Article:
Wenar, Leif (2005) The nature of rights. Philosophy and Public Affairs, 33 (3). pp. 223-253. ISSN 1088-4963

https://doi.org/10.1111/j.1088-4963.2005.00032.x

LEIF WENAR

The Nature of Rights

The twentieth century saw a vigorous debate over the nature of rights. Will theorists argued that the function of rights is to allocate domains of freedom. Interest theorists portrayed rights as defenders of well-being. Each side declared its conceptual analysis to be closer to an ordinary understanding of what rights there are, and to an ordinary understanding of what rights do for rightholders. Neither side could win a decisive victory, and the debate ended in a standoff.[1]

This article offers a new analysis of rights. The first half of the article sets out an analytical framework adequate for explicating all assertions of rights. This framework is an elaboration of Hohfeld's, designed around a template for displaying the often complex internal structures of rights. Those unfamiliar with Hohfeld's work should find that the exposition here presumes no prior knowledge of it. Those who know Hohfeld will find innovations in how the system is defined and presented. Any theorist wishing to specify precisely what is at stake within a controversy over some particular right may find this framework useful.

The analytical framework is then deployed in the second half of the article to resolve the dispute between the will and interest theories.

Many thanks to David Enoch, Gerald Gaus, Steven Gross, Alon Harel, Ulrike Heuer, Richard Holton, Rosanna Keefe, Simon Keller, Matthew Kramer, Stephen Macedo, Glen Newey, David Owens, Thomas Pogge, Henry Richardson, Jonathan Riley, Jennifer Saul, Gopal Sreenivasan, Hillel Steiner, Wayne Sumner, Joan Tronto, Melissa Williams, and the Editors of *Philosophy & Public Affairs* for their suggestions. A Laurance S. Rockefeller Fellowship supported the writing of this article, at the Princeton University Center for Human Values.

1. For the history and current state of the debate between the will and interest theories, see Matthew Kramer, Nigel Simmonds, and Hillel Steiner, *A Debate Over Rights* (Oxford: Oxford University Press, 1998), hereafter *DOR*. The description of the debate as a "standoff" is from L. W. Sumner, *The Moral Foundations of Rights* (Oxford: Oxford University Press, 1987), p. 51.

Despite the appeal of freedom and well-being as organizing ideas, each of these theories is clearly too narrow. We accept rights, which do not (as the will theory holds) define domains of freedom; and we affirm rights whose aim is not (as the interest theory claims) to further the interests of the rightholder. A third theory, introduced here, is superior in describing the functions of rights as they are commonly understood.

Will theorists and interest theorists have erred in adopting analyses framed to favor their commitments in normative theory. This has turned the debate between them into a proxy for the debate between Kantianism and welfarism. Yet that normative dispute cannot be resolved through a conceptual analysis of rights. The third theory presented here is not fashioned to fortify any normative position. Rather, it is offered as a vernacular standard against which to measure the interpretations of rights that various normative theories press us to accept.

The ambitions of the article are thus principally descriptive. The first half of the article shows what kinds of things rights are (i.e., all rights are Hohfeldian incidents). The second half shows what rights do for rightholders (i.e., which Hohfeldian incidents are rights). The two halves together complete an analysis of the concept of a right. The analysis here is general. It holds for all rights of conduct: moral rights, legal rights, customary rights, and so on.[2] The analysis aims to reveal the logical structure underlying our assertions of rights, while remaining faithful to an ordinary understanding of what rights there are, and of the significance rights have for those who hold them.

I. A Modified Hohfeldian Framework

The first half of the article sets out a modified Hohfeldian framework for explicating the meanings of rights assertions. The thesis of this section is that all assertions of rights can be understood in terms of four basic elements, known as the Hohfeldian incidents.[3]

2. The analysis here is not meant to apply directly to epistemic rights (rights to believe, infer, doubt), to affective rights (rights to feel), or to conative rights (rights to want). I proposed some initial contrasts between rights of conduct and these attitudinal rights in "Legal Rights and Epistemic Rights," *Analysis* 63 (2003): 142–46. An expanded version of that paper is available on request.

3. Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919). Explorations of the Hohfeldian system include Stig Kanger, *New Foundations for Ethical Theory* (Stockholm: Stockholm University Press,

There are two fundamental forms of rights assertions: "A has a right to phi" and "A has a right that B phi," where "phi" is an active verb. We begin by connecting these two fundamental forms of assertion to the four Hohfeldian incidents: the privilege, the claim, the power, and the immunity. In the process it will emerge that each of the two fundamental forms of assertion can also indicate complex "molecular" rights, whose structure will be resolvable into combinations of the four "atomic" incidents. Finally, at the end of this section we show how rights assertions that lack active verbs can be translated into active-verb form. We will then have covered all forms of rights assertions, and will have shown that all rights assertions can be understood in terms of the Hohfeldian incidents.

We begin with those rights assertions of the form "A has a right to phi" that indicate the privilege, the first of the four Hohfeldian incidents.

A. Privileges

A sheriff in hot pursuit of a suspect has the legal right to break down the door that the suspect has locked behind him. The sheriff's having a legal right to break down the door implies that he has no legal duty not to break down the door.

For rights like the sheriff's:

> "A has a Y right to phi" implies "A has no Y duty not to phi."
>
> (where "Y" is "legal," "moral," or "customary," and "phi" is an active verb)[4]

1957); Lars Lindahl, *Position and Change* (Dordrecht: D. Riedl, 1977); and Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990). The framework presented here is obviously heavily indebted to Hohfeld and his many commentators, yet certain aspects of it are controversial or new. Some examples: 1) It is not assumed that all rights are claims; 2) The incidents are matched with specific functions; 3) For the purposes of this article the tables of jural correlatives and opposites are unnecessary, and the incidents are not here characterized in terms of the tables. Because the current framework contains differences at this level, the Hohfeldian cognoscenti may find it useful to approach the text de novo.

4. Similarly, "A has no Y right to phi" implies "A has a Y duty not to phi." See Wenar, "Legal Rights and Epistemic Rights."

The type of right here is what Hohfeld called a "privilege," which is also called a "liberty" or a "license."[5] The sheriff's right is a single privilege. A right that is a single privilege confers an *exemption* from a general duty. While ordinary citizens have a duty not to break down doors, police officers have a privilege-right [no duty not] to break down doors. When President Nixon asserted that he had a legal right not to turn over the Watergate tapes, he was asserting "executive privilege." Ordinary citizens have a legal duty to turn over evidence when subpoenaed. Yet Nixon alleged that because he was President he had a legal right [no duty not] not to turn over his evidence. James Bond's license to kill is also an exemption from a general duty. Bond's (alleged) right exempts him from a duty not to do what civilians emphatically have a duty not to do, viz., to kill. Similarly, your driver's license gives you the right to drive. This right exempts you from a duty not to do what you would otherwise have a strong duty not to do—to operate dangerous machinery at high speeds.

We can represent a right that is a single privilege, such as your right to drive, in graphic terms as seen in Figure 1.

In Figure 1 your right to drive a car is displayed as a single privilege. This single privilege is classified according to its function (a single privilege is a right of exemption), and according to the form of its assertion (a single privilege is asserted by expressions of the form "A has a right to phi").

Some assertions of the form "A has a right to phi" indicate not a single privilege, but a paired privilege. A paired privilege is composed of two privileges. The holder of a paired privilege has a privilege [no duty not] to phi, and also has a privilege [no duty not] *not* to phi. That is, for a right that is a paired privilege:

> "A has a Y right to phi" implies both "A has no Y duty not to phi" and "A has no Y duty to phi."
>
> (where "Y" is "legal," "moral," or "customary," and "phi" is an active verb)

5. "Privilege" is in some ways an unfortunate name for this incident, as it may have distracting connotations of hierarchy (compare "feudal privilege"). It is best regarded as a wholly technical term.

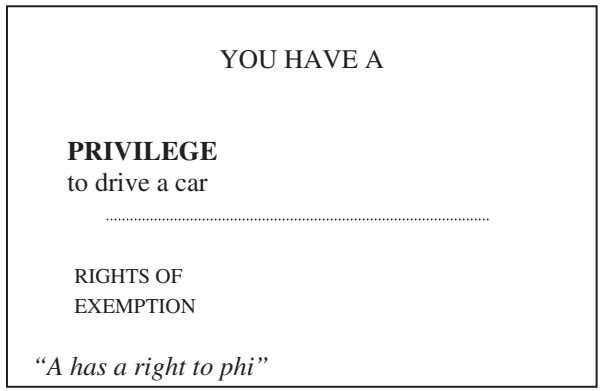

FIGURE 1. The Right to Drive as a Single Privilege

A person vested with a paired privilege is entitled to perform some action, or not to perform that action, as he pleases. For instance, a chess player has the right to capture his opponent's pawn en passant. This right is a paired privilege: the player has a right [no duty not] to take en passant, and a right [no duty not] not to take en passant. The player may take his opponent's pawn, or not, as he thinks best. The function of a right that is a paired privilege is to endow its bearer with *discretion*, or choice, concerning some action. The chess player's right gives the player discretion over whether to take his opponent's pawn, or to leave that pawn on the board.

Paired privileges can be enormously important. For instance, each person has extensive (if not unlimited) paired privilege-rights to move her body, and to use her property. In a liberal society each citizen also has extensive (if not unlimited) paired privilege-rights regarding her speech, association, and religious practice. These paired privilege-rights all entitle the rightholder to choose how to act within some domain: that is, they all specify what the rightholder has no duty (not) to do.

It may be noticed that while a paired privilege is composed of two privileges, the function of a right that is a paired privilege is not related to the function of a right that is a single privilege. The function of a single privilege-right is to confer an exemption from a general duty. Yet neither of the privileges that make up a paired privilege need confer an exemption from a general duty. Rather, the function of the two privileges in a paired privilege-right is together to endow the rightholder with discre-

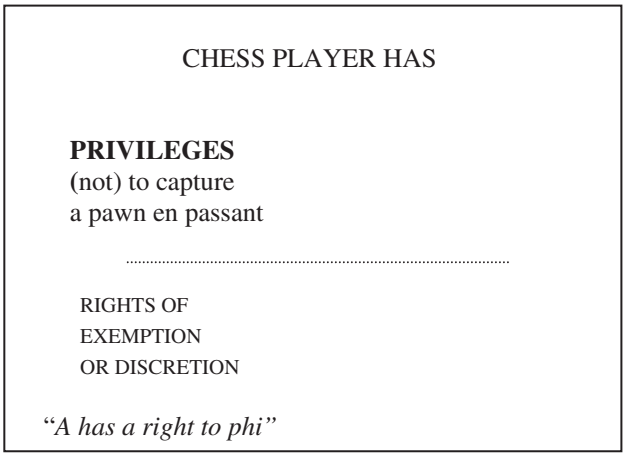

FIGURE 2. A Chess Player's Right as a Paired Privilege

tion concerning some action. The function of the single privilege-right (exemption) and the function of the paired privilege-right (discretion) are entirely independent.[6]

We can represent the chess player's right in the same space as we represented your right to drive, so long as we indicate that the rights which occupy this space may have either of two distinct functions (Fig. 2).

In Figure 2, "Privileges (not) to capture a pawn en passant," indicates the paired privilege to capture and not to capture a pawn. This paired privilege-right is classified according to its function (a paired privilege-right is, unlike a single privilege-right, a right of discretion), and according to the form of its assertion (a paired privilege-right is, like a single privilege-right, asserted by expressions of the form "A has a right to phi").

6. It may also be noticed that in asserting a single privilege-right one need neither affirm nor deny that the single privilege involved is also half of a paired privilege. The sheriff's right to break down the door is an exemptive single privilege. In asserting this right, one need take no position on whether the sheriff also has a single privilege not to break down the door. He may, or he may not (e.g., he may have been ordered to break it down). If the sheriff does also have the single privilege not to break down the door, then his two privileges together form a paired privilege-right: he has the right to break down the door at his discretion. But this discretionary right is distinct from the exemptive right originally asserted, and in asserting the exemptive right one need take no stand on whether he also has or lacks the discretionary right.

B. Claims

We assert not only that "A has a right to phi," but that "A has a right that B phi." This second fundamental form of rights-assertion often implies not a lack of a duty in the rightholder A, but the presence of a duty in a second party B. In such cases:

> "A has a Y right that B phi" implies "B has a Y duty to A to phi."
>
> (where "Y" is "legal," "moral," or "customary," and "phi" is an active verb)

Ignoring the domain restriction "Y," let us examine the simple assertion "A has a right that B phi" when this implies "B has a duty to A to phi." The Hohfeldian incident here indicated is the claim. For every claim in A there is some B who has a duty to A. Your right that I not strike you correlates to my duty not to strike you. Your right that I help you correlates to my duty to help you. Your right that I do what I promised correlates to my duty to do what I promised.[7]

As these examples suggest, rights that are claims can have three different functions. A claim-right can entitle its bearer to *protection* against harm or paternalism, or to *provision* in case of need, or to specific *performance* of some agreed-upon, compensatory, or legally or conventionally specified action. Claims, like privileges, can be of signal importance. Your right against assault, and a child's right to a decent education, and an employee's right to his pay are all examples of rights that are claims.

Some rights are privileges, and some rights are claims. Many familiar rights are combinations of both of these Hohfeldian incidents. For example, in the United States arrestees have the right to remain silent. This is a "molecular" right made up of a privilege and a claim. The arrestee's privilege is a single privilege [no duty not] not to speak, which exempts the arrestee from the general duty to obey police instructions. The arrestee's claim correlates to the police officers' duties not force him to speak, which protects the arrestee from the police (Fig. 3).

7. Notice here that B's duty is not simply to perform the action phi. It is a duty that is owed to or directed toward A. Explaining the "direction" of duties is not simple, and I put this issue to one side here. See Gopal Sreenivasan, "A Hybrid Theory of Claim Rights," *Oxford Journal of Legal Studies* 25 [forthcoming, 2005].

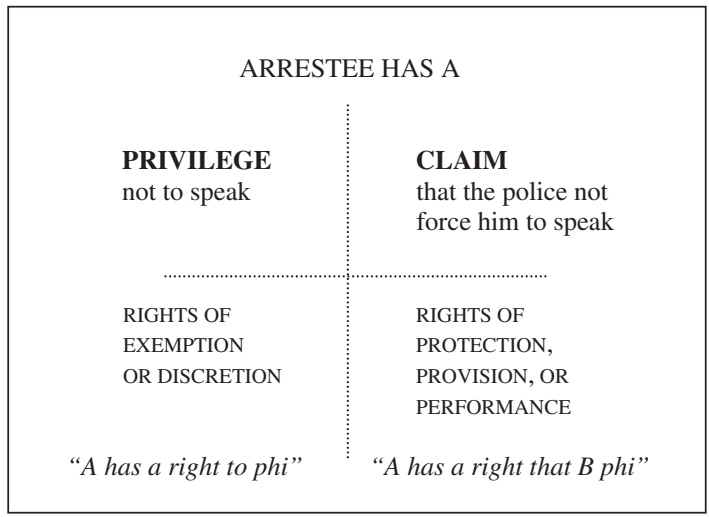

FIGURE 3. The Right to Remain Silent as a Privilege and a Claim

Figure 3 displays an arrestee's molecular right to remain silent. On the left is the single privilege: a right of exemption of the form "A has a right to phi." On the right is the claim: a right of protection of the form "A has a right that B phi." The privilege and the claim together make up the arrestee's right to remain silent.

C. Powers and Immunities

"A has a right to phi" often implies a privilege, and "A has a right that B phi" often implies a claim. These implications hold often—not always—because each of these forms of rights-assertion can also indicate a different, "higher-order" Hohfeldian incident. We have not only privileges and claims, but rights to alter our privileges and claims, and rights that our privileges and claims not be altered.[8]

8. See Sumner, pp. 27–31; Kramer in *DOR*, p. 20. There are not only "second-order" powers and immunities that range over claims and privileges, but "third-order" powers and immunities that range over second-order incidents, and so on. A complex structure of authority such as a political constitution can be seen as a structure of incidents layered in this way.

The higher-order incident indicated by "A has a right to phi" is the power. To have a power is to have the ability within a set of rules to alter the normative situation of oneself or another. Specifically, to have a power is to have the ability within a set of rules to create, waive, or annul some lower-order incident(s). I have a right to promise to give you my fortune. Before I exercise this right I have no duty to give you my fortune, and you have no claim that I do. In exercising my power by making the promise, I create in you a claim to my fortune and thereby create in myself the duty to give it to you. Similarly, a judge has the legal right (power) to sentence a criminal to prison, meaning that a judge has the ability to annul the criminal's privileges of free movement. Or again: in a restaurant you have the customary right (power) to waive your claim to be served a sample of the wine before the bottle is poured, thereby annulling the waiter's customary duty to serve you this sample.

The power, like the privilege, is indicated by propositions of the form "A has a right to phi." All rights that are powers confer *authority*. Rights that are single powers confer nondiscretionary authority. For example, a judge's right to sentence a convicted criminal under mandatory sentencing laws is a single power. The judge's right authorizes her to annul the criminal's right to free movement. Yet this is a single power because the judge has no discretion under the sentencing laws: she must use her authority to sentence the criminal to a specified term of years. A right that is a paired power confers discretionary authority. For example, you have the power to waive, and the power not to waive, the waiter's duty to serve you a sample of wine. Rights that are paired powers, like rights that are paired privileges, endow their bearers with discretion concerning some action. Rights that are paired powers are thus both authorizing and discretionary.[9]

The rights that are indicated by the form "A has a right to phi" have, in sum, three possible functions: single privileges mark an *exemption* from a general duty; both paired privileges and paired powers mark *discretion* within a certain domain; and both single powers and paired powers mark *authority* to alter the normative situation in some way.

9. The "paired power" described here is in fact a simple representation of a more complex structure of incidents. A paired power represents a paired privilege (not) to exercise a single power. This detail would be important in a full treatment of the incidents; here we simply "push" the paired privilege into the power, making the power into a paired power. Wayne Sumner emphasized the importance of retaining privileges here.

Powers can range over the rights of others. Clearly such powers must not be unlimited. The fourth and final Hohfeldian incident is the immunity. One person has an immunity whenever another person lacks the ability within a set of rules to change her normative situation in a particular respect. The immunity, like the claim, is signaled by the form "A has a right that B phi" (or, more commonly, ". . . that B not phi"). Rights that are immunities, like many rights that are claims, entitle their holders to *protection* against harm or paternalism.

A professor has the right to teach and research at her university. A tenured professor has the right that her university not annul her rights to teach and research. The right of tenure is an immunity. The tenured professor's right corresponds to the university's lack of a right (power) to fire her. Similarly, an American's right that Congress not restrict her privilege of free speech protects her against the general power of Congress to impose duties upon her. A witness granted a right against prosecution gains an immunity against being indicted for certain crimes. A defendant who desires to be punished may invoke a right against being required to present evidence that might lead to his acquittal. All of these rights are immunities, and all protect the rightholder from harm or paternalism.[10]

Figure 4 displays all four Hohfeldian incidents working together within a complex right that you have over your body. This complex right comprises both first-order incidents (a paired privilege and a claim) and second-order incidents (a paired power and an immunity). On the first order, the paired privilege endows you with the discretion to move your body, or not to move your body, as you see fit. The claim on the first order affords you protection; it correlates to a duty in each other person not to touch your body. On the second order are your rights regarding the alteration of these first-order rights. Here we see the paired power that gives you the discretionary authority to waive your claim against others touching your body: your right, that is, to authorize others to touch your body. Also on the second order is your protective immunity against other people waiving your claim not to be touched: your right, that is, against anyone else authorizing others to touch your body.

10. Several of these examples are taken from Michael Bayles, *Hart's Legal Philosophy* (Dodrecht: Kluwer, 1992), p. 164.

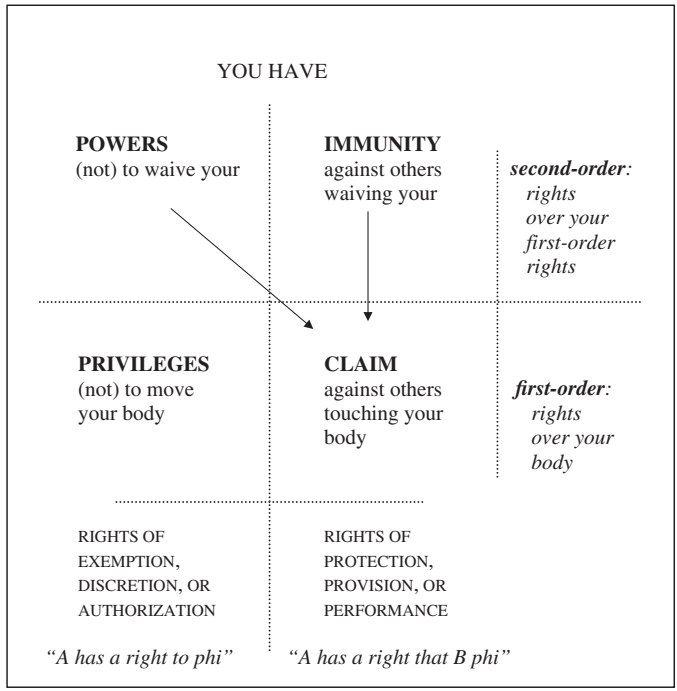

FIGURE 4. A Complex Molecular Right

As Figure 4 shows, the four incidents are positioned in the diagram according to their attributes. Rights over objects such as one's body are first-order privileges and claims. Rights over rights are second-order powers and immunities. As for the two columns, A's "active" rights on the left are privileges and powers, while A's "passive" rights on the right are claims and immunities. Privileges and powers are exercised, while claims and immunities are not exercised; they are merely enjoyed.[11] Moreover, there is an overlap in function between privileges (exemption, discretion) and powers (discretion, authorization) on the left; and an overlap in function between claims (protection, provision, performance) and immunities (protection) on the right.

11. Carl Wellman, *A Theory of Rights* (Totowa, N.J.: Rowman and Allanheld, 1985), pp. 70–71.

Most rights are complex molecular rights like the one in Figure 4: rights made up of multiple Hohfeldian incidents.[12] Molecular rights indicated by the form "A has a right to phi" (where phi is an active verb) will always contain an incident from the left side of the diagram—a privilege or power—although they may contain incidents from the right side as well. Thus the right to move freely is a molecular right that contains privileges (not) to travel about the country; and the right to lead a meeting is a molecular right that contains the power to close a debate.[13] Molecular rights indicated by the form "A has the right that B phi" will always contain an incident from the right side of the diagram—a claim or immunity—although they may contain incidents from the left side as well. Thus the right that others respect one's privacy is a molecular right containing a claim against unwanted surveillance; and the right that the government not take one's property without due process is a molecular right containing an immunity against sudden expropriation.[14]

We have shown how the two fundamental forms of rights assertions can be understood in terms of the Hohfeldian incidents. In both of these fundamental forms of rights-assertion "phi" is an active verb. Assertions of rights in which "phi" is not an active verb but a noun ("Workers have

12. Carl Wellman posited in 1985 that every right consists of a "core" incident with "associated elements" surrounding it. This approach to understanding rights has proved fruitful (see his *Real Rights* [Oxford: Oxford University Press, 1995] and *An Approach to Rights* [Dodrecht: Kluwer, 1997]), and I believe its usefulness could be amplified by the method for representing rights in this article. I do not, however, here commit to Wellman's hypothesis. It should also be noted that the diagrams are not intended to capture all of the complexities of the rights that are displayed, for many of the rights have qualifications not here shown. For example, the legal privilege to move one's body does not contain the privilege to make "fighting words" gestures to others.

13. There are apparent exceptions to this rule because a few English verbs falsely take the active voice. For example, the verb "to inherit" appears active; yet one can inherit without performing any action. Sentences with falsely active verbs should be rephrased to bring out the true agent. Thus "The infant has a right to inherit the estate" should be read "The infant has a right that the executor pass the estate to him." The incident marked by falsely active verbs is ordinarily a claim, not a privilege or power.

14. Wellman argues (*A Theory of Rights*, pp. 75–79) that there are rights whose "core" is not one of the four incidents above, but is rather a "liability" (A has a liability when A is on the "receiving end" of B's power). His examples are the right to be given an inheritance, and the right to be married. Yet these rights are better explained in terms of the four incidents. The right to be given an inheritance is a claim against the executor of the will to transfer the relevant funds. The right to be married is similar: a power jointly held by two people to create in themselves a claim against the relevant authority that this authority exercise its power to join the couple in marriage.

the right to a decent wage") or in which "phi" is a passive verb ("Children have a right to be educated at state expense") are easily transposed into active verb forms. Workers have a right that their employers pay them a decent wage, and children have a right that the state pay for their education.[15] Explications of assertions of rights containing nouns and passive verbs merge in this way into the explication of the two fundamental forms of rights-assertion.

Finally, assertions of broad or indeterminate rights—such as the "right to free expression"—can be specified in several different ways into complexes of Hohfeldian incidents. The different specifications will correspond to different understandings of the right at stake. Indeed one of the virtues of the Hohfeldian framework is its capacity to display in exact terms various interpretations of what people might mean when they assert a broad or indeterminate right like the right to free expression. For example, should a controversial author assert that his right to free expression has been violated by a bookstore refusing to carry his book, a Hohfeldian explication will show that the author is not asserting the (usual) privilege-rights to expression insulated by protective claims and immunities. He is rather asserting a (tendentious) claim-right that others abet the spread of his expression. This Hohfeldian explication will be useful in evaluating the truth of the author's assertion that his right to free expression has been violated.

The framework for explicating rights assertions into assertions about Hohfeldian incidents is now complete. Any assertion of a right can be translated into an assertion about a single Hohfeldian incident, or into an assertion about a complex of incidents, or into a set of alternative assertions about such incidents. All rights are Hohfeldian incidents.

The proof of this thesis is inductive. In examining sample rights, we have found that:

(1) Each right can be identified with one or more of the Hohfeldian incidents; and
(2) Each right has one or more of the six specific functions (exemption, discretion, authorization, protection, provision, performance).

15. Some complex rights assertions combine simpler rights assertions of both of these forms. For example, "I have a right to walk on the bike path without being run over" resolves into "I have a right to walk on the bike path" and "I have a right that others not run me over while I am walking on the bike path." Jennifer Saul suggested this example.

The inductive step is to say: All rights are like this. All rights can be analyzed into Hohfeldian diagrams. Our confidence in this inductive step will increase as we successfully explicate more and more rights with the Hohfeldian diagrams, and as we fail to find counterexamples. The reader may want to satisfy himself or herself that confidence in this inductive step is justified, and may wish to test the framework with more sample rights. The note below reproduces a list of rights from a recent text, which may be useful for evaluating the induction.[16]

Philosophers of law sometimes complain that the ordinary language of rights is loose, or confused. Yet there is nothing wrong with ordinary language. The word "right" in ordinary language is merely systematically ambiguous, like many other words, such as "free."[17] Assertions of rights can refer to various (combinations of) Hohfeldian incidents. Since these incidents have quite different logical forms, speakers may fall into contradiction if they do not understand the implications of their own assertions. For example, it is not uncommon for a speaker to assert a right that can only be a privilege, and then go on to infer from this assertion that someone owes him a duty. Yet this kind of error is not the result of a defect in ordinary language. It is rather a defect in the speaker's

16. "Under what basic headings should we classify the right to change one's name, the right of private security guards to make arrests, the exclusive right to decide who publishes (copyright), stock-purchase rights, the right to recover money damages for defamation, tenants' and landlords' rights, the right to smoke the dried leaves of some (but not all) plants, and the right to judicial review of the rulings of some administrative agencies? Are there purposes for which it is helpful to sort into two basic groupings—say, the positive and the negative—the right of legislative initiative, the right not to be denied a job because of sexual preference, the right to return to a job after taking unpaid maternity leave, the right to interstate travel, freedom of testation, and the right to inform authorities of a violation of the law? And what about hunting and fishing rights, the right to keep and bear arms, a landowner's right to abate nuisances upon his land, mineral rights, the right to present testimony about the victim of a crime in order to influence the sentencing of a perpetrator, pension rights, the right to give to charity tax-free, the right to recover a debt, the right to run for office, the right to view obscene materials at home?" Stephen Holmes and Cass Sunstein, *The Costs of Rights* (New York: W. W. Norton, 1999), pp. 38–39.

We can take three of these rights as samples for analysis. The "core" of the right to give to charity tax-free is a paired power to transfer funds to a charity, the positive power of which is unqualified by the requirement that some percentage of all funds transferred pass to the government. The right not to be denied a job because of sexual preference is a claim that employers not take sexual preference into account when making employment decisions. The right to view obscene materials at home is a paired privilege to view obscene materials at home, plus a claim against the police interfering with one's doing so.

17. Wenar, "The Meanings of Freedom," in *Contemporary Debates in Social Philosophy*, ed. Laurence Thomas [Blackwell, forthcoming 2005].

understanding of the various meanings of the word "right." Ordinary rights-talk can be entirely rigorous and error-free, provided that speakers understand how assertions of rights map onto the Hohfeldian incidents.

The Hohfeldian framework shows that the unity of rights is not a simple Thalesian monism; it is the unity of molecules composed of the atoms of the periodic table. Privilege-rights and claim-rights share the concept of duty, and range over physical objects. Power-rights and immunity-rights share the concept of authority, and range over lower-order incidents. Privilege-rights and power-rights are actively exercised, and overlap in their functions. Claim-rights and immunity-rights are passively enjoyed, and their functions also mesh. All of the rights that we know are built from these common elements, in ways determined by the natures of the elements themselves.

II. The Functions of Rights

A. Theories of the Functions of Rights

All rights are Hohfeldian incidents. Are all Hohfeldian incidents rights? That is, would any of the four Hohfeldian incidents, or any combination of incidents, count as A's right were it ascribed to A? We might label the theory that answers this question affirmatively the *any-incident* theory of rights. Both of the long-dominant theories of the functions of rights—the will theory and the interest theory—oppose this any-incident theory. According to the will theory and the interest theory, some (combinations of) Hohfeldian incidents do not qualify as rights because they do not perform the function that all rights perform. The will theory says that only those combinations of incidents that give their holders certain kinds of choices are properly regarded as rights. The interest theory limits the term "rights" to those incidents that further their holders' well-being. The will and interest theories are each "single-function" theories of rights. According to these theories all rights have some single function, although the two theories differ as to what that function is. Both single-function theories would therefore reject the explication of rights assertions in the first part of this article, in which rights have six distinct functions.[18]

18. Jonathan Riley suggested the label "single-function theory."

The long and unresolved historical contest between these two single-function theories stretches back through Bentham (an interest theorist) and Kant (a will theorist) into the Dark Ages.[19] In the twentieth century the scholarly contest between advocates of the two theories ended in stalemate. I believe that, as is often the case with unresolved historical debates, this situation is explained by each side giving a partial account of a larger terrain. Here I will briefly review the standing objections to each single-function theory in order to show how each is too restrictive as an account of the functions of rights, and to indicate how the weakness of each theory is the strength of the other.

A better alternative, I believe, is what might be called the *several functions* theory of rights. The several functions theory captures what is plausible in the will and interest theories; yet because it does not require that all rights have some single overall function it avoids the procrustean strictures of each. The test of a theory of the functions of rights is how well it captures our ordinary understanding of what rights there are and what significance rights have for rightholders. The several functions theory is, I will argue, preferable to both the will theory and the interest theory on these grounds.

B. The Will Theory

The will theory of rights asserts that the single function of a right is to give the rightholder discretion over the duty of another. A land owner has a right, for instance, because he has the power to waive or not to waive the duties that others have not to enter his land. A promisee has a right because she has the power to demand performance of the promisor's duty, or to waive performance, as she likes. As Hart describes the central thesis of the will theory, "The individual who has the right is a small scale sovereign to whom the duty is owed."[20]

The attraction of the will theory is that it reserves for rights the special role of securing dominion over significant spheres of action. Many important rights do endow rightholders with this kind of discretion, and so serve the freedom of those who hold them. The connection between

19. See the historical sources cited in n. 49, especially the works by Tuck, Tierney, Brett, and Simmonds.

20. H.L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), p. 183.

rights and freedom, so powerful in modern politics, is for will theorists a matter of definition.

However, the will theorist's sole focus on a certain sort of freedom constrains what he recognizes as a right. The will theorist recognizes as a right only those Hohfeldian incidents that confer on their bearers the discretion to alter the duties of others. Thus the will theorist recognizes as rights only those molecular structures that include a paired power (not) to create, waive or annul a claim that one person has against another.[21] This view of the function of rights also entails a restriction on the class of potential rightholders. The will theorist recognizes as potential rightholders only those beings that have certain capacities: the capacities to exercise powers to alter the duties of others.

These constraints render the will theory implausibly narrow. This narrowness is evident, first, in the range of rights that the theory recognizes. Many important rights, such as the complex bodily right in Figure 4, do include a paired power to alter a claim. But many do not. For example, you have no legal power to waive or annul your claim against being enslaved, or your claim against being tortured to death. The will theory therefore does not recognize that you have a legal right against being enslaved, or against being tortured to death. Yet most would regard these unwaivable claims as rights, indeed as among the more important rights that individuals have.[22]

Will theorists have responded to this charge of narrowness in two ways. The first is to restrict the relevance of the theory to a limited context. Hart himself takes this strategy. He admits that the will theory is satisfactory "only at the level of the lawyer concerned with the working of the 'ordinary' law," and is not adequate to handle individual rights at the level of constitutional law.[23] The second strategy is to try to redeem the incidents in question as rights by finding someone who does have

Besides Hart, influential advocates of a choice-based approach to rights include Savigny, Kelsen, Wellman, and Steiner.

21. Hart, pp. 183–84; cf. Wellman, *A Theory of Rights*, p. 199.

22. It is a peculiarity of the will theory that it regards one's trivial claims (such as your waivable claim not to have your left foot touched with a feather) as one's rights, while not being able to acknowledge one's weighty claims (such as your unwaivable claim against being tortured) as one's rights. See Neil MacCormick, "Rights in Legislation," in *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, ed. P.M.S. Hacker and Joseph Raz (Oxford: Oxford University Press, 1977), pp. 189–209, 197.

23. Hart, pp. 185–86, 192–93.

discretion with regards to them, such as a government official who has discretion over whether to prosecute a torturer.[24] Yet even were this search for "choosers" always successful, the result would fit poorly with an ordinary understanding of rights. For here the will theory is still committed to saying that you have no right against being tortured. Rather, the right that you not be tortured would be the district attorney's right, since the district attorney is the person with the discretion.

The limitations of the will theory are also evident in its inability to account for the rights of incompetent (e.g., comatose) adults, and of children.[25] The will theory can acknowledge rights only in those beings competent to exercise powers, which incompetent adults and children are not. Incompetent adults and children therefore cannot on this view have rights.[26] This is certainly a result at variance with ordinary understanding. Few would insist that it is conceptually impossible, for example, for children to have a right against severe abuse.

C. The Interest Theory

The will theory faces serious problems in explaining many rights that most believe there are. Yet where the will theory falters, the interest theory flourishes.[27] The interest theory holds that the single function of rights is to further their holders' interests. More specifically, rights are those incidents whose purpose is to promote the well-being of the

24. Steiner in *DOR*, pp. 248–56.

25. Neil MacCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press, 1982), pp. 154–66.

26. Nor can animals. Hart saw it as a "substantial merit" of the will theory that it cannot assign rights to animals, because animals "are not spoken or thought of as having rights" (Hart, p. 185). Since animals are now often spoken and thought of as having rights, this feature of the will theory may now appear less meritorious. Hart did in a footnote allow that children can have rights, which rights are exercised by their representatives, e.g., parents (Hart, p. 184). Yet he was only able to reach this position by suppressing the central will theory thesis that a rightholder is sovereign over the duty of another.

27. Bentham gave the first modern statement of the interest theory; other champions include Ihering, Austin, Lyons, Raz, MacCormick and Kramer. For an exceptionally clear exposition of the interest theory, see Kramer's essay in *DOR*. I will here use both "interest" and "well-being" to indicate the interest theorist's central concept of what is good for a being. This concept can be construed broadly enough to include a person's agency interests in having and making choices over a range of options.

rightholder.[28] As MacCormick puts it, "The essential feature of rules which confer rights is that they have as a specific aim the protection or advancement of individual interests or goods."[29]

The interest theory is not committed to the implausible thesis that each right is always in the interest of the rightholder. Some inheritances, for example, are more trouble than they are worth. Rather, the interest theory holds that the function of rights is to promote rightholders' interests in the general case: "To ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C."[30]

Since the interest theory turns on the rightholder's interests instead of her choices, it can recognize as rights unwaivable claims such as the claims against enslavement and torture. The interest theory also has no trouble viewing children and incompetent adults as rightholders, since children and incompetent adults have interests that rights can protect. Moreover, the interest theory can accept a wide range of Hohfeldian incidents—such as a claim to another's assistance and the immunity that protects free speech—as promoting the well-being of their holders and so as rights. Finally, the interest theory can acknowledge that individuals may be better off having the power to make choices, and so can embrace many of the rights central to the will theory. The appeal of the interest theory emanates from the wide range of rights that it can endorse, and from the evident fact that having rights can make a life go better.

Yet the interest theory is also inadequate to our ordinary understanding of rights. There are many rights the purpose of which is not to further the well-being of the rightholder, even in the general case. This is clearest with rights that define occupational roles. A judge has a (power) right to sentence criminals, but this right is not designed to benefit the judge.

28. A more exact statement of the interest theory would be necessary to overcome the long-standing objection of third-party beneficiaries. Simmonds gives a good summary of the problem in *DOR*, pp. 197–98; for the classic objection and reply see Hart, pp. 180–81; David Lyons, *Rights, Welfare and Mill's Moral Theory* (Oxford: Oxford University Press, 1994), pp. 36–46. For an adaptation of Bentham's response to the objection see Kramer, *DOR*, pp. 81ff. Kramer's endorsement of "Bentham's test" produces an overly expansive version of the interest theory which I do not discuss here.

29. MacCormick, "Rights in Legislation," p. 192.

30. Neil MacCormick, "Children's Rights: A Test-Case for Theories of Rights," *Archiv für Rechtsund Sozialphilosophie* 62 (1976): 311; see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 180.

Rather, judges are ascribed this right as part of a system of justice that protects the members of the community. A traffic warden has a (power) right to issue parking tickets; but the point of this right is to improve the lives of motorists, not the life of the warden. Similarly, an army captain may have the (power) right to order units, including his own, into battle; yet the specific aim of the rule that confers this right is not to further the captain's well-being. In each of these cases the right is ascribed in order to benefit parties beside the rightholder. The existence of such role-defining rights establishes that the interest theory is implausibly narrow.[31]

Interest theorists have taken two different paths in response to these kinds of cases. Raz tries to rescue the conceptual connection between rights and interests by reinforcing the interests of rightholders with the interests of others. On Raz's variant of the interest theory the existence of a right turns not on the purpose of the right's ascription, but on the sufficiency of the rightholder's interests in justifying the right's normative impact.[32] Raz's variant faces the same difficulty as faced by the original interest theory. Whatever interest a judge has in exercising her right to impose criminal punishments, for example, it cannot be sufficient to justify the dramatic normative effects of her exercise of this right. Raz's response to this difficulty attempts to boost the strength of the judge's interest in exercising her power by drawing attention to the fact that protecting the judge's interest also protects the interests of the public.[33] Yet this attempt to add the interests of the public to the interest of the judge merely highlights the fact that the judge's interest is in itself insufficient to ground this right. Role-bearers often do not have interests in their rights sufficient to justify their having those rights. When they do not, they cannot within Raz's own analysis have rights.[34]

31. See Wellman, *A Theory of Rights*, pp. 25–26; Peter Jones, *Rights* (New York: St. Martin's, 1994), pp. 31–32.

32. Raz, *Morality of Freedom*, ch. 7.

33. Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), pp. 149–51, 274–75.

34. To take another case, Raz describes a journalist's right to free speech as a function of the interests of the journalist's audience. Yet as Kamm observes, "If the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is *not sufficient* to give rise to the duty of non-interference with his speech" (Frances Kamm, "Rights," *Oxford Handbook of Jurisprudence and Philosophy of Law* [Oxford: Oxford University Press, 2002], pp. 476–513, 485).

Kramer takes the other path of response to these role-defining rights, which is to deny that they are rights at all. A judge has no right to sentence criminals, a traffic warden has no right to issue tickets, an army captain has no right to give orders, and so on. This response reanimates a definitional stipulation found in Hohfeld's original 1913 article that "in the strictest sense" all rights are claims.[35] On this view a judge's power to sentence—because it is a power and not a claim—cannot be a right. This redefinition of "rights" does save the statement that "All rights further the interests of the rightholder," but only by withdrawing this statement from ordinary language. The interest theory so construed becomes valid for "rights" understood as a term within a specially constructed dialect of "strictly speaking." Yet the theory remains incorrect for "rights" as commonly understood.[36]

D. The Any-Incident Theory

The will theory and the interest theory are both inadequate to our understanding of rights, the weakness of each being the strength of the other. The will theory captures rights that give discretion to the rightholder without conferring benefits, but fails to capture rights that confer benefits without giving discretion. The interest theory accepts rights that confer benefits, but rejects rights whose holders do not benefit from holding them. In the most general terms, the will theory accounts better

35. Hohfeld, p. 36. Raz does not use the Hohfeldian terminology, yet his characterization of rights implies that he also holds that, in effect, all rights are claims. So Raz is subject to both criticisms here. The criticism of his view in the previous paragraph would go through even were he to broaden his characterization to include other incidents as well.

36. Kramer, *DOR*, pp. 9–14, 93. It is important to note that when interest theorists and will theorists attempt to validate their theses by resorting to a technical discourse, they do not draw a line between legal discourse and lay discourse. Rather, they put lawyers and judges on the side of laypeople in using the "loose" ordinary language of rights. It is only philosophers of law who speak a "strict" dialect of rights. Of course the two types of theorists disagree on which "strict" dialect philosophers of law should speak. So on Kramer's strict philosophical usage judges would not have the right to sentence criminals, while on Wellman's strict philosophical usage infants would not have a right against abuse (Wellman, p. 136). Yet, as emphasized above, ordinary language is not in fact loose in this way (although some people's understanding of it may be). The only reason to resort to a "strict" dialect is to rescue one of the single-function theories from counterexamples. I discuss this point at greater length in "The Functions of Rights," in *Law: Metaphysics, Meaning, and Objectivity*, ed. Enrique Villanueva [New York: Rodopi, forthcoming].

for the incidents on the left side of Figure 4, while the interest theory accounts better for the incidents on the right side. Each theory includes rights that the other cannot.

This is all to the advantage of the any-incident theory.[37] The any-incident theory holds that each Hohfeldian incident, and each combination of incidents, is rightly called a right. This theory counts as rights all of the rights identified by both the will and the interest theories. It counts as rights those incidents that confer choices, as well as those incidents that promote interests. The any-incident theory thus acknowledges as rights the judge's power to sentence as well as the child's claim against abuse. Yet the any-incident theory is not the concatenation of the other two theories. It does not say that Hohfeldian incidents are rights just in case they confer choices or just in case they benefit their bearers. The any-incident theory simply says that any Hohfeldian incident or complex of incidents is a right.

The inclusiveness of the any-incident theory brings it closer than the will or the interest theory to an ordinary understanding of rights. However, the any-incident theory is in fact too inclusive. It counts as rights some Hohfeldian incidents that we ordinarily would not.

In order to locate the over-inclusiveness of the any-incident theory, let us review Section I of this article. There we were concerned to show that all assertions of rights could be explicated in terms of the Hohfeldian diagrams. As we investigated different rights, we found that each right could be cashed out in terms of (combinations of) Hohfeldian incidents, and that each had a certain function or set of functions. For example, we found that rights that mark exemptions from duties are single privileges, that rights that entitle the rightholder to protection are claims or immunities, and so on. In all, we found six specific functions that rights can have (exemption, discretion, authorization, protection, provision, and performance) and we mapped these functions onto the different incidents.

The induction was that each right can be identified with one or more of the Hohfeldian incidents, and that each right has one or more of the six specific functions. Yet we have not asserted, nor is it true, that all

37. To my knowledge the any-incident theory has not been proposed as an alternative to the will and interest theories, although something like it is suggested in Thomson, *The Realm of Rights*.

Hohfeldian incidents have one of the six specific functions. For example, although all rights that confer an exemption are single privileges, there are single privileges that do not confer an exemption or perform any of the other specific functions. Similarly, although many rights that protect are immunities, there are immunities that do not protect or perform any of the other specific functions. All rights are incidents and have one or more of the six functions, but some incidents have none of the six functions.

The space of incidents that do not perform any of the six functions is where the any-incident theory fails. The any-incident theory says that each incident or combination of incidents is a right, regardless of whether that incident or combination of incidents performs any function at all. The any-incident theory becomes overly inclusive when it counts as rights those Hohfeldian incidents that do not perform any of the six functions we found in Section I. Two examples illustrate this over-inclusiveness.

As Hart noted, not all immunities are regarded as rights.[38] One person has an immunity whenever another person lacks a power to alter his normative situation in some respect. Yet by this definition there exist many immunities that provide no protection. To take one of Hart's examples: your city council lacks the power to award you a pension. By the definition of the immunity, you therefore have an immunity against your city council's awarding you a pension. But it would be odd, Hart said, to hear you say that you have a *right* that your city council not award you a pension. Here we have an incident—an immunity—that does not perform any of the six functions. In particular, this immunity does not provide protection. What is more, this incident does not appear to be a right. Yet the any-incident theory says that all incidents are rights, and so the any-incident theory fails by including this immunity within the class of rights.[39]

38. Hart, pp. 191–92; see also Lyons, *Rights, Welfare*, p. 11; Simmonds in *DOR*, pp. 153–54.

39. See also Kramer, "Getting Rights Right," in *Rights, Wrongs, and Responsibilities*, ed. Matthew Kramer (London: Macmillan, 2001), pp. 28–95, pp. 78–89. A will theorist might object to the definition of the immunity used in this article, and so to the construction of this example. In this article B has an immunity whenever A lacks a power to alter B's incidents. However, a will theorist might prefer to locate the immunity in the agency who has the power to nullify a putative alteration of B's incidents by A. Such a theorist might say in the pension example that it is not you but rather the Home Secretary who has the

We can see the same type of over-inclusiveness in another of Hart's examples, this time concerning the privilege. Each of us has no legal duty to assault other people on the street. We each therefore have a single legal privilege not to assault others on the street. But we would balk at saying that each of us has a legal right not to assault others on the street. The reason we balk is because this single privilege does not exempt us from a general duty. This single privilege does not perform the function that all single privilege-rights perform. The any-incident theory, by allowing incidents like this into the class of rights, allows too much.[40]

E. The Several Functions Theory

The several functions theory subtracts these counterintuitive cases from the any-incident theory. The several functions theory holds that any incident or combination of incidents is a right, but only if it performs one or more of the six functions shown in Figure 4. In other words, all (combinations of) incidents are rights so long as they mark exemption, discretion, or authorization, or entitle their holders to protection, provision, or performance. Only those (combinations of) incidents that perform at least one of the six specific functions are rights.

The several functions theory is superior to the any-incident theory in rejecting those incidents that are clearly not rights. Your immunity against your city council granting you a pension does not protect you against harm or paternalism, since being granted a pension would

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immunity against your being awarded a pension, since it is the Home Secretary who could nullify such an award. Yet even with the immunity so recharacterized Hart's point is valid. Even if the Home Secretary is said to have an immunity against your council awarding you a pension, it would be odd to say that he has a right that your council not do so. Hillel Steiner offered the proposed redefinition of the immunity.

40. Showing that incidents that lack the several functions are not rights also solves a riddle about powers that has vexed a number of authors. The law states that you have the ability—and so, by definition, that you have the power—to make yourself liable to prosecution by breaking the law. Yet of course the law does not give you the right to do anything by breaking the law. (See Kramer in *DOR*, p. 104 and the citations there.) The solution lies in seeing that the incident in question is again an incident lacking any of the functions of rights. The law does not give you the *authority* to do anything by breaking the law. So although the law acknowledges that you have a legal power, it does not vest you with any law-breaking rights.

neither harm you nor interfere with your autonomy for your benefit.[41] Your single privilege not to assault others is not an exemption from a general duty to assault others, since there is no such general duty. Therefore according to the several functions theory, neither of these incidents is a right.[42]

The several functions theory is also superior to both the will theory and the interest theory without being simply their concatenation. Like the any-incident theory, the several functions theory counts as rights everything counted as a right by both of the single-function theories. It counts the judge's (discretionary) power to sentence, as well as the child's

41. This is true whether we construe being harmed as being made worse off than one was, than one otherwise would be, or than one should (morally, legally, customarily) be; or whether "harm" is tied to violation of an agent's sovereignty. The several functions theory does not itself commit to any particular interpretation of "harm." Rather, the rights that the theory will count as protective will vary along with the variations in the definition of this term. As for paternalism, it might be thought that there are possible circumstances in which being granted a pension by one's city council would constitute a paternalistic interference with one's autonomy. For example, Simmonds imagines a case in which receiving a pension would threaten one's reputation for having a devil-may-care attitude (*DOR*, p. 154). Reflection on such possibilities lends further support to the several functions theory, since as Simmonds acknowledges in such circumstances it becomes plausible to describe the immunity in question as a right. Gerald Gaus pointed out the importance of paternalism in the function of the claim.

42. It might be argued that an interest theory could explain why rights have the several functions that they do, by showing how all of the functions serve interests in some way. Thus it might be argued that the immunity against being awarded a pension is not a right because it does not protect the rightholder's interests; and the privilege not to assault others is not a right because it does not exempt its bearer from a duty in a way that furthers the rightholder's interests. This proposal faces the threshold objection that a will theorist can make exactly parallel arguments (e.g., the immunity is not a right because it does not protect the agent's sovereignty). The more serious difficulty for the proposal, however, is that it does not overcome the counterexamples to the interest theory arising from role-related rights (as above, the judge's power to sentence is not grounded in the interests of the judge). A supplementary proposal could be advanced to attempt to overcome those counterexamples, this time expanding the interest theory to include as rights all those incidents that serve not just the rightholder's interests but anyone's interests. On this expanded interest theory, the judge would have a right because his power to sentence authorizes him in a way that serves the interests of the community. However, this proposed expansion would inflate the interest theory past the bursting point. For almost every incident, including the immunity against being awarded a pension and the privilege not to assault passersby, serves some interest or other. The interest theory retains it shape only when defined by the interests of the rightholder; removing this definitional element makes it swell toward the any-incident theory. The Editors of *Philosophy & Public Affairs* helped to clarify these points.

(protective) claim against abuse. The several functions theory thus resolves the standoff between the will theory and the interest theory by accepting all of the rights that are recognized by each of the procrustean single-function theories.

Moreover, the several functions theory also recognizes rights beyond those recognized by either the will theory or the interest theory. These are rights that neither give the rightholder discretionary power over the duty of another, nor promote the well-being of the rightholder. The discretionary right (paired privilege) of a citizen to restrain an attacker of a third party, and the discretionary right (paired privilege) of a parent to chastise a naughty child are one type of example. A judge's right (single power) to sentence a criminal to a specific term of years under mandatory sentencing laws, and a police officer's exemptive right (single privilege) to detain a suspect that he has been ordered to detain are another sort of example.[43] Since we would without hesitation call the incidents in these examples rights, this is further confirmation that the several functions theory captures our ordinary understanding of rights better than the will theory or the interest theory do.

Figure 5 displays the extensional relationships among the four theories of the functions of rights, within the realm of commonly accepted rights.

The several functions theory accepts that there is no one thing that rights do for rightholders. Rights have no fundamental normative purpose in this sense. Rather, rights play a number of different roles in our lives. Some rights give the rightholder discretion over others' duties, some rights protect the rightholder from harm, some rights do neither of these things but something else altogether. All rights perform some function, but there is no one function that all rights have. There is no one function that all rights have, as there is no one function that all furniture has, and no one feature that all games have. Rights have all of the functions that they do.[44]

43. These sorts of examples are discussed in Hart, pp. 182–83; Wellman, *A Theory of Rights*, pp. 64–68.

44. To affirm that rights have only six basic functions is not to assert that rights can further only six values. The six functions are basic because they obtain whenever an incident is a right; but rights may, in performing their basic functions, further any number of values. For instance, a right that authorizes farmers to sell their land may increase productive efficiency; and a right that authorizes a minority group to vote may promote social

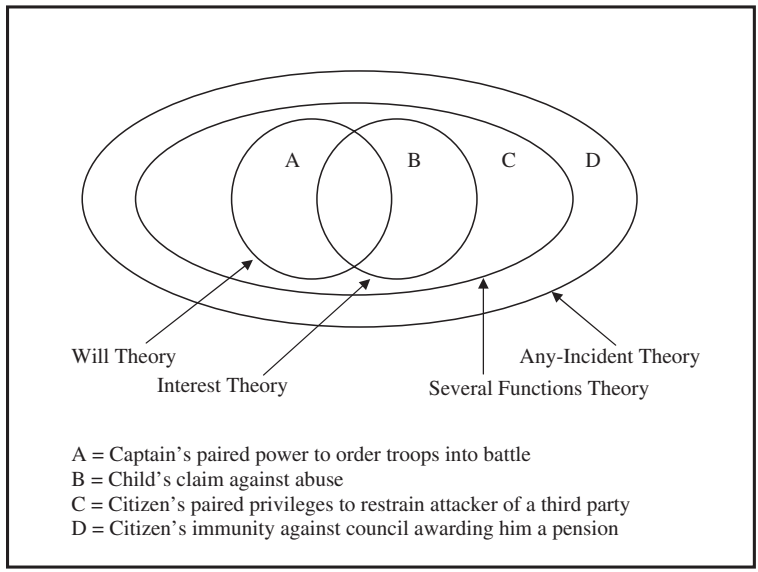

FIGURE 5. The Incidents that are Rights According to the Four Theories of the Functions of Rights

The great advantage of the several functions theory is its fit with our ordinary understanding of rights. It must be emphasized that will and interest theorists cannot evade this point by gesturing to the looseness or non-univocality of rights-talk in ordinary language. Will theorists, interest theorists, and several function theorists can agree that ordinary language will be perfectly tight and univocal so long as speakers understand how assertions of rights map onto the Hohfeldian incidents. This is not the issue. The debate among theorists of the functions of rights would persist even in the Hohfeldian utopia where ordinary language users make no inconsistent assertions about rights.

The issue is the functions of rights. All sides of the debate maintain that the primary standard for settling this dispute is an ordinary under-

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equality. Indeed the six basic functions can themselves be seen as values, and these values may occasionally be furthered cross-categorically when rights perform their basic functions. The legal right against self-incrimination illustrates this possibility. The single privilege-right against self-incrimination exempts its bearer from the general duty to testify, and in so doing it protects its bearer from a requirement of self-harm. All single privilege-rights exempt; this privilege-right in exempting its bearer also protects its bearer.

standing of what rights there are and what roles they play in our lives. The final accusation of will and interest theorists against each other has always been that the other side's theory yields counterintuitive results.[45] Or, rather, each side has accused the other of being *more* counterintuitive. Yet each single-function theory yields many more counterintuitive results than the several functions theory yields. Thus the several functions theory is superior when judged against the standard by which the single-function theories judge each other.[46]

The long debate between will and interest theorists has outlasted the plausibility of either of their theories as a conceptual analysis of rights. The explanation for this, I believe, is that the contest between them has become a proxy for a debate between strongly opposed normative commitments. Those theorists whose normative commitments entail that rights should be distributed so as to create equal domains of freedom—mostly Kantians like Steiner—champion the will theory as an analysis of the nature of rights. Their welfarist opponents like Raz, who hold that the point of morality or the law is to further individual well-being, fight for the interest theory. Each side attempts to portray that part of the ordinary concept that is most congruent with their normative theory as the whole concept. Each side is invested in securing victory for its own analysis, because each side is attempting to use its analysis to preempt objections to its preferred normative theory. A reader convinced that the best conceptual analysis of rights does not allow rights for children will be less concerned with a normative theory that offers none. A reader who believes that rights are conceptually tied to the rightholder's interests

45. A representative sample of passages: Steiner charges that the interest theory "places considerable strain on our ordinary understanding of rights" (*DOR*, p. 287). MacCormick, by contrast, wonders who could accept the will theory, given that it "does such violence to common understanding" ("Rights in Legislation," p. 197). Kramer is even more severe with the will theory, "Many people would shrink from a theory which defines 'right' in a way that commits the proponents of the theory to the view that children and mentally infirm people have no rights at all. Even when stripped of its ghastliness by being carefully explained, such a view tends to sound outlandish when stated" (*DOR*, p. 69).

46. "Theories of rights don't come cheap. Buying either of them [the will theory or the interest theory] involves paying some price in the currency of counter intuitiveness. Nor, I should add, has this centuries-long debate about the nature of rights ever revealed any distinct third theory that even approaches their levels of generality, let alone promises to undercut their prices" (Steiner, *DOR*, p. 298). The several functions theory is this third theory.

will be less likely to protest the manhandling of cases where the rightholder's interests do not ground the right.[47]

Any moral or legal theorist is of course free to stipulate what the word "right" means within his theory. Yet stipulation is effortless; it requires no argument, and it is not analysis. As a subject of scholarly inquiry, conceptual analysis has its own integrity. An analysis that is faithful to an ordinary understanding of rights will not reduce the justificatory burden on any normative theory of rights. Instead, such an analysis will partly determine the justificatory burden that a normative theory must discharge. A faithful analysis will enable us to gauge how much of our ordinary understanding of rights is captured by a normative theory's portrayal of rights, and to judge for ourselves whether that normative theory is compelling enough to convince us to give up the rest.[48] A strong normative argument will be able to withstand scrutiny as a normative argument, from the perspective of an unblinkered view of the conceptual terrain.

III. Conclusion

The congruence of the several functions theory with our ordinary understanding of rights makes it preferable to competing theories. Still, one might hope for a fuller account of the several functions of rights. Why, one might ask, are these particular six functions associated with our concept of a right? Why should rights be characterized by all of these six functions, and by only these six? If rights do not all have some single function, why do rights have the functions that they do?

47. As Raz himself puts it (*Morality of Freedom*, p. 16), "Moral and political philosophy has for long embraced the literary device (not always clearly recognized as such) of presenting substantive arguments in the guise of conceptual explorations." I discuss this theme at greater length in "The Functions of Rights."

48. Following are two examples—one classic, one contemporary—of how rights have been portrayed by normative theorists: "A right is a power of which the exercise by the individual or by some body of men is recognized by society either as itself directly essential to a common good or as conferred by an authority of which the maintenance is recognized as so essential" (Thomas Hill Green, *Lectures on the Principles of Political Obligation* [Cambridge: Cambridge University Press, 1986], p. 103); "In my view, rights are constraints on discretion to act that we believe to be important means for avoiding morally unacceptable consequences" (T. M. Scanlon, *The Difficulty of Tolerance* [Cambridge: Cambridge University Press, 2003], p. 151).

For answers to these questions we would need to turn to history. The concept of a right has been reshaped, fitfully, and by strong social forces, for nearly two thousand years. Rights were extant in ancient law, and contested by Christian scholars of the Middle Ages. Rights were later stretched to define the offices of the burgeoning bureaucratic state. Throughout the modern period rights have been grasped by popular movements attempting to protect or empower the excluded, the exploited and the injured. We in the twenty-first century are the inheritors of a concept that has been pulled and cut by many hands, over many years. This is why, when we use the tools of philosophical analysis to detect the deep structure of our concept of rights, we find an irreducible complexity.[49]

One could hardly count oneself as a theorist if one did not seek a simpler unity—if one did not search for the single logical form, for the single function, that all rights share. The desire for unitary analyses is strong, and for any given concept it cannot be judged a priori whether this desire will be satisfiable. For rights, the desire cannot be satisfied. The standoff between rights theorists in the twentieth century showed that attempts to present some part of the concept of rights as though it were the whole concept will not succeed. Any analysis that cannot imagine the rights of judges and traffic wardens, of the comatose and of children, will not survive outside of the study. Any theory that must retreat to a technical language of "strictly speaking" is not, strictly speaking, a theory of rights. Theorists who try to tie reasoning about rights to a single pillar will bind their readers with ropes of sand.

All rights are Hohfeldian incidents. All Hohfeldian incidents are rights so long as they mark exemption, or discretion, or authorization, or entitle their holders to protection, provision, or performance. Therefore, rights are all those Hohfeldian incidents that perform these several functions.

49. For perspectives on this history up to Hobbes, see Richard Sorabji, *Animal Minds and Human Morals* (London: Duckworth, 1993), pp. 50–57; Fred Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Oxford University Press, 1995), pp. 87–193; Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1962), pp. 19–25, 98–105; Anthony Honoré, *Ulpian*, 2d ed. (Oxford: Oxford University Press, 2002), pp. 84–93; Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1976); Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997); Annabel Brett, *Liberty, Right, and Nature* (Cambridge: Cambridge University Press, 1997). See also Simmonds's reflections on the historical development of the modern jurisprudence of rights in *DOR*, pp. 113–232.