Theory debate by critiquing the biggest charges and the best rebuttals, thereby providing reasons for preferring the Will Theory.
I.B: Background

There exists a legion of legal, political, and philosophical rights literature, most of which attempts to explain or justify propositions about rights based on substantive claims. To summarize such diverse material in a few sentences, much of the literature boils down to no more than the following sorts of claims: ‘There is or ought to be a legal right to X because, morally, people ought to have or do X. Alternatively, it is morally required that people do, or ought to be able to do, Y. But Y requires X. Therefore, X ought to be codified as a legal right. Additionally, right X from code Z does not [only] entail \( \beta \), but rather [also] \( \psi \) because of the following…’ Many legal theorists, however, abhor the incoherency and potential normative devaluation of the term ‘right’ brought on by the proliferation of new rights claims of the kinds just mentioned.¹

By contrast, there are a few theoretical positions (and a correspondingly far smaller subset of rights literature) that attempt to provide conceptual and normative analyses of legal rights \( \textit{qua} \) rights: the ‘what is a legal right’ question. The two principal candidates in this contest are the Will/Choice Theory, and the Interest/Benefit Theory. The theories generally aim to explain \textit{legal} rights, not moral ones. They vie to explain 1, the architectonic principle guiding and shaping the set of all legal rights, 2, the necessary and sufficient formal features of a legal right, and 3, the necessary and sufficient conditions for someone or thing to count as a legal right-holder.²

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² The theorists pose the debate’s fundamental questions differently, which may give the appearance of differing aims or scope. However, upon closer examination most differences turn out to be ephemeral. Matthew Kramer posits that some of the central questions of the debate concern what the holding of a (legal) right involves, the necessary and sufficient conditions for the existence of a right, and ascertaining the similarities and differences between rights and other sorts of entitlements. Matthew Kramer, \textit{Introduction, in} A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 1 (Matthew Kramer ed.) (1998). Peter Jones asks, “[i]f rights can take such different forms [as evidenced by the Hohfeldian schema of jural relations], what is it that makes them all rights? In virtue of what do laws and other sorts of rules give rise to rights?” PETER JONES, RIGHTS: ISSUES IN POLITICAL THEORY 26 (1994). William Edmundson suggests there are two different kinds of questions at play: conceptual and justificatory. “Conceptual questions are questions about what rights \textit{are}, what their makeup is, and what follows from an assertion that X has a right of such-and-such a description. \textit{Justificatory} questions, by contrast, focus on the grounds for, and reasons behind, the distribution of rights. Granted that a right is a certain kind of thing, why should we think that any exist? What grounds could there be for assigning rights? What purposes do rights serve, and could we do without them?” WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 119 (2004) (emphases added). Nigel Simmonds suggests that the (modern version of the) debate has essentially only two aims. First, to answer the Jones’ first question, i.e., discovering the common feature among the four Hohfeldian rights (claim, immunity,
What is the Will Theory? It is actually a family of theories all sharing the underlying idea that “every right is a vehicle for some aspect of an individual’s self-determination or initiative.”

“...[A]ll rights consist in the enjoyment of opportunities for individuals or corporate choices. Each right invests its holder with some degree of control over his situation. To ascribe a right to someone is to say that that person is empowered to make a choice about the fulfillment of someone else’s duty; such an ascription does not perforce suggest that any other aspect of the right-holder’s wellbeing is legally or morally protected”. 4

By contrast, all versions of the Interest Theory hold that “every right protects some aspect of a person’s welfare, which may or may not include some aspect of the person’s freedom.” 5 Any such theory will subscribe to the following propositions:

“(1) Necessary but insufficient for the actual holding of a right by \(X\) is that the right, when actual, protects one or more of \(X\)’s interests. (2) The mere fact that \(X\) is competent and authorized to demand or waive the enforcement of a right will be neither sufficient nor necessary for \(X\)’s holding of that right.” 6

Each family of theories has two names for historical and conceptual reasons. A ‘Will’ Theory prioritizes the right-holder’s will/intentional agency in matters concerning the exercise of a legal right itself (namely, the power to enforce or waive it), whereas a ‘Choice’ Theory might hold that rights exist to protect our ability to make choices in our liberty/privilege, and power) that makes them all “rights”. Second, it endeavors to explain the relationship between claim-rights and duties, and the powers requisite for enforcement of such duties. NIGEL SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE 326 (3rd ed.) (2008).


4 Id. at 2. Hillel Steiner’s Hohfeldian definition of the “unqualified” Choice Theory as follows: “[S]omething is a right if it is either a claim or an immunity to which are attached powers of waiver and enforcement over its correlative restraint. Looked at the other way round, the thesis states that anyone who holds these powers over a duty or disability holds a right correlative to it.” HILLEL STEINER, AN ESSAY ON RIGHTS 61 (1994) “If the [Will Theory] is correct, then all rights are indeed exercisable: all rights entail control over the duties of others.” Id. at 74.

5 Kramer, Rights Without Trimmings at 61.

6 Id. at 63; Matthew Kramer, Getting Rights Right, in RIGHTS, WRONGS, AND RESPONSIBILITIES 28 (Matthew Kramer ed.) (2001). While either theory could be construed as pro or non/anti-Hohfeldian, this distinction is more prominent for versions of IT. According to non/anti-Hohfeldian IT view, rights are not necessarily correlated with duties, but are rather grounds for imposing duties. This notion and a criticism thereof shall be addressed in § III below.
personal lives independently of the choices we make vis-à-vis the legal right itself. By contrast, an ‘Interest’ Theory posits that a right exists where a person’s wellbeing or interests are at stake, whereas a ‘Benefit’ Theory might posit that all rights as such benefit the holder. The distinctions amongst the pairings (will-choice, interest-benefit) are sometimes employed in the literature, but the names are often used interchangeably, perhaps because theorists are unaware of the bases or they deem the distinctions to be trivial.

A third candidate in the debate, the Skeptic, denies that any one theory or principle can explain the entire set of existing positive legal rights, or that a single theory can provide a unified justificatory account for all legal rights. For some unknown reason the skeptic’s position rarely rears its head in the conceptual analysis of rights literature, let alone gets championed. However unpopular in the theoretical literature, such a stance would comport with the historical view of the Common Law as “pragmatic and anti-intellectual”. Additionally, there have in recent years been efforts to provide alternative comprehensive theoretical models, although both their viability and actual distinctiveness from either the Interest or Will Theories [hereinafter “IT and “WT”] has been questioned.

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7 Since some rights do not benefit the holder, but in fact work the opposite effect, e.g., inheriting a money-pit, most proponents today call themselves Interest rather than Benefit Theorists.

8 See Sumner for an alternative account of the four terms, namely, benefit and control refer to relational duties, (claims-duties) while interest and choice refer to rights. Sumner, supra note 1 at 45-6, 101. One might hold that Sumner’s distinction is ephemeral.


I.C: Second-Order Concerns

In contrast to the questions posed, the terms of the debate itself are unclear. Although some suggestions have been offered, there are no generally established guidelines or standards for evaluating the consequences of each theory’s respective difficulties. What constitutes a victorious argument and what a basis for concession? What makes a theory valid and what constitutes failure? Furthermore, there are no established grounds for preferring one methodology, i.e., analytical or normative jurisprudence, to another. Given the purportedly disparate aims of analytic and normative theories, and in

12 By “second-order” concerns I mean those involved in framing the debate, e.g., ascertaining what counts as a valid basis for evaluating rights and what the appropriate objects of analysis are, whether analytical jurisprudential analysis of rights is invariably tainted by norm-inspired goals, etc. “First-order” concerns are substantive criticisms of the other theory’s explanation of some facet of existing legal rights.

13 Wayne Sumner offers ways to evaluate conceptual theories of rights. However, his intended scope is much larger as it is not aimed solely at legal rights, but also moral and natural rights, political rights, institutional rights, etc. First, a theory ought to have extensional adequacy: what a theory includes and excludes, from a “pre-analytical perspective”, as genuine instances of rights. Second, a theory ought to have theoretical adequacy: if a theory identifies more significant theoretical boundaries than its rival, and if it seems advisable to use the concept of a right to mark these boundaries, then there is good reason for preferring the conception yielding that larger map. Sumner’s example is WT’s division between private law and criminal law, where one has exercisable rights in the former but not the latter. Sumner, supra note 1 at 49-53, 96-7. Sumner’s tests are inadequate. First, pre-analytical intuitions about what constitute “genuine” moral or legal rights provides no firm guidelines and may at any rate be a circular exercise. Second, we ought not test a theory about legal rights by the tangential ideas about how they carve up the entire body of law in interesting ways since such divisions may themselves be circular and self-serving. For additional criticisms of Sumner’s tests see Rainbolt, supra note 11 at 112.

Hillel Steiner suggests that since both IT and WT come with their own costs – counter-intuitive commitments, the only way to evaluate their comparative merits is to note the costs of each counter-intuition and “plump for the less expensive package”. As Steiner notes, however, the only way to estimate their respective costs is to classify them and then see whether there are good reasons for treating certain types of counter-intuition as more affordable than others. Steiner, DOR at 298. However, adding up these items does not tell us anything about their relative weight; a problem for one theory may be more damaging than two problems found in another. Hence, Steiner suggests we further consider “the comparative demerits of moral implausibility and explanatory inadequacy in a theory”. Id. at 300. “Explanatory inadequacy” here is in reference to the analysis and ordinary usage of words, and Steiner’s “underlying thought” is that we must know what something is before we can evaluate it. His example is as follows: while both IT and WT hold that all rights are beneficial, we also benefit from others’ actions that are not owed to us. Thus, an action’s being beneficial alone does not provide us with a necessary condition of what the action’s being owed as a matter of right actually means. Id. at 300. However, since “our criteria for identifying rights are independent of our criteria for determining whether they’re [sic] beneficial…the fact that the Interest Theory is logically committed to denying this” is telling against that theory. Id. at 301.

14 The division between analytic and normative jurists as it pertains to this rights debate is as follows: Normative theorists think their project to be mostly or wholly moral and political. They therefore view their candidate theory (Will or Interest) as a theory of legitimacy for the positing of rights, delimiting the set of all rights, and delimiting the kinds of things that there ought to be rights for. By contrast, Analytic jurists view their project as purely conceptual, eschewing – so they claim – normative disputes about the merits or demerits that any given candidate ought or ought not to be a right. “The analytical question of what it is to possess a right must be logically prior to the question of what rights we possess; that the concept of a right
spite of an established body of literature, the nature of the debate remains ill defined. And
the disputants are candid in admitting as such.\textsuperscript{15} Further, since both theories claim to be
superimposing an interpretive schema upon positive legal systems, are their theories’
explanatory dimensions tainted by normative agendas?\textsuperscript{16} In other words, if the
explanation is a wholly exogenous imposition, to what extent is a conceptual theory of
rights merely an effort to convince others to view legal rights in a certain political or
normative light and to generate future rights in accordance with that view?

It may be the case that the entire IT-WT debate is subsumed by that question, and
that every issue therein can be rephrased as a function of it. Some normative jurists, such
as Joseph Raz, a non-Hohfeldian Interest Theorist, and Nigel Simmonds, a Hohfeldian Will
Theorist, unabashedly admit that their theories are wholly “partisan” political projects.\textsuperscript{17} If
analytic jurists and others deny this of their own work, they ought to justify the basis of
their analysis with agreed-upon criteria. From the history of our legal, moral, and political
culture of rights language, what warrants treatment as canon and what warrants purging?
Given past usage, what allows for identification of ‘improper’ or ‘flawed’ usage? In spite
of the widespread lamentation about the proliferation of rights usage there are no
established grounds for delimiting the set of all legal rights. Indeed, this may be
impossible. Our conceptions of what rights are may have diverged so far (or perhaps had
always been so divergent) as to make consensus impossible.

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\textsuperscript{15} Kramer lists the four meta-disputes amongst himself and his fellow authors in \textit{A Debate Over Rights}
as (I), the appropriate grounds for endorsing either of the rival theories of rights; (II), the underivability of
substantive conclusions from purely formal starting points; (III), the potential separation between legal
powers and legal liberties-to-exercise-those-powers; (IV), the methodological dissimilarities between straight-
forwardly political argumentation and formal analysis. Kramer, DOR at 4-5.

\textsuperscript{16} Simmonds claims, perhaps rightly, that conceptual intuitions about rights can be “regimented in a
great diversity of ways”. Simmonds, DOR at 116.

\textsuperscript{17} “Raz is therefore right to emphasize the fact that, when we are concerned with concepts that are
“deeply embedded in the philosophical and political traditions of our culture”, attempts to elucidate those
concepts “are partisan accounts of furthering the cause of certain strands of a common tradition.” \textit{Id.} at 213,
citing \textit{Joseph Raz, Morality of Freedom} 63 (1986)
If meta-ethical realism is untenable, then rationally resolvable disputes in ethics become possible only between those who share certain fundamental values or principles in common. So it becomes important, in the area of rights as elsewhere, for philosophers to identify clearly the assumptions on which their theories depend. If, for example, two different theories of rights rest on a common commitment to the importance of individual liberty, there is in principle no reason why any detailed disagreements between them should not be rationally resolvable. But if the theories are based on different fundamental values – if, for example, one is based on liberty and the other on a commitment to equality – then, to the extent that there is incompatibility between these deep commitments, there may be no way of resolving their surface disagreements. 18

I.D: My Proposed Three-Pronged Test

Constructing a convincing basis for evaluation is not a lost cause. I shall now proffer a three-pronged test for evaluating the competing theories that ought to have intuitive appeal. First, a candidate theory ought to have relatively superior explanatory power over the set of all positive legal rights than its rival. 19 Second, subjected to Ockham’s razor, the superior theory requires relatively less intellectual gymnastics to successfully explain existing legal rights. Third, the superior candidate provides the most cogent normative, justificatory account for and of legal rights. By this conjunction I reject both the ‘austere’ analytical and wholly normative jurisprudential approaches as independently sufficient modes of inquiry or evaluation. In Section III, where the test shall be applied, the first two prongs shall fall under the combined heading of ‘analytical criticisms’, while the third prong will fall under the heading of ‘normative criticisms’.

The reasons for the three prongs are as follows. First, unlike moral or political philosophy, a legal theory ought to be able to explain the positive law: not merely the bare

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18 Jeremy Waldron, *Introduction, in THEORIES OF RIGHTS* 4 (Jeremy Waldron ed.) (1984). Waldron claims that “the meta-ethical problem thus driven modern proponents of individual rights to take a much greater interest in the deep values and principles that underlie the detail of the particular rights that they proclaim. (Id. at 4. Emphasis added). I do not think the possibility of circularity was lost on Waldron.

19 In the least, a conceptually oriented theory of rights ought to have superlative explanatory power for both the general structure of rights and the existing set(s) of rights of empirical legal systems. How extensive must this explanatory power be? If it is demonstrated that a candidate theory lacks explanatory power over a single kind of right (or an instance in exercising it) does that demonstrate a failure for the theory altogether, or is its relative strength of explanatory power all that matters, e.g., theory A can consistently explain more rights within the set of all rights than can theory B? Of course, this generates a demarcation problem. What constitutes the set: Anglo-American legal rights, the set of all rights in all Western legal systems? All rights posited in the world’s legal systems? I shall tentatively assume that the Anglosphere is an appropriate boundary for requiring explanatory power.
facts of institutions and their necessity, but rather the law’s historical and idiosyncratic manifestations (if not every single incidence of law). For example, a theory suggesting that all legal rights exist to protect or justify dreams might be a coherent moral or political theory, but not a plausible legal theory.

Second, Wayne Sumner notes “[i]t is evident from these disputes that for each of the competing conceptions [IT & WT] there are both easy cases of rights which it can readily accommodate and hard cases which it can accommodate only by dint of some delicate maneuvering. But this is precisely what we should expect from models which are partially stipulative.”20 Thus, the test should include Ockham’s Razor: the relatively greater the number of complicated explanatory features, especially those not found explicitly or rooted in positive legal doctrine, the less convincing the theoretical account.

Third, although legal concepts subsist over time, the law is borne out of, and evolves with, socio-cultural-political shifts.21 A legal right is an inherently normative concept, one meant to serve legal purposes. Thus, a justificatory account should be able to provide the strongest reasons for thinking of the construct in a certain way. This is where moral and political philosophy plays a role. Admittedly, this second prong is subject to even serious objections since views about what constitutes the “strongest” reasons may as intractable as Waldron suggests. At minimum, I think it is possible to demonstrate that a theory may fail to meet its own normative aspirations and even directly contradict them.22

One may also question the test’s effectiveness. Can it answer the problem of when an argument is good or bad, when an argument should carry weight, etc? Should the test not have such sweeping goals? Should it rather serve as guideposts within and for the debate, rather than a means of assessment of final victory? Are the metrics too general or insufficiently penetrating to evaluate these sophisticated theories? Are the prongs of equal weight?

There may be other theoretical reasons for rejecting the test’s first two prongs. Leif Wenar suggests that a rights model cannot ascertain what constitutes genuine phenomena to be observed, e.g., positive rights, without making controversial assumptions outside the

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20 Sumner, supra note 1 at 51.
21 See, Spector, supra note 11 at 358.
domain of its inquiry. Instead, like many analytical jurists, Wenar thinks it less contentious to explain what rights people “say” exist and could exist.

Although this is not the appropriate place to challenge analytical jurisprudence, this particular ranking of investigatory difficulties can be viewed as backwards, at least as it pertains to legal rights (if not other kinds). First, positive legal rights are inscribed in law, and even if subject to a plethora of interpretations, the “text” to be evaluated is of a more limited scope than people’s general opinions. In other words, deciding what constitutes a ‘right’ and a ‘law’ (what constitutes a legal text and what does not) may be less controversial than deciding what constitutes an “ordinary” opinion. Second, the law is an arcane subject with esoteric doctrines. Many legal rights, or at least the manner(s) of their operation, are unknown to the public. Focusing upon an “ordinary” opinion on such matters may therefore be giving too much weight to certain perspectives and too little to others.

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23 Id. at 252.
24 Id.
§ II. Non-instrumental choices: Kant and WT’s minimal conditions

II.A: Immanuel Kant

In his recent book, Arthur Ripstein professes to distinguish Kant’s theory of rights, one he labels a theory of right as independence, from both the Interest and Will Theories of rights.25 This section has relatively modest aims. First, it shall demonstrate that Kant’s philosophical position in the *Metaphysics of Morals* is in fact a version of WT, because it endorses the discretionary control over the enforcement or waiver of a right. Second, it shall also demonstrate that this sort of discretionary control constitutes the minimal conditions necessary for any rights model to constitute a version of WT.

Kant is actually considered the father of WT for having identified a legal right as a ‘title to coerce’.26 Both the Civil and Common Law systems were, albeit to far different degrees, influenced by Kant’s ideas of a legal right being a coercive power and an expression of the will (*willkur*), and of rights-based “compossibility”.27 As shall be discussed below, rights-based compossibility requires that the set of all positive rights in a legal system be construed such that no one’s rights can logically conflict with anyone else’s. All rights are, or ought to be, ‘compossible’. Of course, the extent to which there are divergences between Kant’s theory of rights proper and Kantian theories of rights developed in empirical legal systems must be borne in mind.

The classical version of WT was accused of being subject to three ‘fatal flaws’.28 However, this paper will address only the one most critical for the conceptual analysis of rights.29 Professor Wesley Hohfeld suggested that there are actually four different sort of

26  See, Simmonds, DOR at 135-6, 176, 179; Ripstein, supra note 25 at 30.
27  See, Simmonds, DOR at 138, 168-9; CENTRAL ISSUES IN JURISPRUDENCE at 324. See also, Hillel Steiner, *The Structure of a Set of Compossible Rights*, 74 J. OF PHIL. 767 (1977); *AN ESSAY ON RIGHTS* 86 (1994).
28  See Simmonds, DOR at 136-41 for the division of classical and modern versions of IT and WT.
29  The other two criticisms were as follows. First, classical WT was accused of formal emptiness, i.e., that it was necessary to employ empirical, circumstantial, social mores to fill in the content of legal rights, which, more often than not, was merely adopted from the status quo. *Id.* at 136. In other words, classical WT was accused of the illicit importation of moral assumptions. Steiner, DOR at 266. Second, classical IT held that there was an “absence of any set of ideal conditions under which all interests may be reconciled and rendered mutually consistent.” If a reasonable ordering of interests is to be achieved, positive law-making is needed. “[A] realm of mutually consistent interests is the product of *artifice*, not a dictate of reason.” [*Pace* classical WT’s claim of law’s legitimacy derived from a system of rights grounded in the form of a will]. “Lawyerly concerns with principle and with the systematicity of the legal order are explained either as aspects
normative advantages in play in legal discourse when the word ‘right’ is used: a claim, a liberty/privilege, a power, or an immunity. Each of the four advantages correlates to one (always and only to the same one) of four normative disadvantages: a duty, a ‘no-right’, a liability, or a disability respectively. His schema was meant to provide clarity for the legal system, which was muddled by jurists’ conflation of these four advantages or ‘elements’ into one term. And yet something else happened. By dividing legal rights into ‘basic elements’ it was claimed that there was an implicit fragmentation of legal relations, evidencing that “permissibility” and “inviolability” did not necessarily obtain concurrently within a right.31 In other words, since some rights were taken to be violable and could potentially conflict (with one triumphing over another), the Hohfeldian schema was said to undermine Kant’s claims that every right is, or contains, a coercive power and that rights-based compossibility is feasible. For example, since A’s liberty-right correlates with B’s no-right (Hohfeld’s poorly named marker for the absence of a duty or other form of restriction), B’s interference with A’s particular liberty-right (and not any of A’s other rights) cannot trigger in A any power to coercively enforce his right because B has not, by definition, done anything legally wrong.

In his recent treatment of the Metaphysics of Morals, Arthur Ripstein defends Kant’s theory of rights from two charges related to those levied against classical W.32 In responding to the objections Ripstein claims to be able to contradistinguish Kant’s rights theory from both the Interest and Will theories. His basis is as follows: The right to independence is not a special case of a general interest in establishing and pursuing one’s own purposes, but rather the prevention of others doing so for you. Instead of viewing

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31 Simmonds, DOR at 137, 149, 183; Steiner, DOR at 266.
32 Objection I: “The idea of equal freedom is said to be unable to balance competing exercises of freedom against each other except by attending to the underlying interests at stake, and so to those interests, rather than freedom as such.” Objection II: “The claim that a distinctive set of standards governs the use of force is said to overlook the fact that the concept of a norm is prior to the concept of a sanction for its violation.” Ripstein, supra note 25 at 31.
rights as institutional instruments protecting ulterior ends (e.g. an autonomous private life), Kant’s rights constrain others only for the sake of the independence created thereby. The rights exist solely to prohibit conduct interfering with that modicum of independence afforded by the system of reciprocally limited freedom.\footnote{Id. at 34-5.} The system of right, therefore, does not champion choice per se, but rather the freedom to act independently of others’ choices.\footnote{Id. at 35.}

Although we should not exaggerate the extent of his error (especially because it does no serious damage to his account of Kant’s legal and political theory), Ripstein has gone awry in taking some versions of WT as representing all versions; for Kant’s claimed uniqueness is actually just one version of WT.\footnote{Alternatively, if our account of Ripstein is correct he may have made the additional error of attributing to Kant a limited version of IT, one where the relevant consideration of wellbeing warranting rights status is limited to individual autonomy (something ITs consider to be within the scope of the relevant interests that underpin rights, but not exclusively). Consider the following IT view: Although a person may be said to have the freedom to do something, “[n]o one ever has a 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.” Glanville Williams, The Concept of Liberty, 56 COLUMBIA L. REV. 1129, 1145 (1956), quoted in Kramer, DOR at 14; Steiner, AN ESSAY ON RIGHTS at 74. The problem with attributing this view to Kant is that coercive power requires exercise, i.e., it is an activity on the right-holder’s part. Having a title to coerce means that the right-holder cannot, as under Williams’ and IT’s general view be a mere passive beneficiary.} Demonstrating why requires investigating the relationship of right to coercion and what it means under WT for the power of coercion to be related to choice or ‘the will’.

II.B: Rights and Coercion

As already mentioned, Kant was the first philosopher to identify a right as a title to coerce.\footnote{Ripstein, supra note 25 at 30.} In the section of the Metaphysics of Morals entitled ‘Right is Connected with an Authorization to use Coercion’, Kant states the following:

“…[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.” 37

In terms of the history of rights theory, Kant has here made a radical and fruitful move. Earlier rights theories identified the content of rights with subjective and primitive motivations in a State of Nature. The set of rights produced thereby invariably lead to conflicts and unenforceability in many circumstances or in all circumstances. For example, A’s rights to life and self-defense conflict with B’s right to seek justice (vengeance) for A’s having killed C. By contrast, Kant’s definition of rights gives weight to the idea of a right as a legal entitlement; for if there is to be the rule of law and systematicity, and if rights are organs of that system, then the opportunity to actualize one’s rights cannot be a matter of mere chance. The rule of law entails that the successful operation or viability of a rule is not a fluke, and having a right means there is no need for calculating the probability of its successful exercise. The power to exercise (i.e., enforce and waive) a right follows analytically from the definition of ‘a right’.

Identification with a power of coercion also serves as a limiting principle for legal rights. The principle provides a clear standard for ascertaining when an agent may be said to hold a bona fide right. If one does not have the power to legitimately coerce, e.g., by enforcing the right in a juridical context, then one does not actually have a right. Kant can agree with Will Theorists of all stripes (analytical and normative jurists) that this power of control is the identifying marker of a right-bearer. Subscription to this idea alone suffices to make Kant a Will Theorist, even if his is a unique version within the family of WTs; for the quintessential claim of all versions of WT is to identify rights with this power of control.

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37 IMMANUEL KANT, METAPHYSICS OF MORALS 6:231, pg 25 (Mary Gregor Trans.) (1996). He continues on to state “[b]ut why is the doctrine of morals usually called (especially by Cicero) a doctrine of duties and not also a doctrine of rights, even though rights have reference to duties? - The reason is that we know our freedom (from which all moral laws, and also all rights as well as duties proceed) only through the moral imperative, which is a proposition commanding duty, from which the capacity for putting others under obligation, that is, the concept of a right, can afterwards be explicated.” Id. at 6:239, pg 31-2 (emphasis added).
II.C: WT’s Minimal Requirement

In spite of this identification, the matter of establishing the discretionary control as the core WT feature is not so easily resolved. This is because the relevant kind of choice and its proper objects are matters of some dispute amongst Will Theorists. Herein lies Ripstein’s concern: some versions of WT either explicitly hold or are forced to admit that legal rights exist for the sake of ulterior ends. On this view, rights are instruments for the development of autonomous lives, and the content of those lives may be relevant to the shape and nature of the legal rights. Hence, the locus of choice for these versions of WT lies beyond the effectuation of the right qua right. The fear, then, is that if our concern with legal rights lies in ulterior social goals, then their stability and peremptory force will be undermined. Rights will be constantly evaluated - leading to possible recalibrations of scope or content, or even eradication - for their ability to effectuate the desired social outcomes. In other words, if rights are stable artifacts of law only insofar as and so long as they are sufficiently utile in bringing about their non-legal goals (which themselves may shift over time), then that stability is ephemeral.

Nonetheless, other versions of WT deny that the relevant sort of choice or exercise of the will is concerned with ulterior ends. Instead, these versions hold that rights are non-instrumental units of freedom and that the relevant kind of choice pertains to the discretionary control over the rights themselves. The question of choice can be a wholly descriptive matter of identifying when a legal right obtains, thereby bypassing the need for justificatory accounts about why X ought to be a right or why Y ought to be a right-holder that look beyond the right itself. Ripstein’s fears about instrumentality cannot come to fruition for these versions because there is no further object of consideration within their purview (i.e., actualizing other policies or desired social outcomes).

Interestingly, the division amongst WTs about the relevant kind of choice does not necessarily align with any of the theoretical divisions mentioned above (analytical vs. normative theorists, Hohfeldians vs. non-Hohfeldians, classical vs. modern versions of

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38 Spector puts the problem thusly: “[WT] focuses on the powers of right holders but ignores the underlying autonomy-based justification. Hart, for example, suggests that the justification of those powers associated with the Will Theory is an interest in autonomous choice [Hart, infra note 43 at 188]. Under the Kantian view, however, rights cannot be grounded on interest—not even an interest in autonomous choice—because that would disregard the value of autonomy.” Spector, supra note 11 at 362.
WT). Subscribers to the non-instrumentalist view include Hillel Steiner,39 Wayne Sumner,40 Kant, Carl Wellman,41 Nigel Simmonds,42 and (the early) HLA Hart.43

It may be helpful to view the differences as ‘thick’ versus ‘thin’ versions of choice, where all versions of WT fall along a spectrum of how robust their view of the relevant sort of choice is, why they think it is important, and what they believe choice accomplishes. Using that thick/thin distinction, imagine the total set of WTs as a Venn diagram where the circle of thick versions of WT encompasses the entire circle of thin versions. In other words, in addition to their ulterior ends as guiding choices (related to their conceptions of the good, etc.), it seems that the thick versions must additionally view choice as encompassing the discretionary power of rights enforcement and waiver. If that is the case, then being common to all versions of WT, propounding this ‘thin’ choice, i.e., choosing

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39 Steiner, DOR at 238.
40 Sumner, supra note 1 at 98.
41 Wellman, supra note 1 at 95-6.
42 “The point is simply that we value the capacity to choose quite independently of the value put upon the content of such choices. We do not regard the general character and profile of our society as a natural landscape over which we have no control; nor do we regard the course of our individual lives as being inflexibly determined by inherited social roles. Knowing that these things are alterable, we believe it is our responsibility as moral agents to exercise choice about whether and how they might be altered.” Simmonds, DOR at 125 (emphasis added).
43 “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.” H.L.A. HART, Legal Rights, in Essays on Bentham: Studies in Jurisprudence and Political Theory 162, 183 (1982).

“The unifying element [of Hohfeld’s four normative advantages] seems to be this: in all four cases the law specifically recognizes the choice of an individual either negatively by not impeding or obstructing it (liberty and immunity) or affirmatively by giving legal effect to it (claim and power).” H.L.A. HART, Definition and Theory in Jurisprudence, in Essays in Jurisprudence and Philosophy 35 n 15 (1983).

Simmonds notes that most modern WTs have abandoned most of Kant’s broader claims in favor of more limited analytical theses. He labels HLA Hart’s version a ‘modest’ form of WT. Simmonds, DOR at 137 and footnote 35. Additionally, Simmonds elucidates two Hartian positions, the ‘early’ Hart whereby his WT can account for all Hohfeldian elements, and the ‘later’ view where Hart made his two concessions and rejected Hohfeld’s unilateral liberty in favor of Bentham’s bilateral one. Hart’s early view is found in his Are There any Natural Rights? and Definition and Theory in Jurisprudence. His later view is articulated in Legal Rights (although there are traces of the early view there) and subsequent essays. Simmonds, DOR at 218-22.

Simmonds himself subscribes to a version of Hart’s early view, rejecting the later view wholesale. “In Hart’s [earlier] theory, the duty is not imposed as a protection for free choice; rather it forms the object of the relevant choice. To possess a right, on this view, is to have control over a duty incumbent upon someone else. The right is not the rationale of the duty, nor its justification: it is the power to waive or demand performance of the duty.” Id. at 215-6.
whether to exercise one’s right in a legal context, as a necessary feature of rights suffices to minimally establish a rights theory as constituting a version of Will/Choice theory.  

We are fortunate to have guideposts for how this minimal exercise of will or choice operates. HLA Hart construed his own version of WT and identified right with coercion, or in his words, “exclusive control”. For Hart, the “fullest measure” of control is comprised of three 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 leaved 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.”

Without necessitating agreement with the rest of Hart’s version of WT, Kant’s rights theory requires either Hart’s three elements or a test akin to them. Otherwise, Kant is forced into the dubious position whereby a right-holder is incapable of the discretionary control over waiver or enforcement even though the definition of rights requires identifying them with coercion. The positive facet of the negative theory of non-interference is the

44 In coming to Ripstein’s defense, Professor Weinrib claims “Ripstein's point … is that Kant from the beginning conceives of rights relationally, i.e., that there never is a conceptual space in which the right can be specified independently of its relation to the normative position of others. This is what he [Ripstein] thinks marks Kant's view off from both IT and WT.” Private Correspondence with Professor Ernest Weinrib, April 21, 2010. Professor Ripstein himself believes that since the compassibility requirement is inherent in the structure of rights, there cannot exist interests over and above the rights (which are non-instrumental), which he thinks WT’s like Hart’s exhibit. Private Conversation with Professor Arthur Ripstein, April 14, 2010. Even if Ripstein is right to think that when the content of choices become legally relevant one requires an instrumentalist view of rights, one that is evaluated based on its capacity to effectuate the underlying interests/choices (Ripstein, supra note 25 at 34), it does not help his claim about WT. For no such conceptual disconnect is necessary for a WT. Any actualization of the right-holder’s choice vis-à-vis the right itself is ineluctably tied to the duty-holder’s duty. In fact, without the correlation, the choice would have no juridical meaning. Ripstein’s contradistinction, then, might have value only when considering those versions of WT that bother to concern themselves with the content of choices, which do not represent all WT’s, nor speak to those unifying principles that make WT a family of theories.

45 Hart, Legal Rights at 183.

46 Id. at 183-4. However, it is critical to note that “[v]ersions of the Will Theory differ in regard to the number of enforcement/waiver powers that must be held by Y before we can classify her as a right holder in her relation with X. The boldest versions of the theory insist that Y must hold an enforcement/waiver power at each of the three main junctures…” Kramer, DOR at 63. Variation in the number of enforcement/waiver powers will be prove important when addressing WT’s purported difficulty with inalienable rights. Although I have suggested that the minimal requirement of WT involves these elements, as we shall see in § III in response the inalienable rights problem, WT does not require the “full measure” of control, i.e., that all three elements must obtain, in order for there to be a viable legal right.
exercise of a right: countering undue interference via litigation in the private law system. And the ‘hindering of hindrances’, or countering interference, which defines Kantian coercion just is these elements of enforcement and waiver.\(^47\) To this extent, then, Ripstein is either incorrect or overstates his case in identifying the Kantian right entirely with the negative idea of non-interference by others. For the right-holder’s exercise of this kind of control suffices to constitute the sort of “choice” or ‘exercise of will’ sufficient to make Kant’s theory a WT.

To count as a version of the Will Theory a rights model need not subscribe to the ideas of rights compossibility or the instrumentality of rights. For the contrary to be the case, one would need to demonstrate either that the compossibility of the set of all legal rights is a necessary consequence of discretionary control over one’s right, or that there exists a bi-conditional logical relationship between the idea of rights as coercion and compossibility. Since neither demonstration is possible, compossibility is not a necessary feature of a Will Theory. Additionally, since all the versions of WT that propound either rights compossibility and/or the instrumentalism of rights also hold that rights involve discretionary control in their exercise, it is fair to hold this latter element as the quintessential feature of Will Theory.

Having established this minimum criterion of discretionary control, one might ask why it is at all important. Who cares what makes something a Will Theory of rights? We ought to care because it is this feature of WT that provides its tremendous value for both the conceptual analysis of rights and in articulating legal rights’ normative force. Under a Hohfeldian IT, and perhaps even from Hohfeld’s schema of jural relations itself, the correlation of rights with duties makes rights language redundant. If all rights can be understood perfectly via their correlate duties, ‘right’ is deprived of a distinct meaning from ‘duty’, thereby robbing legal thought of an idea of rights as a normative force independent of the mere focal point of obligations (to treat ‘obligations’ and ‘duties’ as completely synonymous here).\(^48\) If legal rights are something more than the mere flip-side of duties,

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\(^47\) See, Ripstein, supra note 25 at 81.

\(^48\) This is Hart’s “redundancy” argument. Hart, *Legal Rights* at 181-2; Carl Wellman, *Introduction*, in I RIGHTS AND DUTIES: CONCEPTUAL ANALYSES OF RIGHTS AND DUTIES xi (Carl Wellman ed.) (2002). See Sumner, supra note 1 at 52-3 for two kinds of responses to the redundancy argument. First, non-Hohfeldian Interest Theorists may claim that rights have a distinct role because they are logically prior to duties, even if
even in some minimal sense as the discretionary power to enforce those duties at the
bearer’s whim (the sort of discretionary power the duty-bearer himself lacks when it comes
to the fulfillment of his obligation), then a rights theory is required to explain how this is
possible. Providing rights this distinct and valuable role alone often convinces theorists to
prefer WT to IT, without having to commit to some of the more undesirable versions of
WT.

II.D: The Hohfeldian Dilemma: WWKD?

Like others before him, HLA Hart hit a wall when confronted with Hohfeld’s
schema of jural relations.49 Faced with this edifice, Hart made two sacrifices. First, he
claimed that at least some liberties/privileges are not enforceable per se. Now, some
liberties are fortunate to fall within a ‘protective perimeter’: a situation where a liberty and
claim-right obtain concurrently.50 However, this relationship between liberties and claims
is contingent at best.

Here is an example of the perimeter of protection relationship between a claim and
a liberty. From his own property, A has the liberty to look into his neighbor B’s yard. But
nothing protects A’s liberty to look into B’s yard as such. B is free to build a fence or plant
shrubs if he so desires. These obstructions thereby eradicate A’s liberty to see into B’s
yard. But A’s liberty is protected from attempts to thwart his glances that violate his person
or property. A has claim-rights against B vis-à-vis protection from physical harm to

rights are reducible to them. Second, any IT may claim that WT molecularism (discussed below in “Option
B) itself requires reduction to more basic elements. In response to the first charge, the IT position confuses
interests with rights: it is the interests that play the critical role in their theory for “grounding” duties, not
rights (the legal constructs) as such. Rights under that view are simply markers of duties. I shall develop this
idea further in § III.C.2 on Joseph Raz. The second charge also misses the mark: the aggregative nature of a
WT ‘molecule’ or bundle of rights does not by itself entail the lack of a distinct function from duties.

49 The fragmentation of ‘rights’ into claims, immunities, liberties/privileges, and powers. See, Hohfeld,
supra note 29. Hohfeld used the words ‘privilege’ and ‘liberty’ interchangeably. “A “liberty” considered as a
legal relation (or “right” in the lose and generic sense of that term) must mean, if it have any definite content
at all, precisely the same thing as privilege…” Id. at 42. Even so, contemporary scholars prefer the word
‘liberties’. The reason for this is not clear, although it may in part have to do with traditional political and
legal rhetoric often speaking of our ‘rights and liberties’ (e.g., the English Bill of Rights speaks of our
“ancient rights and liberties”), and so employing the word ‘liberties’ gives distinct meaning to the two terms
rather than having a pleonastic phrase.

50 Hart, Legal Rights at 171; Simmonds DOR at 182.
himself or his land (including trespassing) that, incidentally, protect his liberty to look into B’s yard. B cannot interfere with A’s liberty to look assaulting him.\footnote{Hart, Legal Rights at 167.}

Adopting Bentham’s language, Hart called those freedoms afforded a perimeter of protection by claim-rights and their correlative duties ‘vested’ liberties. By contrast, those not within the constellation of a claim-right and the correlated duty’s protection are ‘naked’ liberties.\footnote{Id. at 172, citing JEREMY BENTHAM, III WORKS 218 (1843). See also Steiner, AN ESSAY ON RIGHTS 89-90 (1994).} Since they are unenforceable, Hart held that ‘naked’ liberties do not warrant be considered as distinct kind of legal right.\footnote{Hart, Legal Rights at 173.} Hart was not alone in thinking so. Without regard to (or, more probably, knowledge of) the vested/naked distinction, Hohfeld’s early critics denied that any liberties/privileges were rights because the law cannot take cognizance of them.\footnote{See, e.g., Corbin, Arthur, Forward, in Hohfeld, supra note 30 at xi-xii (“One noted jurist declared that Hohfeld’s ‘legal privilege’ had “no juristic significance” (probably because such a “privilege” is the absence of societal compulsion or force."). Of course, these critics were challenging Hohfeld’s schema itself, which some Interest Theorists hold to be sacrosanct. Thus, this particular criticism does not necessarily tell against WT per se.} Hohfeld himself believed that only claim-rights were most properly called ‘rights’ in the strictest sense of the term.\footnote{Hohfeld, supra note 30 at 38.}

Second, Hart came to think that WT could not explain immunity-rights.\footnote{Id. at 189-92; Simmonds, DOR at 219.} The correlative of immunity is a ‘disability’. For example, the government is ‘disabled’ from passing legislation in areas protected by constitutional rights. Hart thought the immunity \textit{qua} immunity was not subject to the agent’s full choice requisite for his three elements because, even if one could later exercise a claim-right by suing the government for violation, a constitutional right cannot be waived (i.e., the right-holder lacks the power-right of waiver vis-à-vis the immunity).\footnote{Hart, Legal Rights at 190.} If correct, this would constitute a serious problem for WT.

Interestingly, even some Interest Theorists think Hart’s concessions were mistaken.\footnote{See, Kramer, DOR at 61; Neil MacCormick, Rights in Legislation, in LAW, MORALITY AND SOCIETY 195 (PMS Hacker and Joseph Raz eds.) (1977). For a WT critique of Hart’s concession, see Simmonds, DOR at 218-22.} This paper will not rehash all the existing arguments against Hart’s
acquiescence in this section, but shall instead attempt to provide a Kantian rejoinder to the
texts posed. Kant has two plausible lines of attack at his disposal. He may argue (A)
that Hohfeld’s schema is not as useful as it seems, or (B), that his system conforms to
Hohfeld’s schema under a molecularist view of legal rights. However, option (C), which
would attempt conformity with the ‘basic’ Hohfeldian position, i.e., where each ‘element’
is an autonomous right, is less successful.

Option A: Rejecting Hohfeld

First, the Kantian could simply deny the utility of Hohfeld’s schema. He could
assert that our jurisprudential predecessors were sloppy in constructing their concepts and
that Hohfeld himself took too much at face value when creating his own. While Kant
would invariably agree with idea of power rights, he might take issue with the other
Hohfeldian advantages. To see why requires further explication of some basic features of
Kant’s theory.

In contrast to the rights tradition that preceded him (Hobbes, Locke, etc.), Kant’s
conception of a right must conform to certain normative standards: namely, his Universal
Principle of Right and One Innate Right (hereinafter “UPR” and “OIR”). The UPR is a
metric by which to test the validity of all rightful conduct, including the creation of legal
rules that offer and protect positive, acquired rights. The OIR is the one natural, original
right we possess by virtue of our humanity. It is an analytical derivation from the UPR
rather than being analytically identical to it. All other rights must derive from the OIR and
conform to the UPR’s standard.

Unlike a Hobbesian or Lockean right (which are simply unilateral interests –
debatably, not necessarily tied to one’s wellbeing or benefit) the OIR contains a restraining
condition within its very definition, i.e., a non-interference and equal freedom requirement.
This entails that any given instance of a bare capacity for action is not necessarily a rightful

59 “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or
if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a
universal law.” Kant, supra note 36 at 6:230, pg 24.
60 Kant’s OIR is the one, original, natural right held by all human persons. “Freedom (independence
from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in
accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.”
Id. at 6:237, pg 30.
action/an act of freedom, for if one’s action interferes with another’s freedom it cannot be
the function of a right. Therefore, inherent in the Kantian notions of ‘a right’, rightful
action, and freedom is a standard by which we must determine an action to be right/free not
simply by virtue of one’s choosing (bare capacity) to so act, but also based on its impact
upon others (in certain, though not all, ways).

Given his own definitional commitments to coercive power, Kant could join Hart in
rejecting the idea that Hohfeldian ‘liberties/privileges’ are legal rights. This is because they
are just expressions of the bare capacity for unilateral action or inaction. Kant could simply
assert that liberties (‘naked’ and ‘vested’) do exist and perhaps warrant the status of moral
rights, but not of legal rights. The coexistence requirement inherent in the definition of ‘a
right’ necessitates the just/normatively desirable coercive power that is simply unavailable
in a so-called liberty/privilege. For Kant, freedom must be understood as encompassing a
total framework of interacting individuals. It is a conception of ‘ordered liberty’. If agents
can interfere with one another’s freedom, neither ordered liberty nor rights (save the OIR)
could be said to obtain. This is why Kant holds that rights can be “enjoyed” only in a
rightful condition, which is one of civil society that utilizes public justice.61

Kant would have the same problem with claim-rights, at least under certain
understandings of them. Under one interpretation of a basic Hohfeldian viewpoint, where
each advantageous jural element (liberty, claim, power, immunity) is a right unto itself, one
could have a claim without the power to enforce or waive it.62 This seems nonsensical
under the Kantian definition of a right. The divorce may be coherent for a moral right, but
not a legal one. To adopt the proposed view would be to hold that all claims qua claims are
unenforceable, or only contingently so. Kant might therefore take issue with the basic
Hohfeldian’s very usage of the term ‘claim’. If a ‘claim’ is taken to be explaining
something of law and not just morality, it must be more than a mere identifying marker of
an entitlement; it must additionally entail that the bearer has some sort of legal capacity to

61 This is why Kant holds that rights can be “enjoyed” only in a rightful condition, which is one of civil
society that has public justice. Kant supra note 37 at 6:306, pg 84-85.
62 Kramer, DOR at 9, 64, 65, 68, 82-3; Kramer, Getting Rights Right at 60.
make a claim. Even though the word ‘claim’ connotes an assertion, i.e., an action, or the potency for one, Hohfeld’s language may suggest a purely passive right.⁶³

Hohfeld may have been trying to preserve the normative language of claim and duty, even though both are potentially subsumable under the rubrics of power and liability. For example, a ‘claim-right’ may be nothing more than the power to call upon a duty-bearer to act or refrain from action by threat of legal action (litigation, etc.), whereas a power-right alters legal relations in other ways.⁶⁴ That seems to be more of an ‘analytical’ approach than adherence to the passive (and moralistic) usage of ‘claim’. Hohfeld might reply that a duty is still something different from a liability, e.g., one may be liable for a breach of a duty, but this might only be semantics. For example, we can call each stage of (i) obliged action or omission, (ii) compelled performance, and (iii), court-compelled fulfillment of obligations (payment of damages or performance), as merely being different species of liability (to act or refrain from action or to suffer a penalty).

Kramer holds that because Hohfeld’s schema is an abstract system of deontic logic it is not subject to empirical or moral refutation. It is meant to serve as a corrective measure and guide for jurists to increase precision in the law, not as a report of the current law.⁶⁵ But its capacity to provide precision is possible only if you already think that the schema cuts the law at its natural joints. If one starts with a basic definition of ‘a right’, which Hohfeld intentionally does not⁶⁶ but Kant does, then insofar as it cannot comport with that definition Hohfeld’s schema’s disutility becomes evident. If you think rights by definition are enforceable, then Hohfeld’s identification of liberties as rights is incoherent to you. The same holds for claims or immunities that are wanting for enforcement power. Hohfeld’s fragmentation of rights only becomes a problem if you find some compelling reason to subscribe to his schema in the first place. If Kant can defend his definition as being coherent, then this fragmentation is not necessary.

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⁶³ The same might be said of Hohfeldian immunities.
⁶⁴ Kramer labels this an ‘ingenious’ but flawed WT possibility (Kramer, DOR at 99-100), while Rainbolt attributes to Hart the view that claim-rights are composed of both claims and powers. Rainbolt, supra note 11 at 99.
⁶⁵ Kramer, DOR at 22-3.
⁶⁶ Hohfeld, supra note 30 at 36
**Option B: The molecularist Hohfeldian position**

Second, Kant could claim his rights theory conforms to Hohfeld’s schema of jural relations. His best chance of doing so would be as molecularist’ Hohfeldian, whereby every right is complex. Molecularism here means that every legal right is actually a combination of some Hohfeldian elements (e.g., claim and/or immunity + power to enforce/waive + liberty to exercise the power), rather than viewing each element in isolation as constituting a right unto itself. Aggregating Hohfeldian elements in this way offers two potential benefits. First, there is a greater chance that every permissible right will also be inviolable. Second, Hart’s problem of enforcing immunities may be bypassed. Immunity-rights could be viewed as being comprised of all the advantageous Hohfeldian elements. Thus, violations of the immunity will trigger an associated claim-right with the power to enforce the immunity.

Carl Wellman, a WT Hohfeldian, holds that any given ‘element’ forms the core or nucleus of a right, to which the other elements attach.67 One can think that these orbiting elements are interchangeable, like planets revolving around a sun68 or like electrons joining and leaving an atom, although the core or nucleus element remains the same. However, a Hohfeldian molecularist view does not necessitate that the elements be subject to disaggregation and recombination. One can instead hold the view that the elements are necessary incidents of a unified, right. Thus, a rights ‘molecule’ can be either evolutionary or static.

The distinction between evolving and static views may be important for the basis and integrity of rights. Evolutionary molecularist views seem to be borne out of the same reaction to Hohfeld’s fragmentation of rights that gave rise to modern IT and the idea that all rights are granted and constructed by the government. What the government giveth, the government may taketh away. This gave rise to the “bundle” theory of rights, where each Hohfeldian element is but a contingent feature of rights. The “bundle” theory came to theoretical prominence with American Legal Realism (Karl Llewellyn et al), and is the dominant American view of rights today. Hence, Wellman’s view seems to constitute an interesting amalgamation of WT and IT heritages.

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68  Wellman, *Rights and Duties*, supra note 48 at 171.
One can subscribe to the static view of rights whether or not one believes, as Kant
does, that certain rights are logically prior to the positive law. Either way, the static view
provides a firmer notion of rights as fixtures in the law, providing clearer guidance for
rights-holder behavior than can the evolutionary view. Since law is supposed to give
guidance for people’s actions and rights are meant to effectuate that purpose, unless
everyone else’s rights morph concurrently Kant should prefer a static molecularist
viewpoint.

In this way, Kant might be able to reply to the classical IT charge of a disconnect
between permissibility and inviolability for legal rights. However, this will be possible
only if there can be molecular rights with liberties at the core.69 Now, most molecular
models take for granted that liberties can be at the core. In fact, some theorists, such as
Hart,70 argued that liberties always constituted the core of a right until Wellman
demonstrated otherwise.71 I, on the other hand, do not think a liberty-core molecule is even
feasible, based on Kant’s theory or otherwise. Positing such a molecule does too much
damage to the Hohfeldian schema: it either collapses the distinction between a claim and
liberty or eliminates the Hohfeldian ‘no-right’.

It is easy to see why a Kantian would want such a right in his arsenal. As facets of
the OIR, liberties are always accompanied by a claim and power of enforcement, with
correlative duties and liabilities by others. A Kantian may try to maintain that the
difference between molecular rights with liberties and claims at their cores is the relevant
kind of action. The molecule with a liberty-core is predominantly concerned with the right-
holder’s own activity. The right-holder is free to act as he pleases without interference by
others (so long as he himself does not interfere with others’ rights). Others’ unjust
interference will trigger the right-holder’s associated claim, which he has the power to
enforce. By contrast, the molecule with a claim-core predominantly concerns the right
holder’s ability to enforce or waive the duty-holder’s required action. The difference can
thus be characterized as that between active and passive rights. The liberty-core right is an

69 That is, unless liberties are restricted in scope to the discretionary role in exercising a power-right (if
and when to enforce or waive a right), which. But that is not what Hohfeld or most theorists mean by the
term.
70 Hart thought there was a bilateral liberty was “involved in all the most important kinds of legal
right…” Hart, Legal Rights at 166.
71 Wellman, A Theory of Rights, supra note 1 at 61-80.
‘active’ right, while the claim-core right is a ‘quasi-passive’ right (not fully passive because of the right-holder’s power to exercise enforcement or waiver).

Despite these characterizations, is there a real difference between the two molecules? Might the liberty right at the core of the first molecule be irrelevant, such that its legal exercise tracks that of the claim-cored molecular right exactly? Say A’s liberty-core molecule is a right to choose his vocation. B interferes with A’s procuring the kind of job he wants in a manner sufficient to trigger the associated claim. Is it the freedom to choose A’s vocation that which the claim is enforcing or something else, some other right? Since the liberty correlates with a ‘no-right’ it must be some other right.

Even if the cases are distinguishable and the claim does enforce the liberty itself, what happens to the ‘no-right’ that correlates the molecule’s liberty-core? Is it nullified or rendered moot by the associated duty? As we shall see below, Will Theorists would not deign to posit nominal rights because they think all rights are exercisable. So why would they accept nominal correlates? At any rate, for this liberty-cored molecule to be coherent the liberty must be correlated with a duty, not a ‘no-right’. But this cannot be squared with Hohfeld’s schema. If this description is accurate, then Kant will not find solace in molecularist views of Hohfeldian rights.

Option C: The basic Hohfeldian position

The third and worst alternative for Kant’s theory of rights is to attempt compatibility with a ‘basic’ Hohfeldian position, whereby element (claim, power, immunity, and liberty/privilege) is treated as an independent right. Analysis of each basic right should bear out difficulties with both Kant’s accounting for each as a right and the logic of Hohfeld’s schema. Particularly, some Hohfeldian pairs of correlatives seem capable of being subsumed under others, and some pairings seem less appropriate than other possible combinations of Hohfeldian elements.

Again, Liberties/privileges would have to be viewed as facets or derivatives of Kant’s OIR. If A’s actions (acting under the auspices of a ‘liberty’) actually interfered with B’s freedom, A would have violated a duty correlative to B’s OIR. In that situation, A cannot be said to have a right, i.e., proper utilization of a facet of his own OIR, because of his violation of the equal freedom requirement of the UPR and B’s OIR. Thus, what is often called a conflict of liberties would instead be a situation where one party (if not both)
violates some facet of the other’s OIR. \textsuperscript{72} This is a problem because a basic Hohfeldian ‘liberty’ cannot itself trigger the coercive power required to protect the OIR. That would require a \textit{claim}-right, and, indeed, the above account seems to reduce all liberties to enforceable claims. For Kant, transgressing a right violates a duty because the violator has impinged upon the OIR. If so, the transgressor’s mere Hohfeldian ‘no right’ seems to have disappeared. This suffices to distinguish Kant from HLA Hart’s WT. For Kant, if liberties \textit{qua} liberties are bona fide rights, then there is never a need for a ‘perimeter of protection’ by claim-rights; there are no liberties lacking inherent protective power. Kantian liberty-rights, if any exist, are a function of the OIR, for which claim and power rights exist in private law.

Hohfeldians may disagree with this analysis, and argue that I have conflated liberties and claims and not provided a proper account of when liberties themselves obtain. Alternatively, they might hold that the violation of the liberty coincides with the violation of a claim (Hart’s “perimeter of protection” relation), and it is really the latter right that the law is enforcing. A Kantian and others might also object that this concocted scenario is impossible. If there was wrongful interference in this situation, the action could not properly be a rightful one and thus not a genuine instance of liberty. The agent was merely mistaken about what he was at liberty to do. If, however, the interference was not wrongful, then it was not a violation of the agent’s liberty-right.

In response, one must first say that a basic Hohfeldian Will Theorist cannot simultaneously hold that the liberty-right is distinct and that all rights are necessarily exercisable. For where is the possibility of enforcing the liberty \textit{qua} liberty? Simmonds holds that “[t]he invocation of a Hohfeldian liberty will normally have a practical point only when it is made in resistance to a claim of duty”. \textsuperscript{73} If that is true, then what is the difference between asserting a liberty-right and merely denying the existence of a duty-claim relationship? Must one always assert a liberty in such situations? A enters a contract with B over the supply of widgets. A sues B over one of the contract’s terms about supply

\footnote{Although it should be borne in mind that not all interference with one’s liberty is wrongful. See Ripstein’s explanation as to how others’ use of their liberty might simply change the facts of the world without constituting an unjust interference with one’s liberty. For example, a competitive business’ depriving its rival of customers through superior products or services does not unjustly interfere with the rival’s liberty. Ripstein, \textit{supra} note 25 at 39; Kramer, DOR at 15; Simmonds, CENTRAL ISSUES IN JURISPRUDENCE at 299.}

\footnote{Simmonds, DOR at 157.}
dates. Defendant B denies that the contested clause means what plaintiff A claims it means. It turns out that A’s interpretation is glaringly wrong. If B is correct about the contract, did he have to posit a liberty-right claim in order to deny having been under the duty, or does it suffice that A demonstrate that no duty was ever brought about? How does one establish the existence of the liberty but by establishing the latter in such disputes? If so, what does the liberty-right add to our jurisprudence?

Second, if a liberty is indeed a facet of the OIR, then its true correlative is a duty and not a ‘no-right’. You may have no duty when it comes to rightful actualizations of your own liberty, but you have a duty not to wrongfully interfere with my liberty simply by virtue of it being a facet of my OIR. If there is no possibility of wrongful interference with liberty-rights then there are no grounds for enforcing them. But, says the Kantian, the OIR is enforceable because all positive rights are derived from it. Thus, there must enforceable duties correlative the liberty-rights if all rights are titles to coerce.

These incoherencies alone, I think, suffice to show why the basic Hohfeldian position is incompatible with Kant’s fundamental definition of legal rights. Since the locus of coercive power lies in the ability to enforce or waive a right, and since one cannot waive the OIR itself but rather enforce or waive its positive law manifestations throughout the various stages of litigation, the Kantian WT account cannot apply to basic Hohfeldian liberty-rights. A Kantian liberty-right, should it even exist, cannot be squared with Hohfeld’s required ‘no-right’ correlate, because all rights must be enforceable.

The Kantian theory also has difficulty accounting for Hohfeldian power-rights as expressions of the OIR. But neither can a non-Kantian basic Hohfeldian adequately explain such powers. For example, how is the power to generate a contract *qua* right tied to a coercible power of enforcement? We do not coerce others into the generation of contracts, but rather concerning their enforcement or violation. Neither a would-be promisee nor would-be promisor seems to have a general ‘liability’ for being subject to contract formation.74 But if the power to generate a contract is a power-right and not a liberty-right, it seems to undermine the correlativity axiom, whereby all four species of

74 In a contract, the promisor is the party who makes the promise while the promisee is the intended recipient of the promise. Jim offers Bob delivery of 100 widgets on Friday in exchange for $100. Bob accepts. Jim is the promisor, while Bob is the promisee.
Hohfeldian rights are correlated (logically and temporally) with the four normative disadvantages.

Kant could say that while no individual is ever obliged or ‘liable’ to contract with me, if my general ability to enter contracts is hindered by individuals or the government, then my OIR has indeed been violated, for which tort (or constitutional) law applies and suits can be initiated where I can coercively enforce my right. But why does this tell us something unique about power-rights? Why would this be different from a violation of liberty or claim-rights?

Kant would also probably think (the later) Hart was wrong to suggest that immunities are not subject to WT’s explanatory power. There are several possible ways of responding to (the later) Hart and WT critics. First, the molecularist might hold that the only way to account for coercive power here is in the enforcement of the claim-right facet of a constitutional right, not the immunity-right alone. In other words, violation of the immunity triggers an associated claim-right and power-right to enforce it.75 Under a basic Hohfeldian view, by contrast, there is no necessity for the immunity-right-holder to also hold an associated claim and power-rights. The immunity-holder’s harboring these additional rights would be (at best) sufficient but not necessary.

Second, Professor Ripstein’s thinks that innate right “is a constraint on others’ conduct, rather than a way of protecting some non-relational aspect of you”.76 According to this view, a constitutional immunity is a right simply because it is a constraint on the government’s conduct. However, that idea alone seems inadequate. Where does the coercive power, the discretionary control, come into play? What ensures that the constraint is enforced? If the government repeatedly violates free speech in what sense is it still a bona fide constitutional right? Quis custodiet ipsos custodes? To constitute a WT right

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75 Although generally a molecularist, Sumner thinks it sufficient but not necessary that all legal rights be molecules. He suggests basic immunity rights are feasible if they take liberties or powers as their “content”. His example is a constitutional clause guaranteeing free speech. The right is an immunity disabling the government’s power to regulate in the specified domain. The right entails the liberty to speak and thus seems like a molecule comprised of a liberty and immunity. “But closer inspection reveals that this is not (necessarily) the case. The liberty which is entailed by the right is also entailed by immunity, since it is an immunity against legislative restriction of that liberty. The relationship between the liberty and the immunity is thus logical rather than normative: the liberty is part of the content of the immunity.” See, Sumner supra note 1 at 37-38.

76 Ripstein, supra note 25 at 35.
there must be the opportunity for enforcement and waiver of the immunity in conformity with (at least some of) Hart’s three elements.

This may be troublesome for Kant’s theory, because, aside from the OIR, rights are essentially given and enforced by the government. If there is a ‘first-level’ coercion *qua* enforcement of rights by plaintiffs suing defendants, it exists only because of a ‘second-level’ of coercion in the form of government power: providing the legal apparatuses that protect and enforce rights (courts, police forces, etc.). Kant, however, is not a Lockean. The citizenry do not have coercive power against the government, nor a right to revolution.

The Kantian has at least two alternative ways to respond. First, he can deny the enforcement issue is a real problem. He could suggest that constitutional ‘rights’ are not bona fide rights because there can be no coercive power used against the government. Real rights, as opposed to the provisional variety found in the State of Nature, can obtain only within civil society. Citizens are able to enforce their rights only because of the state’s coercive power (to enforce court judgments, etc.). But an individual citizen, or a collection thereof, can have no rightful coercive power against the state. Hence, citizens cannot be said to have coercive power of enforcement of rights against the state. To explain why citizens can challenge violations of certain constitutional clauses that an “independent judiciary” can enforce on their behalf, constitutional rights must be understood as mere self-imposed constraints by the government: actual “disabilities” being something of a fiction.

Notice, by the way, that ‘disability’ is not a problem for Hohfeld since he has only presented a schema of deontic logic\(^\text{77}\) not tethered to any larger political theory. For Kant, by contrast, ‘disability’ takes on the additional normative dimension of unacceptably qualifying or limiting government power; for if the government acts within the parameters of the UPR, nothing can (otherwise) legitimately qualify or restrict its power.

One problem with this possible Kantian approach is that, even within the sphere of private law, one’s ability to enforce a property or contract right is subject to a whole series of government choices, e.g., the courts accepting the case, passing judgment, enforcing the judgment with the (threat of force) via the executive branch officers, etc. A Kantian may

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\(^{77}\) Kramer, DOR at 22.
appeal to the tripartite division of government promoted in the *Metaphysics of Morals*, whereby an independent judiciary would protect citizens’ rights from abuse by the legislature or executive branches. But this would be merely buying into the fiction that because there is a separation of powers the judiciary is somehow not a branch of ‘the government’. Even if there is a benefit from the disaggregation of powers created by the tripartite system as a prophylactic against tyranny, it does not follow that the judiciary is anything but a government agency distinct from any given human’s capacity for choice. The judiciary’s interest in enforcing rights, for example, does not necessarily correspond with any given agent’s interest.

Is the successful exercise of a legal right not guaranteed enforcement powers but rather a matter of probability? My choice may not align with the government’s interests or abilities. The American state of California is currently bankrupt. To tackle its budgetary issues its courts may be forced to reduce their caseloads. If a Californian wants to sue for a violation of his property for a problem arising under state law but the state will not or cannot hear his case due to a lack of funds to handle litigation, does he have a legal right under the Kantian version of WT?

The Kantian’s second, and superior, alternative is to claim that constitutional rights are indeed bona fide rights. He might claim that a constitutional bill of rights is merely the codification of one or more facets of everyone’s OIR, the one, original, natural right held by all human persons. This one right is not contingent upon the state for its existence. The Kantian, who denies a right to revolution or coercive power against the state, shall still be hard pressed to explain immunity-rights as a function of choice or will. He may want to hold that this criterion of discretionary control of enforcement or waiver does not apply to the OIR, which somehow constitutes an exception to the rule. In other words, the OIR is not the kind of right that can be waived. Granting the Kantian distinction for the sake of argument, the enforcement problem nevertheless remains unresolved.

**Assessment**

Of the three alternatives, Kant’s best alternative is to reject Hohfeld’s schema altogether. As all rights derive from the OIR there is no facet of a Kantian right for which interference therewith fails to give rise to both a ‘claim-right’ and the coercive power of enforcement. Kant could claim compatibility with molecularist versions of Hohfeld’s
schema if he denies there can be molecules with liberties at their core. In this way, pace Kantian critics, the permissibility and inviolability for most rights are not severed. Indeed, liberty-rights are no more or less of a problem for Kant than for any sort Will Theorist or jurist who thinks rights must be cognizable by the courts. However, to the extent Hohfeld thinks liberties/privileges are genuine legal rights this will serve as a barrier for compatibility with Kant’s theory. Further, in the face of a basic position, the Hohfeldian schema often segregates elements in ways that render Kantian rights conceptually incoherent, such as a claim without a enforcement power, or where the violation of a liberty-right cannot be remedied for want of a claim, and where a liberty must be correlated with a duty and not just a no-duty if it is to be a right at all.

II.E: Rejecting Kant’s WT

Although we have suggested Kant’s theory is best understood without Hohfeld’s schema of jural relations, this paper does not promote subscription to Kant’s version of the Will Theory. As mentioned above CWT was accused of being subject to three fatal flaws. In addition to these three, one ought to be dissuaded by the Kantian position for two reasons that bear mentioning in this paper. The first is logically prior to the problems raised by Hohfeld: namely, the very plausibility of the OIR. Second, one ought also be suspicious of rights-based compossibility, irrespective of the claimed disconnect between permissibility and inviolability.

II.E.1: Against the OIR

The Kantian OIR is a dubious starting point for a modern theory of legal rights. A ‘One Innate Right’, from which all other rights are derived, is, I think, an example of Hume’s natural/is-ought fallacy. Kant claims we have this right by virtue of our humanity (not our personhood, interestingly).78 Given his complex metaphysical-epistemology, whereby freedom must be said to exist independently of special-temporal bounds in order to avoid determinism (as per the Third Antimony in the Critique of Pure Reason), Kant might himself reply there is no bona fide fallacy here because there is no divorce between

78 Kant, supra note 37 at 30.
ought and is. This paper is obviously not the proper place to settle that dispute. Nonetheless, Kant proffers the OIR (and UPR) as bald propositions, without argument as to why someone should ‘believe they exist’ or at any rate why one ought to subscribe to such norms. One does not find in the positive law a claim that all species of legal rights are reducible to a single, originary right. We should also be skeptical of possible circularity: how convenient that there already exists a natural, innate right to protect the very thing that we want the positive law to protect, i.e., exercises of our will.

II.E.2: Against Compossibility

Kant defines ‘Right’ as “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.” He thereby invented the idea of rights-based compossibility. The idea is that, pace previous rights thinkers such as Hobbes and Locke, it makes no sense to posit that when A has a right to \( \phi \) it can be undermined or negated by B’s rights to \( \phi \) or \( \psi \). In other words, Where A’s right to \( \phi_1 \) conflicts with B’s right to \( \phi_2 \) or \( \psi_1 \), then the set of rights in which \( \phi_1 \) and \( \phi_2 \) or \( \phi \) and \( \psi \) generally obtain is logically impossible. What A and B have in that situation cannot be called ‘rights’ because at least one party could not be said to actually be entitled to so act. It is logically impossible for both parties to legitimately coerce each other simultaneously. Rather, theirs would be ephemeral and contingent interests subject to the whims of fortune. Compossibility requires that a set of rights obtain where such conflicts amongst rights do not arise.

But what does this conflict entail? Must all conflicts of potential exercises of rights actually be demonstrations of incompossibility? No. Ripstein is correct to analyze the situation as one where the facts of the world have simply been changed by another acting

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79 To avoid redundancy with the section on coercion, this section shall discuss compossibility as it applies only to Hohfeldian claim-rights and their correlative duties.

80 Kant, supra note 37 at 6:230, pg 24.

81 That is to say, Kant was the first philosopher to think of rights as being subject to compossibility. It was Leibniz invented the idea of “compossibility” as such. See, Steiner, DOR at 265 n 50.

82 Steiner captures the notion well by saying that where A is claimed to have a right, his action is permissible. But if B’s right prohibits A’s exercise of his own right, then A’s action is impermissible. But A’s action being simultaneously permissible and impermissible, which is a logical contradiction. Steiner, The Structure of a Set of Composable Rights, supra note 27 at 767-8.
within his right. It does not follow that because one cannot exercise one’s right at a particular juncture that the right has necessarily been violated.

The problem evidences what I shall call the ‘type-token’ fallacy, where the ‘type’ would be the right itself and ‘token’ a particular sort of way to exercise the right. There is a presumption that because a given instance of the (purportedly legitimate) exercise of a right leads to conflict, that the rights themselves conflict and are not compossible. The type-token fallacy presumes that compossibility entails all conceivable usages of the interest underlying the right. In other words, it confuses ‘the possible’ with the right/just/legitimate. Kant’s idea of freedom rejects this conflation, as evidenced by both his UPR and OIR. Within their very definitions, i.e., coexistence of freedom of choice, freedom from being constrained by another’s choice, the UPR and OIR (From which all other rights, e.g., acquired rights, are extensions) instances of conflict cannot be instances of a Kantian right being employed.

As mentioned above, Kant’s UPR is a standard of rightness. It is a metric against which all positive law must be evaluated for legitimacy. If there is a situation where “the freedom of choice of each” cannot “coexist with everyone’s freedom”, then someone (or both parties) is acting beyond his rights. If such conflicts arose from the positive law, Kant might say that dialectical resolution, undertaken by the courts through adjudicative disputes, can resolve these imperfections in the law over time. This would not be adorning the courts with the role of prioritizing rights through subjective, relative ranking. The

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83 “…Kant’s account of independence does not aspire to isolate people from the effects of other people’s choices. Instead, my independence of [from] your choice must be understood in terms of my right that you not choose for me. I remain independent [even] if your choices have effects on me, as when you decline to cooperate with me on some product, or you pursue your own purposes, and in so doing render things I had hoped to use unavailable. Any such idea of independence from all effects of the actions of others violates Kant’s basic idea of equal freedom. To insulate one person from all effects of others’ choices would subordinate everyone else to that person’s choice…Once freedom is understood in terms of people’s respective independence, one person’s freedom need not conflict with another’s.” Ripstein, supra note 25 at 39 (emphasis added).

“This argument has force against freedom understood as the ability to do as one wishes, but not Kant’s conception of independence. The limits are equally applicable to all, and their generality depends on the fact that they abstract from what Kant calls the “matter” of choice – the particular purposes being pursued – and focus instead on the capacity to set purposes without having them set by others. What you can accomplish depends on what others are doing – someone can frustrate your plans, e.g., buy the last quart of milk in the store. If they do so, they don’t interfere with your independence, because they impose no limits on your ability to use your powers to set and pursue your own purposes. They just change the world in ways that make your means useless for the particular purpose you would have set. Their entitlement to change the world in those ways just is their right to independence.” Id. at 16 (emphasis added).
courts would instead decide whether certain *possible* exercises of a right would actually violate the equal freedom requirement of the UPR and OIR, and thus not constitute exercises of a ‘right’ at all.

Hillel Steiner, however, offers this additional problem: what about situations where B, who in exercising his right, hinders the *only* way for A to exercise his own right. If the *only* way A can exercise his right to φ is via actualization type Q, but the *only* way to do Q is hindered by another’s rightful action, in what sense can we say that A has a right? For example, if the only way for Bob to make a flower delivery is by gaining access into a building, but all manners of ingress happen to be thwarted by Jim’s legitimate exercise of his own rights, what sense does it make to say that Bob has a right to deliver the flowers? Bob’s action is permissible (since he has the right to deliver the flowers) and impermissible (since he cannot violate Jim’s rights) simultaneously, which, to Steiner, is a logical contradiction. Steiner thinks a non-contradictory set of rights is possible, while Interest Theory critics think this scenario demonstrates that compossibility is impossible on the assumption that such conflicts will invariably arise in any conceive set of rights.

Under Ripstein’s analysis, we might respond to Steiner’s variation of the problem with the following. Your right consists in the freedom from having your ends set by others. No one can make you deliver the flowers. You are free because you set your own purpose: to deliver the flowers. Just because you were unable to carry out your purpose, i.e., complete delivery of the flowers, does not mean you did not have the right to do so. If the protesters had to clear a space for you to deliver the flowers, their freedom would be subordinated to the deliverer’s choice, to the detriment of the equal freedom of all.

This Ripsteinian account seems unsatisfactory given the Kantian analytical definition of ‘right’ whereby it makes no sense to call something a right if it is impossible

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84 Steiner’s also poses the problem from the duty-holder’s perspective: If A owes a duty to B, and the only way for A to meet his duty is to φ, but C’s own rightful action prevents A from φ-ing, for A has a duty not to interfere in what sense does B have a right? Steiner sees the matter as one where B’s action is both permissible and impermissible simultaneously, thereby constituting a logical contradiction. Steiner, AN ESSAY ON RIGHTS at 81.

85 This is a variation of Steiner’s own example. Id. at 78.

86 Kramer, however denies that the conflict constitutes a ‘contradiction’, since he believes that such language is the wrongful imposition of modal logic into the sphere of jural logic, and furthermore holds that contrary rights, e.g., two people each respectively having exclusive property rights to Blackacre, is perfectly possible. Kramer, DOR at 19-20.
to utilize. However, Nigel Simmonds correctly identifies Steiner’s articulation of
compossibility concerns as a false problem, and provides a Kantian criticism.\textsuperscript{87} To convert
Simmonds’ response into Kantian language, Steiner presupposes the existence of
conflicting rights without first testing their validity vis-à-vis the UPR. In other words, he
pulls the cart before the horse by presuming that both the claimed rights generally and the
instances of their exercise constitute genuine rights (rightful action) in the first place.

In response to compossibility critics, Kant himself may say that in an empirical
situation where such a conflict obtains one of the parties does not actually have the right to
φ or ψ. The reason is as follows. The empirical ‘nitty gritty’ of establishing a legal state of affairs whereby the actualizations of rights do not conflict need not affect the idea of
compossibility as a criterion for a set of rights. To say that because instances of usages conflict that the rights themselves conflict may simply be a situation where the rights’
scopes have not properly been demarcated by the positive law. Thus, even if in empirical
scenarios where employment of rights conflict, it does not follow that it is logically
impossible for the right to φ and/or ψ to obtain simultaneously. Again, Kant would say that
the problem is with the positive law, not the set of rights or kinds of rights generally.
Perhaps in such situations we might say A and B have prima facie cases for potential
exercises of rights, but that on further analysis, it turns out that one or the other (or both)
actually did not have a genuine right.

Nonetheless, I submit that the Kantian answer is Orwellian. It is a post hoc,
revisionist view of a conflict of rights situation. Essentially, the view posits that what one
thought was a secure right was just a bad judgment. When viewed according to ‘right reason’, it turns out one was simply mistaken either about having the right generally or that one’s action was a proper exercise of one’s right. Under the Kantian view, the judge, in

\textsuperscript{87} “Of course, the demonstrators will possess claim-rights against assault, trespass, etc., and their liberty will enjoy a perimeter of protection in consequence. Perhaps I can deliver the flowers only by violating their claim-rights (using tear gas, ramming them w/ my delivery van, etc.). Conflicts of duty will therefore be a common and frequent consequence of situations where duty-acts may permissibly be interfered with. Steiner’s argument, however, seeks to lead us to a theory of Justice via a series of claims about compossibility. Alternative schemes of rights are to be eliminated not as counter-intuitive or unattractive, but as self-contradictory. He therefore cannot be justified in treating certain rights (such as the rights that provide a perimeter of protection for liberty) as already in place prior to the commencement of the argument. The existence of such rights cannot be invoked to support an otherwise invalid step in the argument because all such rights are to be derived from the theory itself.” Simmonds, DOR at 186 (emphasis added).
deciding a dispute (a purported ‘conflict’ amongst rights), simply discovers the ‘true’
boundaries of the rights. This of course presumes that ‘true’ boundaries can and do exist.
But what about the period before the judge’s decision, when the boundaries were not
‘clear’? Did the prima facie right-holder not have the right in question? Even if we re-
characterize the situation whereby proper demarcation aims at eliminating conflicts, there
are no guidelines for how to do so. This seems to be wholly contingent upon the normative
preferences of the positive legal system and society at large. Steiner’s is not a false
problem, but rather a viable legal scenario. That requires a vision of ‘the good’ and thus a
lexical ordering of interests.
§ III. Modern IT & WT’s Biggest Weaknesses

III.A: Introducing the Arguments

This section will address the positions staked out by Will and Interest Theorists on what are taken to be the most critical first-order concerns of the debate\(^\text{88}\) and which may constitute the largest defects of each theory. First, the arguments and the most able responses by defenders of each theory will be presented. I shall subject these responses to criticisms on their merits and also subject them to evaluation according to the three-pronged test from Section I.

The charges are briefly summarized as follows: no version of WT can adequately explain the inalienability of certain rights. If true, the theory cannot explain constitutional rights (in Hohfeldian terms, non-waivable immunities held against the government), which many people consider sacrosanct. In turn, IT cannot explain how, although it identifies rights with interests, neither third party beneficiaries of contracts nor others interested in the fulfillment of such contracts have rights under the law. This argument is actually a synecdoche for two larger problems for IT: an inability to delimit the set of all rights and - when as a version that adheres to a basic Hohfeldian position - providing a seemingly counter-intuitive notion of rights: a claim-right that is unenforceable by the claim-holder. IT is also charged with being unable to specify the relevant kinds of interests that warrant being rights (whether this is a first-order or second-order concern is not settled). The WT argument against IT about third party beneficiary rights is, in a sense, the flipside of the IT argument against WT about inalienable rights; both turn on the existence of power-rights of waiver and enforcement and with whom that power lies.

III.B: WT and Inalienable Rights

The Charges

IT’s charges WT of being incapable of accounting for the inalienability of some kinds of rights.\(^\text{89}\) Since all WT rights must be exercisable, and ‘exercise’ requires the

\(^{88}\) This is generally agreed upon in the literature. See, e.g., Sumner, supra note 1 at 51; Sreenivasan, supra note 11 at 259-60, 262-3.

\(^{89}\) See, e.g., MacCormick, supra note 58 at 196-7. IT also famously charges WT with failing to account for the rights of incompetents (minors, the unconscious, mentally handicapped, etc.). As Simmonds
possibility of the discretionary use of waiver and/or enforcement, it follows that under the WT all legal rights must have the potential to be waived or enforced. However, since in reality certain rights cannot be waived, WT fails to explain such rights. The inalienability problem is actually about excising the power to waive another’s duty, so it need not be restricted to situations involving attempts to forever relinquish a right. For example, it is a violation of minimum wages law for a laborer to waive his right to such a wage for a temporary job, even though the laborer could assert the right for his next job. Even if he did such work for one day, it would still count as a violation of the laborer’s right, which the law will hold he did not technically waive. I do not think this criticism is as strong as it is made out to be, and may in fact backfire to some extent. However, I will first show why some WT responses to date have been unsatisfactory.

Steiner’s Response

Hillel Steiner frames the inalienability problem from the vantage point of government disablement. His example involves state officials that are disabled from waiving enforcement of criminal laws. Now, all Hohfeldian relations exist between two persons, the holder of a normative advantage and the holder of a correlated normative disadvantage. Thus, a government official’s disability must be correlated to a particular immunity. The immunity correlated to the official’s disability is located in another, higher-ranking official. Furthermore, “immunities which are unwaivable entail the presence of disabilities in the immunity holders themselves. Whereas a waivable immunity implies a

rightly points out, this criticism is borne more so out of normative rejection than a genuine conceptual difficulty, of the WT’s consequences. The law can protect such persons adequately without a need for positing legal rights as the necessary vehicle for doing so. See Simmonds, DOR at 226 n 138 for good arguments as to why IT’s charge of a lack of rights for incompetents is not compelling. At any rate, I consider the Inalienability argument to be IT’s “best” because it is the most successful at undercutting WT’s explanatory power over power-rights, which WTs consider essential for the discretionary control or choice that, for them, defines rights.

90 “The crucial question here concerns the possibility, rather than the fact, of inalienable claim-rights. Will Theory makes inalienable claims-rights incoherent in principle.” Sreenivasan, supra note 11 at 260.
single Hohfeldian relation between two persons, an unwaivable immunity implies a pair of such relations between three persons”.91

Steiner’s example works as follows: Official A’s disability from waiving enforcement of the criminal law is correlated to the immunity of his superior, Officer B. Officer B is immune from his subordinate A’s waiving the duty to enforce the criminal law. Officer B’s immunity is in turn not waivable because he too is disabled from waiving enforcement of the law: this, by virtue of his superior’s, Officer C, immunity therefrom. This series of relations continues up the bureaucratic chain. However, there is no infinite regress of each superior official’s own superior being similarly disabled because we must, claims Steiner, get to a point where there is an immunity that must be waivable as a matter of Hohfeldian logic (rather than because actual governments are comprised of finite numbers of officials). So, “[u]nwaivable immunities (eventually!) entail waivable ones.” While admitting there can be unwaivable immunities, they cannot exist without there also being waivable ones. “[And the waiving of that one renders waivable whatever (otherwise unwaivable) immunity entails it.”92

Contra Steiner
The Analytical Criticisms

Steiner’s argument fails for three reasons. First, Steiner’s concern with the bilateral logic of Hohfeldian relations blinds him to the bizarreness of his answer. As he is well aware, such a law (a constitutional right, a criminal law, etc.) is a blanket prohibition upon the government and thus over all public officials (a finite set of actors). Thus, if Hohfeld’s schema is to have explanatory value, it cannot be used to posit regresses that are incongruous with the basic realities of positive, empirical law: the former ought to be subordinate to the latter. There is no need for a cutoff point because there cannot actually be an infinite regression.

Second, and more importantly, the almost-infinite regress is generated because Steiner misconstrues the unwaivable immunity-right as itself including a disability, thereby triggering a series of immunity-disability relations between superior and subordinate

91 Steiner, DOR at 253 at n 31.
92 Steiner, AN ESSAY ON RIGHTS at 71-3, restated in DOR at 253-4.
government officials. This is a misidentification. It is instead a case where the law (constitutional clause, legislation, etc.) has eradicated, or never even generated, the immunity-right-holder’s power-right of waiver. If the contrary were the case, one would have to hold that the agent harbors both a waiver power and a disability from exercising waiver concurrently. This suggests an effete or nominal power-right (at least as far as the waiver prong is concerned, since the agent may very well have a viable enforcement power). Since rights are necessarily exercisable for WT, Steiner should loathe positing the existence of nominal rights.93

Indeed, the agent is ‘disabled’ from waiver, but it makes little sense to posit a Hohfeldian ‘disability’ because there is no correlated immunity holder. Who is ‘immune’ from a prohibition to waive? The only way to make sense of that position in Steiner’s example would be if the citizens had corresponding criminal law immunity rights, which WTs generally deny. Less contentious examples are easy to construct. For example, who is ‘immune’ from our disability to waive our constitutional rights to free speech? In this way, Steiner’s response fails our proposed test second prong, Ockham’s razor, for positing unnecessary rights relations and for positing nominal, overlapping rights in his effort to explain inalienable rights.

Simmonds’ Response

Nigel Simmonds does not think there is a knockout response to IT’s inalienability argument. Instead, he makes the case for partial, as opposed to the full measure of, control of Hart’s three elements. The inalienability of a right leaves one with two-thirds of the options for enforcement or waiver. In this way, WT has no problem explaining the remaining options as ‘rights’. However, Simmonds continues on to explain why inalienability occurs. Like ITs, he thinks right-holders are prevented from alienation or waiver in these circumstances in order for them to possess and enjoy the right. Thus, on the one hand, WT need not deny that eliminating waiver power strengthens the right. Contrary to IT claims, on the other hand, a right’s strength or weakness is not necessarily correlated

93 ‘…[N]either the Will Theory nor, for that matter, the Interest Theory is a theory about nominal claims and duties at all. Adherents of either theory are, as such, logically at liberty to acknowledge to deny the existence of any such non-jural relations.’ Steiner, DOR at 297.
to the number of choices (Hart’s three elements, or less) associated with the right. 94

**Partially Defending Simmonds**

*Pace* Simmonds, Gopal Sreenivasan argues that, given the definition of WT, reducing control (inalienability of the power to waive) over a right cannot be reconciled with the idea of inalienability *strengthening* it. “Someone with only a residual measure of control over my duty to φ lacks the ability to exert her will in certain ways—notably, to make it the case that my failure to φ does not count as a breach of my duty. How can this not weaken her ability to exert her will, and so not weaken her claim-right on (WT)?” 95

In response to Sreenivasan, even Kramer acknowledges not all versions of WT necessitate harboring all three of Hart’s elements in order for an agent to count as a right-holder. 96 Just because the right lacks the “fullest measure” of control does not mean WT is incapable of explaining it as an expression of choice. 97 Thus, the IT inalienability argument is at best a partial victory.

Let us take minimum wage, a non-constitutional immunity right, as our example. Many people think that eliminating waiver power for certain rights strengthens a person’s freedom: here, establishing a floor for wages allows people to afford a certain quality of life. But therein lies Sreenivasan’s confusion, the same suffered by Arthur Ripstein in assuming what all versions of WT must do, 98 for this does not speak to the strength of the legal right *qua* right, but rather to its ability to effectuate a particular social-policy goal. A legal right may be devoid of waiver power and still be wholly ineffective in achieving that social goal. This can occur for many reasons. For example, this can be due to weak

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94 Simmonds, DOR at 229-30.
95 Sreenivasan, supra note 11 at 261.
96 Kramer, supra note 46. Steiner breaks down the Hart’s elements into five and adds a sixth of his own for completeness: “(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.” Steiner, DOR at 240
97 See, Hart, *Legal Rights* at 183 n 85.
98 *Infra*, Section II.C
enforcement power,\textsuperscript{99} a lack of clarity in the claim-right, etc. Simmonds is therefore
correct to hold there is no “reason to expect such strength or weakness to be a simple
function of the number of different facets of choice associated with a right.”\textsuperscript{100}
Nevertheless, rather than focusing upon the right itself, Simmonds’ defense errs for
focusing on the power to effectuate a policy goal as a function of a legal right’s strength.\textsuperscript{101}
A legal right may be quite potent without effectuating the social policy for which it was
conceived, and exercise of such rights could also conceivably generate results wholly
different from, or even opposite to, those intended by the law makers.

Possible Backfire?

The essence of IT’s charge is that a right is strengthened by eliminating the waiver
power and thus part of the claim-holder’s choice. But that argument may in fact be a two-
edged sword. By the same reasoning, IT should also hold that enforcement power is or
ought to be secured as well. For a curious result is observed in the hierarchy of immunity-
rights: right-holders may have greater discretion in enforcing their constitutional
immunities than their non-constitutional immunities, even though we generally think the
former kind of rights are more important.

In contrast to Simmonds, a libertarian, Lochnerian WT viewpoint might hold that
lacking the power of alienation (i.e., removal of the waiver power) in such circumstances is
a lamentable deprivation and weakening of legal rights (freedom of contract, maximizing
employment opportunities, etc.). Nevertheless, the libertarian Will Theorist is free to think
that constitutional rights are not similarly weakened. In fact, the cases are distinguishable.
Constitutional rights are immunities that do not define the parameters of the right-holder’s
possible actions, but rather those of the government’s, i.e., its ability to legislate in certain
spheres. By contrast, most or all non-constitutional immunities proscribe a fellow citizen’s

\textsuperscript{99} Steiner adds that this weak enforcement capacity may be due to the power-right being held, on the IT
view, by government officials whose lack the motivation to enforce the right. Steiner, DOR at 288. One
should additionally consider the possibility that the enforcement powers could themselves be weak for being
subject to other legal stipulations, conditions, etc.

\textsuperscript{100} Simmonds, DOR at 230.

\textsuperscript{101} “The worker is prevented from alienating his right precisely so that he continues to possess and
enjoy it.” Simmonds, DOR at 229.
actions while also narrowing the parameters of the right-holders’ possible actions.\textsuperscript{102}

Further, if an immunity-holder chooses not to enforce infringements of his constitutional rights (even if this does not technically constitute legal waiver or relinquishment), then no one else can take action to enforce his right. By contrast, an agent’s waiver of a non-constitutional immunity may be supplemented by an alternative power-holder’s capacity to enforce the agent’s claim in the non-constitutional situations, thereby overriding his choice. This is an ironic result, which undermines the IT charge, because there seems to be the potential for higher-priority rights going \textit{de jure} unenforced, but not lower-priority rights. This cuts against IT’s claim of rights as protecting wellbeing and reinforces the notion of a right as a function of choice.

An Interest Theorist might respond by claiming both that this account misconstrues the Hohfeldian relations and that inalienable rights cannot be distinguished by rank. Since the inalienable minimum wage right is actually an immunity-right from being paid less than that wage, it is the employer whose range of choices is narrowed by being disabled from paying less than the legal wage, not the wage earner-immunity-right-holder. And one cannot waive that immunity. The employer is thus comparable to the government, and it is his acts alone that are constrained, not those of the immunity-holder.

This otherwise accurate characterization of immunities misses the thrust of the charge. First, the employer counts as a ‘fellow citizen’, as mentioned above. Second, for IT and WT, the immunity exists for the holder’s protection (his ability to choose/his wellbeing), not that of the disability-holder. In dire economic times, for example, it may nevertheless be in my best interests to get any sort of wage I can. The Will Theorist will also hold that the immunity is invariably tied to a power-right of \textit{enforcement}. In the constitutional case, I can legally choose to let the government take my land without paying me just compensation. Under a molecularist WT view, I can waive my immunity-right (or, under a more complex molecule, a claim-right corresponding to the immunity-right) to enforce my constitutional immunity, but I cannot legally let my employer pay me below the minimum wage. Since under the IT view the government bears the power-right, it should be able to sue to enforce the minimum wage law. But there is no government power to sue

\textsuperscript{102} Again, rejecting Steiner’s characterization of criminal law enforcement as entailing a Hohfeldian immunity-disability relationship between any given two parties.
to enforce the right-holder’s constitutional immunity-right. Moreover, if the Interest Theorist claims that the government only holds the waiver power, it cannot justify why it does so without also wielding enforcement power.

For example, Steve wants to work on a construction job and agrees to be paid below minimum wage. His contract with the construction firm is void and the government could enforce Steve’s right (since under the IT view the government holds the corresponding power-right) by suing the company so that Steve is paid (in the least) the difference between his actual wages and the wages he would have received had he been paid the minimum wage. But Steve’s action has not constituted a waiver of his immunity-right: neither he nor any other agent (public or private) possesses the waiver power. He has merely participated in the firm’s violation of the minimum wage laws.

In the constitutional right situation, by contrast, there is no overarching body to (de jure) enforce the immunity. No branch of the government can initiate a suit to enforce a constitutional claim on my behalf. The right-holder does not have to sue to enforce his right, and may in fact even welcome the government’s ultra vires actions as being desirable, beneficial, etc. This is not for a want of enforcement power, but rather a matter of the holder’s discretion; he could try to enforce my right by initiating suit, but nothing compels him to do so. By contrast, Steve triggers a government obligation to enforce the minimum wage law (whether or not Steve himself chooses to enforce his rights) when he takes on an illegal wage for the construction job. IT must therefore explain why, since it holds that the removal of waiver power is a means to strengthen one’s claim-right, no one (an attorney general or other government attorney) intervenes to enforce constitutional rights, which are considered the most important rights.

One might object that failing to sue in the constitutional case does not count as waiver either. Choosing not to enforce a right is not the same thing as waiver. In response, that position confuses alienation and relinquishment of a right with waiver. Alienation has two meanings for rights. The first meaning is the total forfeiture of a right, 

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103 This differs from Simmonds’ dystopian argument against IT, which holds that all version of that theory are “compatible with a state of affairs where all powers of enforcement and waiver are monopolized by the state and its officials. Simmonds, DOR at 225. My objection pertains to the ranking of immunities and powers to enforce, and the conspicuous absence of governmental enforcement power vis-à-vis the higher-order immunities via litigation.
such as selling your property and losing control over it forever. The second is that, when a right is unwaivable one must act in conformity to its dictates, e.g., never receive pay below minimum wage. Thus, you can alienate your right in one instance without forfeiting it forever.

Interest Theorists might suggest that this claimed weakness is no such thing. They will suggest it is merely an unfortunate state of affairs and that by establishing an appropriate agency the government could enforce constitutional rights. However, the onus is on them to explain why such a state of affairs does not, and has never, obtain(ed), and why it would be possible for the government to enforce one’s constitutional rights in the first place.

III.C: IT and Third Party Beneficiaries
The Charges

IT is incapable of segregating or ranking those interests that warrant constituting rights from those that do not. This is a fundamental problem, because ITs do not want to hold that all interests are rights, because that would make operating a legal system impossible. That would also entail that many rights protect trivial and perhaps even harmful interests, although we would expect legal rights to protect mostly important interests. WT furthermore holds that IT’s inability to identify the relevant kinds of interests opens the flood-gates for any sort of interest to be claimed as a right, thereby introducing incoherency to the law (along with the law’s expansion beyond reason) and denigrating the notion of legal rights.104

These charges are a natural extension (i.e., the almost universal application to all legal rights situations) and the probable intent of H.L.A. Hart’s more targeted criticism of IT. Hart posited that contracts with a third party beneficiary (hereinafter “3PB”) establish rights and duties only between the promisor and promisee: only they have rights and duties, not the 3PB or anyone else.105 Hart’s argument has two parts. First, since IT holds that rights are predicated upon interests, it should also hold that the 3PB has rights under a contract; after all, it is the 3PB’s wellbeing/interests that serve as the contract’s raison

104 See, Edmundson, supra note 2 at 126; Simmonds, DOR at 224-5.
105 Hart, Legal Rights at 187-8.
d’être. However, since the law does not grant 3PBs such rights, or at least not in most places, IT has failed to explain the rights (and lack thereof) in question. Second, because IT holds interests to be the basis of rights, it should hold that additional - and even unintended - beneficiaries of the contract ought also to have rights. This refers to persons not specifically mentioned in the contract but who nevertheless stand to benefit from/have an interest in the 3PB receiving the good or service from the promisor. In this way, IT is charged with failing to delimit the number of right holders under a (3PB) contract and being incapable of ascertaining bona fide right-holders.

The IT Responses

Interest Theorists generally deny that Hart’s first charge has any force. They hold that 3PBs (and perhaps others) do in fact have rights in these situations. Matthew Kramer suggests Will Theorists have merely begged the question for assuming that 3PBs lack rights because they have employed ‘their own’ definitions to exclude such persons from being a right-holder. By this Kramer is referring to the dominant WT view that a right-holder invariably holds both a claim-right and a power-right of enforcement/waiver. Just because the 3PB himself lacks the power to enforce or waive his right does not mean he lacks a claim-right. While claim-rights must be enforceable, it is perfectly acceptable for Kramer that different parties hold the relevant Hohfeldian elements. Under his view, the 3PB scenario is merely one where the right-holder harbors a claim-right while another agent, such as the government, holds the power-rights of enforcement and waiver. Since others can exercise the power, the claim-right is in fact enforceable. However, Kramer suggests that dividing claims and powers amongst different agents should be the exception and not the rule for legal rights. “Nothing in IT suggests that the possibility of divergences between the location of some legal right and the location of the legal power for

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106 For example, if 3PB is to receive a large sum of money from the promisor, and I am 3PB’s child, whom my parent has promised an expensive surgery once the money arrives, I too may be said to have a sufficient IT interest to warrant a right. I should therefore be viewed as the ‘4PB’, as it were. Others may have interests contingent upon 3PB receiving his benefit as well. See, Sreenivasan, supra note 11 at 262.
107 Kramer, DOR at 66-8.
108 Id. at 68.
109 Kramer, Getting Rights Right at 60.
110 Id. at 60.
demanding/waiving the effectuation of its desirability of such divergences.”

There are two alternative IT responses to Hart’s second charge of unlimited proliferation. Preferring one to the other depends upon what one thinks IT can and ought to accomplish. The analytical Interest Theorist denies it his job to provide a metric for ascertaining which interests warrant rights. On the other hand, the normative Interest Theorist may attempt to provide such a standard. Kramer, a proponent of the first view, contends that any attempt to segregate or rank interests is a function of political theory, not the conceptual analysis of legal rights. He therefore holds that any such metric must be exogenous to the structure of legal rights themselves. Nevertheless, Kramer propounds exactly such a metric! He invokes a modified version of a test proposed by Jeremy Bentham. The tests aims to identify holders of claim-rights correlative to a given contractual duty by asking what findings are sufficient to establish a breach by the duty-bearer. Particularly, “any person Z holds a right under a contract or norm if and only if a violation of a duty under the contract or norm can be established by simply showing that the duty-bearer has withheld a benefit from Z or has imposed some harm upon him.”

In his book *The Morality of Freedom*, Joseph Raz advances a non-Hohfeldian

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111 *Id.* at 61.
112 Given that there are widely divergent versions of IT, based on fidelity or opposition to Hohfeld’s schema of jural relations and normative or analytical approaches, it is important to demonstrate how all versions suffer identical problems, and to avoid our being charged with undermining one version of the theory but not another. This cannot be accomplished for the first problem, since non- or anti-Hohfeldian normative Interest Theorists reject Hohfeld’s schema, and thus reject the division of rights into ‘claim-rights’, power-rights, immunity-rights, or liberty-rights. While this is not the place to discuss the matter, this places the non-Hohfeldian ITs closer to Hohfeldian WTs, whether or not they recognize it.
113 “Interest Theory…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 analytic 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 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 of worthiness would supplement it.” Kramer, DOR at 79.
114 “[I]f at least one way of proving the breach will involve nothing more than a demonstration that a certain person has undergone some detriment (unreceived benefit or some inflicted loss) at the hands of duty-bearers(s) then that person holds a right under the relevant contract or norm.” Kramer, DOR at 81; Hart, *Legal Rights* at 178-81.
115 Kramer, DOR at 81.
version of IT. He does not think rights are necessarily correlated with duties, but are rather the grounds for them.116 ‘Grounding’ here has two meanings or functions. The less controversial one is that general rights are dynamic. Faced with new circumstances, new specific duties may be generated for pre-existing general rights, adding to the existing set of specific duties or replacing others.117 The more controversial meaning is that rights somehow take precedence over duties: they are justifications for the imposition of duties upon others.118 Raz identifies right-holders as beings of “ultimate value” (non-derivatively/intrinsically valuable) or legal fictions like corporations.119 However, rights themselves need not be restricted to things of ultimate value. “Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties”.120 Raz also provides a test for ascertaining when an interest warrants becoming a legal right.121 Sreenivasan suggests Raz’s account suffices to delimit the set of right-holders, even though Raz himself never expressly addressed the 3PB problem.

The 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.122

116 Raz, supra note 17 at 167-8, 186.
117 Id. at 171. Pace Raz, Kramer, a Hohfeldian Interest Theorist, demonstrates how the correlativity axiom (of a claim-right always being tied to a duty, but not vice versa) does indeed obtain in these situations and notes that Raz’s assertions contrariwise are unsubstantiated. Kramer, DOR at 41-4.
118 Id. at 168, 172.
119 Id. at 177. Raz’s definition of rights: “X has a right’ if and only if [1] X can have rights, and [2], 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.
120 Id. at 180-1.
121 An interest is sufficient to base a right on if and only if there is a sound argument of which:
   1. The conclusion is that a certain right exists, AND
   2. Among its non-redundant premises is a statement of some interest of the right holder,
   3. The other premises supplying grounds for:
      A, attributing to it the required importance, OR
      B, holding it to be relevant to a particular person or class of persons so that they rather than others are obligated to the right holder
   4. The premises must be sufficient by themselves to entail that if there are no contrary considerations then the individuals concerned have the right
   5. To these premises one needs to add others stating or establishing that these grounds are not altogether defeated by conflicting reasons.

Together they establish the existence of the right. Id. at 181-2.

122 Sreenivasan, supra note 11 at 265.
Kramer, Simmonds, and Steiner’s *A Debate Over Rights* was published in 1998. The year after its publication, the English Parliament passed a law giving third party beneficiaries claim-rights against contractual promisors. Such rights, however, are not part of the Common Law, and most Common Law countries have not followed England in this regard. It is not clear what this empirical change in English law has on the validity or strength of Hart’s argument, if any. Irrespective of this change in the English law, what remains problematic for IT is the possibility of 4PBs, 5PBs, etc.

III.C.1: Problem I: Unenforceable Claim-Rights
The Analytical Criticisms

Kramer’s response fails our proposed test. His theory does not confront the requisite legal doctrine about how contract rights come to exist or address how 3PB (4BP, etc.) rights conform to that doctrine. IT therefore lacks explanatory power over the positive law. Under the Common Law, certain conditions must be met in order to form a contract: an offer, acceptance, and consideration (*a quid pro quo*). IT 3PB claims-rights have nothing to do with these fundamental rules of contract law. In fact, Kramer must ignore these rules in order to posit the purported claim-rights. Kramer might respond that one cannot refute a Hohfeldian claim with empirical (here, legal order) evidence. However, the charge does not involve denying the validity of Hohfeld’s schema, but rather whether something counts as a genuine instance of a Hohfeldian claim-right.

Kramer’s model fails our test’s Ockham’s razor prong for two reasons. First, positing a model of a single right with two (or more) distinct, concurrent bearers of its parts is unnecessary and adds a complication to what constitutes being a right-holder. It is no longer ‘my’ right, but rather ‘our’ rights. Is it not counter-intuitive to say that the government is a ‘right-holder of my right’?

Second, and more importantly, there is no power-right associated with the 3PB’s purported claim-right. IT holds that all claims must be enforceable, even if the power and claim-holders are distinct. However, the purported 3PB claim-right is completely

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123 The Contracts (Rights of Third Parties) Act 1999 (1990 c. 31)
124 Kramer, DOR at 22
unenforceable by any party. Therefore, the theory not only generates an infinite number of claim-rights for 3PBs nowhere discoverable in the positive law, but also posits them without offering a basis for how to take juridical cognizance thereof (by courts, etc.). One could view Kramer’s theory as positing moral rights, where there is a perceived ‘wanting’ in the positive law. If so, in spite of Kramer’s claims to the contrary, this would be a wholly normative agenda, not an analytic, descriptive exercise.

Moreover, Kramer’s theory posits rights that are nominal from their inception. Such rights have no juridical value. It is one thing for a right to become nominal because over time it becomes unenforceable, but what is the point of positing that a right exists, although nominal, from its inception? Positing such rights has, at best, only theoretical/academic value: it says nothing about real legal systems.125 Hohfeld himself might disparage these sorts of rights, as he endorses the view that “well-founded” claims must be recognized and secured by law.126

The Normative Criticisms

Kramer’s view also fails the test’s normative prong. The division of claims and powers cannot give weight to the idea of a right as a legal entitlement. The opportunity to actualize one’s rights ought not be a matter of chance or luck, let alone a potential non-option. The rule of law means that the successful operation or viability of a rule is not a fluke. Having a right means that there is no need to calculate the probability of its successful exercise or a concession that it has no legal force. If it is a right, it ought to be exercisable at will. Kramer’s 3BP claim-rights, however, are wholly unenforceable.

Both IT and WT agree that the reason for having rights to protect some aspect of persons. Their disagreement is about whether that aspect is exercising one’s will through choices or one’s interests and wellbeing. If protection is the agreed-upon raison d’être of such legal constructs, why would there exist kinds of claim-rights – the kind Hohfeld said were the most properly labeled as rights of the four species – that cannot fulfill this

125 The rights generated by the 1960 Canadian Bill of Rights could be called nominal, at least from the period of 1960 to 1982, but the lack of associated enforcement mechanisms was considered a grievous error on the legislators’ part.
126 Hohfeld, supra note 30 at 38; Steiner, DOR at 244 n 19.
fundamental role? Even on IT’s own terms, a claim-right on Kramer’s ‘separation’ view does not seem to protect an interest, but merely serves as a marker for one.

Thus, IT’s view robs rights of the moral power and force that let people stand up to unjust interference by others and to demand what is theirs when others do not fulfill their end of a bargain. On Kramer’s view, a claim-holder does not make his claim, but is rather made on his behalf by others. Furthermore, to implicitly hold that another person or body knows best what is an agent’s interest vis-à-vis enforcing a legal right is merely to assert that the right-bearer is the beneficiary of a policy that can be given or taken away at the ‘wiser’ power-bearing party’s discretion. The right is contingent upon a larger social calculus. Thus, the claim-holder is the bearer of an enforceable right only so long and insofar as the power-right-holder thinks the policy is in the claim-holder’s interest.

Additionally, Kramer’s reasons why IT should treat one position (claim and power rights borne by the right-holder alone) as the rule and the other (segregating them amongst different holders) as the exception are inadequate. As Simmonds notes, if all rights are benefits bestowed for individuals’ protections, and if the basis for segregating claims and powers is a policy decision made by government officials, it is perfectly reasonable for all IT rights to be so segregated.

Kramer offers normative grounds for opposing this possibility. He thinks Interest Theorists can express disapproval of such situations because it undermines autonomy and self-determination, which are important interests. “A state of affairs wherein public officials hold all legal powers of enforcement/waiver would grievously distress anyone who values latitude and initiative.”

This defense seems to contradict Kramer’s other beliefs. Given the reason IT divorces powers and claims amongst different holders in the first place (to account for incompetents, inalienable, and welfare rights as benevolent interests), it is reasonable to believe IT would require that segregation for a great many rights. This includes a host of

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127 See, Simmonds, DOR at 196. Steiner argues that paternalism is both a moral and analytical failing on IT’s part; as mentioned above ( supra note 99), transferring enforcement power to other agents does not guarantee they will be sufficiently incentivized to enforce the claim-holder’s right. Steiner, DOR at 286-7.

128 See Kramer, Getting Rights Right at 60-62.

129 Id. at 61.
social welfare/socio-economic rights, the raison d’être of which are found in paternalistic impulses. It segregates powers and claims for inalienable rights on the belief that individuals ultimately cannot be trusted to effectuate their own interests as well as others might on their behalf for some of the most important rights (constitutional immunities, minimum wage laws, etc.). It is therefore unclear why the theory would value latitude and initiative by bestowing power-rights upon claim-holders for lesser rights. The only seeming explanation is that agents cannot do themselves as much harm by ‘misusing’ their powers of enforcement or waiver for these lesser rights, which undercuts the idea of championing “latitude and initiative”.

III.C.2: Problem II: The failure to provide a delimiting criterion

*Matthew Kramer and Bentham’s Test*

The Analytical Criticisms

Let us now address Kramer’s attempt to delimit the set of legal rights. It is important to note that Jeremy Bentham’s test exists solely in the realm of political theory: it is not part of and unknown to the positive law. Kramer has moved from ‘ought’ to ‘is’, i.e., from the implicit premise that the law ought to employ this test to the view that rights are so delimited. He has given Will Theorists no reason to give credence or weight to his version of Bentham’s test, or to recognize its ‘validity’, importance, or superiority to possible alternative tests.131 Besides, who is supposed to employ Kramer’s test? A court cannot do so, because there is no power-right to enforce the claim.

As for Bentham’s test itself, ‘unreceived benefit’, ‘inflicted loss’ and ‘sufficient’ interests are vague standards. Kramer’s sufficiency standard operates as follows: for N to obtain, X must necessarily obtain. Thus, a proof of X’s absence is sufficient to establish that N does not obtain. Further, a demonstration of ~X is sufficient to prove that N has been breached. But what happens when “~X” is replaced with “imposed some harm”? Is it not possible that the duty-bearer can bring about an undesirable state of affairs for the 3PB, yet still have fulfilled his contractual duties? E.g.1, A contracts with B to deliver flowers to

131 Steiner notes that Kramer offers no independently motivated defense of Bentham’s test (other than the fact that it purportedly accomplishes its goal), and questions whether an independently motivated reason could even be generated at all. Steiner, DOR at 285.
C. Unbeknownst to A or B, C is deathly allergic to flowers. B delivers the flowers and C dies. E.g.2, A contracts with B to deliver flowers to C without specifying which kind of flowers. B buys X species of flowers, which possess a scent that is fatal to C’s prize show dog. Does C have a claim (under the contract, rather than tort law) against B under Kramer’s test in either case?

Further, though the test prevents an infinite, concurrent proliferation of possible claimants, there could be an infinite number of potential 4PBs, 5PBs, etc., generated far after the contract has been formulated. For example, A contracts with B to fix C’s home. C’s home falls into disrepair because B did not fulfill his duty, and now all the homes on C’s street decrease in market value. Do all the homeowners now have claims against B? Even Kramer’s example (where the promisee steps in to benefit 3PB in the requisite manner in lieu of the promisor’s fulfilling the bargain) provides a claim-right contingent upon failed performance, not for performance as such. The innumerable rights IT may be required to recognize under Bentham’s test, which may extend rights to unforeseeable parties beyond the 3PB, means IT cannot satisfy the Ockham’s razor prong of my test. WT is better able to delimit the set of rights by excluding such claim-rights altogether, most or all of which the positive law does not even recognize.

Again, Kramer does not think it is his job qua analytic jurist to draw lines amongst interests (even though he attempts to do so via the Bentham test). However, Kramer may be begging the question, for it is possible that the general structure of a right itself contains either a criterion of worthiness or at least indicia of worthiness for something being a right and someone being a right-holder. Hillel Steiner, a fellow analytical jurist, albeit of the WT variety, is of that persuasion. Admittedly, this view is more amenable to Will Theorists, because they can assign greater significance to Hohfeldian ‘powers’ as a limiting principle for rights-bearing capacity than can their IT competitors. That IT is not similarly “empowered” is no fault of the structure of rights.

The Normative Criticisms

IT creates rights for persons who lack moral significance in a transaction; they are too remote from the actual legal activity to warrant the moral significance of rights

132 Kramer, DOR at 81.
It is also problematic that a 4PB claim-rights could be generated only because of the 3PB’s arbitrary actions. The 4PB, 5PB, etc., can fit within the proposed test’s criteria for being rights-bearers, even if they have 1, absolutely no involvement in the contract or its purposes and 2, have interests that are not contingent upon the specific interests involved in the contract. Most importantly, nothing is morally owed to them.

Additionally, Kramer gives us no reason to think Bentham’s test has any moral purchasing power. For example, the test’s move from ‘unexcused detriment’ to a promisor’s duty owed to the 3PB can be viewed as a moral non sequitur. Where A and B have contracted to benefit C and C has undergone an unexcused detriment at B’s hands, it does not follow that that B has a duty to C or that C ought to have a claim-right. It is equally reasonable to consider C’s suffering an unexcused detriment as a mere marker of A’s right as having been violated. Kramer will say he is merely providing a way to segregate those interests that can be necessarily evidenced as tied to the contract from those interests that are at best sufficiently tied to the contract. However, just because the interest can be identified as necessarily tied to the contract, it does not follow that it warrants rights status. Kramer requires an additional justificatory account for this purpose, and simply allowing him to deny that it his job to do so begs the question.

So, why should we accept the test? Why should we accept ‘sufficient interest’ as the basis for drawing a line in the sand? If legal rights are supposed to have a strong legal and moral force, why should we utilize such a weak or low standard? Why should we accept the idea that these additional interests (3PB, 4PB, etc..) warrant legal cognizance? The fact that Kramer’s test allows for us to create links beyond the contracting parties to “bona fide” right holders belies a lack of moral seriousness IT entails for the rule of law and for what legal rights are. Efforts allowing for such attenuated right-bearers are furthermore emblematic of a false sense of legal entitlement.

133 One can think of this remoteness along the lines of Justice Cardozo’s famous “Zone of Danger” test from Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), which limits a party’s liability for negligence to only those actions reasonably foreseeable by the defendant.
Joseph Raz’s Theory
The Analytical Criticisms

There are several reasons why we should consider Raz’s view to be flawed. First, there is no compelling reason to treat rights as the grounds of duties, at least not under Raz’s more controversial meaning of the phrase. This is an ‘ontological’ fallacy. Legal rights and duties are both constructs, so why should one be logically prior to the other? Raz seems to have become confused by his identifying legal rights with interests. Under his test it should be the interest that is the ground for both a right and a duty. Although Raz’s intent is to divorce legal relations from the correlativity axiom, he unnecessarily complicates this by giving rights the dual role of ‘grounding’ devices and correlated normative advantages, the latter of which Raz has never really eradicated. When subjected to my test’s Ockham’s razor prong, Raz’s account of ‘grounding’ adds an unnecessary feature to a rights model. WT and other versions of IT are able to account for positive rights without resorting to speculative assertions of their purported logical or justificatory priority. The positive law itself does not take into account this prioritization. Raz also fails to provide a basis for holding rights’ ‘logical’ or ‘justificatory’ priority, rather than adopting the contrary view.

The first part of Raz’s test states one must identify an existing right, but since it further requires that a court or legal body ascertain the existence of the right only by weighing competing interests, there is no right until a court actually says there is. Furthermore, once a legal body pronounces a right’s existence, by weighing the evidence and holding that the interest is of sufficient weight, there is no reason why a duty does not concurrently spring into existence. Since even for IT the set of all interests is larger than the set of interests that warrant rights-status, Raz cannot simply reply by asserting that interests equal rights for his test, or that there is a right at the beginning of the proposed analysis.

Second, it is not clear why rights-bearers must be of ultimate value. Moreover, given the plurality of human belief systems, and given that a rights-based society puts some value on pluralism, agreement that persons are indeed of ultimate value may not even be

possible. It is also unclear such a high standard as ‘ultimate’ value is required, assuming that a viable means of ascertaining ‘ultimateness’ (intrinsic, non-derivative value) can even be plausibly constructed.

Third, perhaps certain constitutional rights and debates about them in legislatures and supreme courts take on the character of an intermediary between ultimate values and duties, but not the vast majority of rights. In fact, since some rights are of trivial or very low value, for them to constitute an “intermediate step” between ultimate values and imposing duties will often require a very complicated demonstration, perhaps beyond the competency or time of a legal body; that is, if the exercise is in fact anything other than question begging. More importantly, even if people do agree that there are one or more interests serving as an intermediary, they may not agree that it/they warrant(s) rights status, let alone rank (constitutional or lower rights). They may also disagree about whether a group of such interests are sufficiently correlated to warrant a singular right. Regardless, the positive law does not employ such a standard for evaluating the rank of values when considering whether a right exists at all, or engage in the sort of exercise Raz has posited.

Fourth, Raz’s schema implies that every right must serve the right-holder’s interest. But since some rights can exist without serving their holder’s interests, his claim does not reflect the empirical legal reality. Fifth, one might challenge his support for group rights because it is of a lower standard than that required for living persons (who must be of ‘ultimate value’). This is odd because most (legally generated) groups exist for individuals’ sakes. Sixth, Raz’s test for the sufficient bases for a right provides zero guidance on how it is supposed to work: it does not tell us what interests warrant rights, how to weigh competing values, what constitutes sufficiency, etc. These criticisms all relate back to the delimitation problem. Pace Sreenivasan, Right’s definition of rights and his balancing test provide no guidelines for delimiting the set of all rights or how to segregate the interests that warrant rights-status from those that do not warrant it. How do we tell what is “sufficient” using Raz’s criterion? In Sreenivasan’s example, why is the nephew’s interest not sufficient? Counting as “an aspect of Y’s well-being” (Raz’s def) is too vague to give any guidance about delimitation.

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135 This paper is also not the appropriate place to discuss Raz’ liberal perfectionism.
136 This argument is found in Cruft, supra note 11 at 372.
The Normative Criticisms

Raz wants a court or other body to compare the interest/right against competing interests in order to ascertain whether it is ‘worthy’ of giving rise to a duty. This is moral and political theory masquerading as legal theory. It reflects what he wants rights and the legal order to be, rather than a description of what they are and how they operate. The test also undermines the Rule of Law because it promotes naked instrumentalism to effectuate any given ‘right’, i.e., an ulterior social policy agenda. Instead of a democratically elected legislature deciding these considerable and weighty policy considerations, a judge is asked to create law, even of the constitutional (fundamental) variety, *ex nihilo*.

Raz’s idea of a right as an “intermediate step” may have explanatory power for a right’s scope (a court determines it *post hoc* after weighing the strength of the bearer’s claims against that of the opposition, e.g., another person’s right where they conflict or the government’s concern for the commonweal), but not its very existence. For example, Raz’s account may cover how a court decides if a man yelling fire in a crowded theater is a proper *exercise* of his free speech rights. If, however, the government tomorrow issued a proclamation stating that a right to free speech itself was contingent upon Raz’s enumerated factors people would be up in arms.

Furthermore, Nigel Simmonds, a Will Theorist, argues that Raz’s schema actually renders rights worse off for making all rights putative, thereby robbing them of their peremptory force, in spite of Raz’s claims contrariwise. 137 Consequently, Simmonds suggests, “rights become weighty considerations that are to be balanced against many other considerations in deciding if a duty should be recognized; and with the loss of their peremptory character, rights are collapsed into the general range of interests that are considered in the context of the state’s distributive and aggregative projects.”138

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137 Simmonds, DOR at 203. “Establishing the existence of a right [the first premise of Raz’s test] will, for this theory, be only the first step in a potentially complex course of reasoning that may or may not lead to the conclusion that a certain individual is under a duty. Any particular individual against whom I assert my right can respond by saying that, while the existence of my right is accepted, (a) my right establishes that a duty exists but not that he is himself under a duty; (b) whether he is under a duty depends upon how my interests are to be balanced against many competing considerations; and (c) when so balanced my interests are outweighed: therefore (d) he is under no duty correlative to my duty. It is in this sense that Razian rights, far from possessing ‘peremptory force’, are in fact simply markers of important interests that are to be taken into account along with a host of competing considerations.” *Id.* at 204.

138 *Id.* at 225.
Conclusion

Section II explored competing models of rights: Kantian and Hohfeldian. While debates about their purported incompatibility still wage, this paper has aimed to clarify some of the technical problems involved with attempting reconciliation. The criticisms offered against both rights models might also undercut partisan allegiance to one or the other account. The paper has also hopefully freed WT from misconceptions about its scope or potential.

Section III attempts to demonstrate the virtues of the proposed three-pronged test. While some WT responses to its biggest weakness are to no avail, my counterargument to the IT inalienability charge should give Interest Theorists some pause. I hope to have also illustrated, at least in part, the undesirable theoretical and normative consequences of subscribing to IT. The Hohfeldian versions of that theory commit adherents to useless, unenforceable legal rights. It is as if they should want a right-holder to be able to say ‘Though I may never be able do anything about it, you should know you violated my rights’. That view should be unpalatable to both legal theorists and anyone else concerned about the vitality of legal rights. Further, IT can make almost any subjective desire or sense of loss into a legal right. These standards lack a relation to the existing positive law and make the total set of rights unexaminable and probably make a legal system unworkable. IT demands a set of legal rights infinitely larger than any legal system—or all combined—could ever account for, let alone manage in a system of courts, legislatures, government agencies, etc.

Even if they agreed with my proposed three-pronged test, Interest Theorists might claim that their arguments have been arbitrarily labeled as the most fatal based on subjective preferences. They themselves charge WT with failing to account for the rights of incompetents (children, the mentally ill, etc.) and an inability to account for the inalienability of some rights. ‘Why’, they may ask, ‘are our theory’s problems worse than these?’ ‘Why do these not constitute far larger gaping holes in WT’s explanatory account of the positive law than ours?’ They might also argue that the proposed test artificially narrows the debate to concerns about legal rights, when the ‘proper’ objects of inquiry should also include (at least) moral and institutional rights.
In response, it is unclear why legal rights must be lumped together with other kinds of rights. It may in fact beg the question that all species of right can be subject to a singular form of analysis. Further, we must ask what is worse: option A, failing to account for inalienable and incompetency rights (at best only partially in the first case) given the number of positive rights thereby excluded and the normative consequences of doing so. Option B, by contrast, allows for such rights, but also includes an infinite amount of additional rights that the positive law does not recognize, and for reasons alien to it.

I submit that the explanatory gaps are far larger for IT and that the quantum of fruitless, innumerable rights claims it produces demonstrate IT’s inferiority to WT. From a normative vantage point, the consequences of adopting IT’s vision of rights is unpalatable because it denigrates the idea of rights as genuinely protective measures for individuals and groups. IT generates an infinite amount of rights –enforceable or otherwise - for reasons we ought (as a matter of moral, political, and legal theory) to recognize as flimsy and often devoid of moral worth.
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