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What's Wrong with Bentham's Test? Methodological Concerns and Suggestions

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Abstract

Matthew Kramer's theory of right-holding is a major contender in the debate about rights. Kramer proposes a version of the Interest Theory that amends the Basic Idea of the Interest Theory—that rights protect interests—by incorporating Bentham's Test, an algorithm that identifies the party to whom an existing duty is owed. It is argued that Kramer's methodological approach in devising Bentham's Test as a tool to answer questions about right-holding leads into a dilemma: Either Kramer is left with no theory at all or with one that has alarmingly implausible implications. It is suggested that organizing conceptual investigations around a notion of normalcy may provide a way of avoiding both this unsatisfactory approach and the problems that affect other versions of the Interest Theory.

Keywords: *Legal Philosophy; Claim-Rights; Interest Theory; Matthew Kramer; Rights*

I. Introduction

Matthew Kramer's version of the Interest Theory undoubtedly holds a place among the most influential contributions to the debate about theories of rights. Like all Interest Theories, Kramer's version incorporates and develops what he himself once referred to as the "basic idea" of the Interest Theory—namely, that rights protect interests.[1] Moreover, Kramer also presents what he has labeled "Bentham's Test," which, according to his latest book, is simply a "notational variation" of his version of the Interest Theory and which, as the title suggests, will be the main focus of this paper.[2] More concretely, I will be concerned with the relation between Bentham's Test and the Basic Idea of Interest Theories. Kramer restricts his theory to Hohfeldian claims—that is, such rights that are correlated to the duty of another. For the purpose of this paper, I follow Kramer in

1. Matthew H Kramer, "Rights Without Trimmings" in Matthew H Kramer, NE Simmonds & Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 2000) 7 at 61.
2. Matthew H Kramer, *Rights and Right-Holding: A Philosophical Investigation* (Oxford University Press, 2024) at 188.

using 'claim' and 'right' interchangeably unless otherwise noted. My main argument against Kramer consists in showing that the methodological approach Bentham's Test employs dictates how we must understand the Basic Idea in Kramer's account. This reading of the Basic Idea—which I refer to as the 'weak reading'—is contrasted with a much more 'substantial' one. The contrast between the weak and substantial readings can be used to carve out a fundamental methodological flaw that underlies Bentham's Test.

I should point out that the methodological issues I address in this paper are less fundamental and operate on a different level than the critiques raised by scholars such as Siegfried Van Duffel or David Frydrych.[3] Frydrych offers the most fundamental case against theories of rights. He argues that all theories of rights are methodologically dubious stipulations that cannot provide any real insights into or explanations of the nature of rights. This is, I think, primarily because he does not believe that there is a single, stable, system-independent nature of rights or a univocal meaning of 'right'. Even if such a nature or meaning exists, theorists have not managed to establish it. Consequently, the attempt to elucidate the nature of rights is a wild goose chase, and the entire debate should be abandoned.[4] In this paper, I do not offer any counterarguments to this type of fundamental critique.[5] Rather, my paper is premised on the optimism that the debate is not spurious and that, in principle, meaningful insights can be offered about the nature of rights. However, as I highlight later, I am not committed to any form of monism about rights. My argument does not imply that there is a single kind of right serving a single purpose or some such thing; it is compatible, for instance, with the claim that the debate between Interest and Will Theories should be abandoned because they are unjustifiably monistic.[6] Thus, my methodological critique of Kramer's theory is not a criticism of the attempt to offer a theory of rights per se, but—assuming that this is a worthwhile endeavor—of the specific way Kramer goes about it. This is justified, I think, because Kramer seems to share this optimism. I will demonstrate how other theories fare better in this

3. See e.g. Siegfried Van Duffel, "The Nature of Rights Debate Rests on a Mistake" (2012) 93:1 Pacific Philosophical Q 104; David Frydrych, "The Case Against the Theories of Rights" (2020) 40:2 Oxford J Leg Stud 320 [Frydrych, "The Case Against"]; David Frydrych, *The Architecture of Rights: Models and Theories* (Palgrave Macmillan, 2021).

4. See Frydrych, "The Case Against", *supra* note 3.

5. Offering such arguments would require an entirely different project that would not focus on discussing rights. My views fundamentally differ from Frydrych's. For instance, he seems to believe that a concept is a mental representation, whereas I lean more toward a theory that considers concepts as abstract objects: see David Frydrych, "Down the Methodological Rabbit Hole" (2017) 49:147 Crítica, Revista Hispanoamericana de Filosofía 41 at 43. This has far-reaching implications for what can be achieved through conceptual investigation. For example, can it tell us something about the world, or merely about how we conceive or think about it? Frydrych offers a discussion of "modest" and "immodest" versions of conceptual analysis (*ibid* at 44-45). This also relates to questions about semantic realism and the relationship between thinking and being, and while these are important questions that should be addressed, discussing them would be an entirely different project.

6. See e.g. Leif Wenar, "The Analysis of Rights" in Matthew Kramer et al, eds, *The Legacy of H.L.A. Hart* (Oxford University Press, 2008) 251; Van Duffel, *supra* note 3; Frydrych, "The Case Against", *supra* note 3.

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regard: That is, they do not commit the methodological error Kramer makes, even though they may still fall short of satisfying those who are sympathetic to Frydrych's arguments.

To develop my argument, I briefly recapitulate Kramer's version of the Interest Theory and its connection to the Basic Idea (section II) and Bentham's Test (section III) before introducing the two ways in which 'protection' can be understood in the Basic Idea (section IV). Through the way in which Bentham's Test is constructed, Kramer seems committed to what I shall call the 'weak reading' of the Basic Idea. This way of approaching questions about rights or right-holding, however, leads to a dilemma: Either Kramer is left with no theory at all or with one that has alarmingly implausible implications (section V). I then consider that, on behalf of Kramer, one could reply by biting the first bullet of the horn of this dilemma. I argue that while this option is available, it would require a significant shift of focus in Kramer's work, and that the attention Bentham's Test has received (from both critics and proponents) is entirely unwarranted (section VI). Finally, I turn to discussing the problem that Kramer's reasons to oppose the substantial reading of the Basic Idea seem powerful and sound. I cautiously suggest that organizing conceptual investigations into the nature of rights around a notion of normalcy may avoid at least some problems with the substantial reading (section VII).

II. Kramer's Interest Theory and the Basic Idea

Since Kramer's account is supposed to be an Interest Theory of right-holding, it should come as no surprise that he subscribes to the Basic Idea of the Interest Theory, given that he takes this idea to underlie virtually all versions of it. Kramer first introduced the Basic Idea thus:

> The basic idea underlying the Interest Theory is that every right protects some aspect of a person's welfare.[7]

Obviously, this can only be the starting point for a working theory of rights—it is nothing more than a *Basic* Idea. Over the years, Kramer has refined his version of the Interest Theory several times, and in his latest book he has arrived at the following formulation:

> **Interest Theory of Right-Holding**: Individually necessary and jointly sufficient for the holding of a claim-right by *X* are (1) the fact that the duty correlative to the claim-right deontically and inherently protects some aspect of *X*'s situation that on balance is typically beneficial for a being like *X*, and (2) the fact that *X* is a member of the class of potential holders of claim-rights.[8]

7. Kramer, *supra* note 1 at 61.
8. Kramer, *supra* note 2 at 101.

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There are many features of this theory that would deserve a thorough investigation; however, my main concern in this paper will be Bentham's Test, which Kramer describes as a "notational variation" of his formulation of the Interest Theory.[9]

Before I introduce Bentham's Test, a brief note on how to understand the phrase "inherently protects" is in order. Kramer himself specifies:

> What such phrasing indicates is that the content of a specified duty D cannot be realized—and therefore that D cannot be fulfilled—without affecting *X*'s situation in some way that is on balance typically beneficial for beings like *X*.[10]

I will not delve into the details here. For further discussion, however, it is important to highlight that "inherently" is not to be understood in terms of legislative aim or justificatory basis. As we will see below, Kramer has consistently argued that we should avoid focusing on justification or legislative intent, and the inclusion of "inherently"—I think Kramer would strenuously affirm—is not to be taken as a renunciation of that position. While its inclusion is meant to exclude incidental protective effects from being counted as rights, the term 'inherently' operates on the content of the relevant duty. That is to say, it is the precise statement of the content of the duty that will reveal which interests are inherently protected and which are not (rather than a statement of legislative aim or something of that sort). In other words—and this will be important later on—Kramer remains committed to what is usually referred to as an 'analytical' rather than a 'justificatory' version of the Interest Theory.

Since the main focus of this paper is on Bentham's Test, we need not be overly concerned with the details of Kramer's statement of the Interest Theory. The Theory's first condition, however, incorporates what Kramer referred to as the Basic Idea (albeit in a qualified way). Although there are, of course, significant differences in wording between the earliest statement of the Basic Idea and its reappearance in the latest formulation of the Interest Theory, these are not crucial to my point. I am more concerned, quite literally, with the basic idea—the very core of Interest Theories. The different readings I wish to point out are not distinguished by the subtle nuances of particular phrases. This also means that, if I am correct about the dilemma, it cannot easily be avoided by playing with words. We can thus disregard the qualifications and focus on the unpolished, intuitive thought of the Basic Idea, which I assume is adequately captured by the following:

> Every right protects an interest of the right-holder (i.e., something typically beneficial for them).

9. Kramer, *supra* note 2 at 188.
10. *Ibid* at 101.

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III. Bentham's Test

As I said before, the Basic Idea is not a working theory of rights. Among the most pressing problems for any Interest Theory of rights is the threat of over-inclusiveness. Obviously, having an interest is not sufficient for holding a right. If my neighbor wins the lottery, I may well have an interest in them cutting me in, but I certainly do not hold a right. In other words, the Interest Theory needs some way of determining in which cases interests come with a right; otherwise, it would be hopelessly over-inclusive.

The problem of over-inclusiveness cannot be solved by the Basic Idea alone. Consider a case that both Kramer and Visa Kurki have used to illustrate this problem.[11] Doris is owed social benefit payments by the state. She always uses some of the money to shop for groceries in a local store. Thus, the store owner has some interest in Doris receiving the money and, in some sense at least, this interest is protected by the state's duty to pay Doris the social benefits. However, it would be clearly absurd to claim that the store owner holds a right that Doris receives the money. This would be the result if we were to take the Basic Idea as providing necessary and sufficient conditions. Accordingly, Kramer does *not* claim (nor does anyone for that matter) that the Basic Idea provides a *sufficient* condition.[12]

However, having nothing more than a necessary condition is a little thin, especially because this leaves us without any way of determining whether some person holds a right correlative to a specific duty. Another way to look at it is that the Basic Idea is precisely just that—a *basic* idea, which in and of itself does not provide a working or satisfying theory of rights or right-holding. Accordingly, every Interest Theory, being built upon the Basic Idea, needs to address the danger of overexpansiveness for cases like the store owner example, and thus grow into a functioning theory. Different versions of the Interest Theory may be characterized and distinguished from one another based on how they supplement or elaborate on the Basic Idea. Kramer moves beyond the Basic Idea, not just in his formulation of the Interest Theory quoted above, but also by devising Bentham's Test. This provides us with sufficient conditions for right-holding, but only if the existence of some legal duty—which is needed as an input for Bentham's Test—is established.[13] Kramer is cautious on this point because he believes that, strictly speaking, the sufficient conditions for the holding of a right would have to include the sufficient conditions for the existence of a legal duty. Since he thinks that this is too much to ask of a theory of right-holding, Bentham's Test can be

11. See Matthew H Kramer, "Refining the Interest Theory of Rights" (2010) 55:1 Am J Juris 31 at 36 [Kramer, "Refining the Interest Theory"]; Visa AJ Kurki, "Rights, Harming and Wronging: A Restatement of the Interest Theory" (2018) 38:3 Oxford J Leg Stud 430 at 436-37; Kramer, *supra* note 2 at 189-90.

12. See Kramer, "Refining the Interest Theory", *supra* note 11 at 36.

13. See Matthew H Kramer, "In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights" in Mark McBride, ed, *New Essays on the Nature of Rights* (Hart, 2017) 49; Visa Kurki, "Are Legal Positivism and the Interest Theory of Rights Compatible?" in Mark McBride & Visa AJ Kurki, eds, *Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer* (Oxford University Press, 2022) 73 at 87-88.

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applied only if the existence of a legal duty has already been established. I return to this point briefly in section VII.

In his latest book, Kramer tells us that Bentham's Test should not be understood as an addendum to an otherwise malfunctioning Interest Theory of rights, but rather as a 'notational variation' of Kramer's version of the Interest Theory. More concretely, we should not consider Bentham's Test a *deus ex machina* that miraculously solves the problems of overexpansiveness that the Interest Theory faces when left to its own devices. Rather, he claims, "when we take due account of the phrase 'and inherently' in my formulation of the Interest Theory, we can recognize that Bentham's Test and the Interest Theory generate exactly the same conclusions about the holding of claim-rights by various parties."[14] While it would be misleading to present Bentham's Test as an add-on to the Interest Theory, we can view Kramer's Interest Theory as a development of the Basic Idea into a working theory, of which Bentham's Test is a "notational variation" that is only different in "orientation" from Kramer's Interest Theory, but is helpful because it is "frequently more convenient."[15] It seems fair, then, to consider Bentham's Test a central tenet of Kramer's view on rights and right-holding, on a par (at least) with his statement of the Interest Theory. Thus, focusing on Bentham's Test seems justified; and if Bentham's Test really does differ from Kramer's Interest Theory only in orientation and notation, then we should expect the problems for Bentham's Test that I point out below to befall his Interest Theory as well.

Drawing on the works of Bentham and (perhaps to an even greater extent) H.L.A. Hart's exegetical labor, Kramer first introduced Bentham's Test as a delimiting criterion in "Rights Without Trimmings," but he has since substantially refined it in response to critics such as Gopal Sreenivasan.[16] The exact content and why those changes occurred need not concern us in the context of this paper. The most recent formulation of Bentham's Test runs as follows:

> If and only if at least one set of facts minimally sufficient to constitute a breach of D includes the fact that the situation of *Q* has been affected by *R* in a way that is normally detrimental for someone like *Q*, *Q* holds a legal claim-right correlative to D.[17]

To see Bentham's Test in action, we can apply it to the case of Doris and the store owner. We can understand Bentham's Test as a sort of algorithm: To start, we need an existing legal duty as input. In this example, it is the state's duty to pay Doris social benefits. The algorithm then involves two steps. The first is to

14. Kramer, *supra* note 2 at 188-89.
15. *Ibid*.
16. See Kramer, *supra* note 1; Gopal Sreenivasan, "A Hybrid Theory of Claim-Rights" (2005) 25:2 Oxford J Leg Stud 257. I share Kurki's worry that Bentham's Test may by now be so distant from Bentham's original work that the label is simply misleading: see Kurki, *supra* note 11 at 437, n 30. However, it is well established, so I shall stick with it. See also Kramer, *supra* note 2 at 188.
17. Kramer, *supra* note 2 at 188 [emphasis removed].

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determine the set of facts that is minimally sufficient to establish the breach of duty. Following Kurki's analysis, this set includes (at least) the following two facts:

1. The state has the duty to pay benefit B to Doris at T1.
2. The state has not paid B to Doris at T1.[18]

Given that these facts are jointly sufficient and that each is necessary to constitute a breach of duty, they satisfy the criterion of minimal sufficiency. The second step of the algorithm requires us to ask whose interests are adversely affected by at least one of the facts in the set. The second fact is detrimental to Doris; therefore, she does hold a right to the benefit. However, this set of minimally sufficient facts to constitute a breach of duty does not include anything that is directly detrimental to the store owner. Accordingly, the store owner does not hold a right. This case clearly shows how Bentham's Test is supposed to function as a crucial add-on to the Basic Idea: The Basic Idea tells us only that we must identify beneficiaries to find right-holders, but it is blind to the distinction between those who merely benefit and those who have a right (and benefit). Separating the former from the latter is the task that Bentham's Test is supposed to achieve.

IV. The Meaning of 'Protect' in the Basic Idea

I now turn to discussing different ways of understanding the Basic Idea. Recall that the Basic Idea states that every right protects an aspect of the right-holders' welfare, i.e., something that is typically beneficial for them. I would like to draw attention to the word 'protect' and highlight different ways of understanding it.

A natural way of understanding 'protect' in the context of the Basic Idea is in terms of a function, purpose, or point that the right—or perhaps more precisely, the underlying norm—has. Protecting the interests of right-holders is the job of rights, as it were. For further reference, I shall call this the 'substantial reading' of the Basic Idea:

> **Substantial Reading (SR):** 'That rights protect interests' means that it is the point of a norm or a contract that confers a right to avert the setback of interests of the right-holder.

This understanding of 'protect' is reflected in many versions of the Interest Theory. There may be several ways of fleshing out what 'point' means in more detail, but it has been done by the likes of Jhering, MacCormick, Lyons, and Raz in terms of intention. There is a reason why this reading initially seems appealing. At the heart of the SR lies the thought that there is a certain *teleology* to rights.[19]

18. Kurki, *supra* note 11 at 437. I note that in Kurki's rendition, Doris is called Mary.
19. See David Frydrych, "The theories of rights debate" (2018) 9:3 Jurisprudence 566 at 567.

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To say that legal rights are not a natural kind, but rather an intuitive way of understanding the teleology of rights, is to say that they have a point, a purpose, a function, or some such thing that is connected to the purposefulness of the activities that establish them.

Jhering, for example, believes that a right-holder is simply the one to whom the benefit of the right is intended.[20] The Basic Idea, then, would be that a right and its correlative duty are brought into existence with the intention (of a lawgiver or parties of a contract) to protect certain interests. The reference to the intentions of the parties involved in creating the duty in question explains the fact that it is the point of this duty to protect certain interests (but not others).

Jhering is not alone in thinking along these lines. MacCormick maintains that we must consider the features of right-conferring rules if we seek to understand rights, claiming that 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."[21] Similarly, David Lyons holds that:

> [A] person with a right ... is one for whom a good is "assured," or an evil obstructed, by requirements or prohibitions upon others' behavior, in the sense that some other person or persons are required to act or forbear in ways *designed or intended* to serve, secure, promote, or protect his interests or an interest of his.[22]

In his work on specifically legal rights, Raz has entertained similar thoughts and claimed that, in general, "where a law is laid down by authority its meaning is dictated by the *intentions* of that authority."[23] A few paragraphs later, he applies a more general approach to rights:

> [A] law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty.... [A] rule is identified as a right-conferring one by the reasons for its adoption. To be a rule conferring a right it has to be *motivated* by a belief in the fact that someone's (the right-holder's) interest *should be protected* by the imposition of duties on others.[24]

A natural way of understanding this is to read it as a version of the SR specified above. It is the point of a duty to protect certain interests, and to hold a right is to have an interest protected by a duty whose point it is to protect that interest (or interests of that kind). I do not believe that any of these authors is so

20. In *The Spirit of Roman Law at the Various Stages of its Development*, Jhering writes: "The subject of the right is the one to whom the benefit of it is intended." Rudolf Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, *Vol. III-1*(Breitkopf & Härtel, 1865) at 314 [translated by author].

21. DN MacCormick, "Rights in Legislation" in PMS Hacker & J Raz, eds, *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Clarendon Press, 1977) 189 at 192 [emphasis added].

22. David Lyons, "Rights, Claimants, and Beneficiaries" (1969) 6:3 American Philosophical Q 173 at 176 [emphasis added].

23. J Raz, "Legal Rights" (1984) 4:1 Oxford J Leg Stud 1 at 13 [emphasis added].

24. *Ibid* at 13-14 [emphasis added].

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naïve as to believe that this is, strictly speaking, a necessary condition for right-holding. Raz, for instance, clarifies in a footnote to the first quote above that this can only provide a rough idea.[25] I discuss this further in section VII.

For the context of this paper, it is largely irrelevant whether the SR or the general idea behind it is correct. Instead, it serves as a contrast to Kramer's position. Precisely in opposition to the authors mentioned above, Kramer is keen to steer us away from focusing on intentions or the purpose of norms that underlie rights and duties: Writing with Steiner, he says that to determine whether person Q holds a right, it is "[q]uite immaterial … whether or not the underlying purpose of the norm or decision is to promote the interests of Q."[26] Moreover, in "Rights Without Trimmings," he invites us to "view Bentham's Test as a way of avoiding an undue focus on intentions."[27] Arguably, he is diverting our attention from intentions for good reason. It is simply unclear how we could reliably infer from a specific norm the intentions that went into forming it in the first place. This is even more problematic once we realize that people have nested, overlapping, and generally fuzzy intentions, so that knowing them may simply pose further questions about what aspects are actually relevant.[28] Also, precisely whose intentions are we talking about? More often than not, many people are involved in devising a legal norm, and it may well be that their intentions diverge quite drastically, even though they have agreed on some specific wording. Worse yet, the relevant legal authority may have ulterior motives or be duplicitous about its intentions. Thus, it appears that the move away from intentions is well motivated.

Against this background, it seems that the Basic Idea is incorporated into Bentham's Test in a particular way. The idea that rights protect interests remains present in Bentham's Test because of the connection of rights to the breach of a duty that includes the undergoing of a detriment. Roughly speaking (i.e., ignoring necessary qualifications), a right protects an interest in the sense that the interest is set back or frustrated if the correlative duty is breached. The meaning of 'protect', however, is significantly weaker here than it is in the SR. It is not true that it must (though it can) be the point of the right or the right-conferring norm to protect this or that interest; rather, 'protection' is understood as an *effect* of the underlying norm. There is certain possible conduct by person A that would frustrate (or serve) the interests of another person (B). By introducing a relevant duty to perform or omit the action in question, B's interests are normatively protected, regardless of whether the authority introducing the duty intended to protect those interests or was even aware of them. The interest is protected in the sense that a certain action (or omission) that would frustrate it is rendered wrongful by the relevant norm, which imposes a duty and confers a right. I refer to this as the 'weak reading' of the Basic Idea:

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25. *Ibid* at 13, n 21.
26. Matthew H Kramer & Hillel Steiner, "Theories of Rights: Is There a Third Way?" (2007) 27:2 Oxford J Leg Stud 281 at 290.
27. Kramer, *supra* note 1 at 85.
28. See *ibid* at 85-87.

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> **Weak Reading (WR):** 'That rights protect interests' means that the imposition of the correlative duty on person A has the effect of rendering as wrongful some action (or omission) that would frustrate the interest of another person (B).

I should stress again that this is only reconstructing the way the Basic Idea is incorporated into Bentham's Test, and more specifically, how the term 'protection' is interpreted here. Obviously, Bentham's Test does not entail that any person whose interest happens to be protected in this way by the imposition of a duty on another is a right-holder. In other words, the WR, which is only a part of Bentham's Test, provides a necessary but not a sufficient condition for right-holding. The criterion of minimal sufficiency is then needed to trim off those persons whose interests are protected in the relevant sense but who are not right-holders.

The difference between the interpretations of 'protect' can be illustrated using the familiar case of Gopal's Granny.[29] Irene is Jack's grandmother, and Jack has the right (established by contract) to receive 100 pounds from Quentin, who has a correlative duty to pay the money. Assume that Irene has an interest in her grandson receiving the money. I am not interested in the dispute over whether Bentham's Test can accurately identify right-holders in this scenario. Instead, I would like to highlight that Irene's interest is protected by Quentin's duty according to the WR but not according to the SR. Irene's interest is protected according to the WR because Quentin's failure to pay Jack would frustrate Irene's interest, and this omission is rendered wrongful by the relevant contract. Again, this does not imply that Kramer is forced to accept that Irene holds a right, as the WR is only a necessary condition. I agree with Kurki that Irene does not pass Bentham's Test in its most recent formulations.[30] Nevertheless, her interest *is* protected in the sense of the WR. It is not protected by the SR, however, because it is not the point of the contract to secure a benefit for Irene.

Kramerians might interject at this junction and complain that neither the WR nor the SR captures the meaning of 'protect' as it is supposed to be understood in Kramer's formulation of the Interest Theory because I pretermitted the term 'inherently'. Since the 'inherently' operates on the content of the relevant duty, and since the content of a duty is usually an action or omission, I believe it could be added to the WR, such that we speak of an action or omission that would *inherently* frustrate someone's interest. This would also exclude Irene from being a right-holder because the relevant (in this case) omission, if correctly specified, does not inherently but will only incidentally frustrate Irene's interest. The meaning of 'protect', however, would still have to be considered in terms of an effect. At any rate, my main target in this paper is Bentham's Test, which works without a mention of 'inherently'. This is not a coincidence but by design. To recall, Kramer says that the equivalence of his version of the Interest

29. It was first discussed by Gopal Sreenivasan and later dubbed 'Gopal's Granny' by Mark McBride: see Sreenivasan, *supra* note 16 at 264; Mark McBride, "The Unavoidability of Evaluation for Interest Theories of Rights" (2020) 33:2 Can JL & Jur 293. See also Kramer & Steiner, *supra* note 26; Kurki, *supra* note 11 at 441.

30. See Kurki, *supra* note 11 at 441-42.

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Theory and Bentham's Test becomes apparent "when we take due account of the phrase 'and inherently'."[31] I take this to imply that the criterion of minimal sufficiency in Bentham's Test performs the same kind of work as the term 'inherently' in his formulation of the Interest Theory. So even if I should be wrong about the way in which 'inherently' could be incorporated into the WR, my point against Bentham's Test remains valid.

V. A Methodological Flaw and a Dilemma

I aim to show that Bentham's Test is fundamentally unsuited for grasping the nature of its object—that is, rights or right-holding. The argument that leads to that conclusion is not straightforward for the simple reason that it requires some assumptions about the nature of rights that could be considered begging the question against Kramer. Obviously, that must be avoided. Accordingly, I begin my argument with some observations about duties and the activities that bring them about (such as legislating or contracting), which, as far as I can tell, should be agreeable to Kramer as an avowed legal positivist. In light of these general observations, I suggest that there is a second way of reading the Basic Idea: the thought that rights or the correlative duties protect interests. It appears that Kramer must subscribe to this reading because of the methodological approach he takes to devise Bentham's Test. The weak reading of the Basic Idea, however, runs into a dilemma: Either Kramer does not have a theory at all, or his theory has deeply implausible consequences.

The basis of my argument can be put in Aristotelian terms, which Fortenbaugh has pointedly done as follows:

> For any purposeful thing, whether a natural object or an organism, whether a man-devised tool or activity or association, its essential nature is determined by its function and is expressed by the *logos* which states its purpose.[32]

In relation to our current topic, I hope it is uncontroversial to assume that rights are created by purposeful human activities, such as legislating and contracting. Hart, for instance, claims "that legal obligations are very often (though not always) human artifacts."[33] The main point of speaking about legal obligations in terms of "artifacts" is to emphasize that they are purposefully created entities aimed at achieving certain characteristic ends. By analogy, consider the activity

31. Kramer, *supra* note 2 at 188.

32. WW Fortenbaugh, "Aristotle's Analysis of Friendship: Function and Analogy, Resemblance, and Focal Meaning" (1975) 20:1 Phronesis 51 at 52.

33. HLA Hart, "Legal and Moral Obligation" in Richard E Flathman, ed, *Concepts in Social & Political Philosophy* (Macmillan, 1973) 187 at 188, cited in Kenneth M Ehrenberg "Law's artifactual nature: how legal institutions generate normativity" in George Pavlakos & Veronica Rodriguez-Blanco, eds, *Reasons and Intentions in Law and Practical Agency* (Cambridge University Press, 2015) 247 at 248, n 4. Hart does not explain the caveat; Ehrenberg has suggested that it might be reserved for customary laws that are not deliberately created (see *ibid*).

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of making keys. This is a purposeful activity aimed at creating keys that have the function or characteristic aim of (un)locking doors. In addition to producing an artifact that determines its characteristic aim, such activities can also have side effects. For example, the activity of making keys also produces iron shavings.

These are the thoughts that my argument relies on: Legislation and contracting (and similar) activities are purposeful and bring about rights, which are artifacts with characteristic functions. We understand the nature of an activity, at least in part, by understanding its characteristic aim. Lastly, purposeful activities may have effects that are *only* side-effects. Now, it might be said that these thoughts are less pure than I make them out to be: I discuss this concern in section VII.

One effect of legal norms and contracts that impose duties is that they protect interests. That much is hard to deny, and even Will Theorists might agree here (although they would likely argue that this is always merely a side-effect). Clearly, however, having a protected interest—in the sense that someone else's flouting of a duty would set back that interest—is insufficient for holding a right. That is also undisputed. What is the approach of Bentham's Test to determining who holds a right? Basically, Bentham's Test defines a subclass of the effects that a duty-imposing norm has. Namely, of all potential effects, we first consider only those that are classifiable as protection of an interest in the weak sense of 'protection'. Since the subset of those effects is clearly much more extensive than the set of right-holders, we define a further subset—namely, a subset of those effects classifiable as protection of an interest. Importantly, however, Bentham's Test does not define this subset with reference to or in terms of the function of the underlying norms or contracts, or the purposefulness of the activities that created them. The criterion of minimal sufficiency is independent of their characteristic aims, purposes, or functions. We are only asked to consider which facts are minimally sufficient to constitute a breach of duty and not what the point of this duty (the underlying norm) may be. This, I think, is true by Kramer's own lights given his insistence that, for his theory, the underlying purpose of a norm is "quite immaterial."

If this is a fair assessment of how Bentham's Test works, it follows that the elements in the defined subset (i.e., rights, right-holders, or instances of right-holding) are not themselves artifacts created to fulfill certain functions; or, more precisely, they cannot come into view *as* such. Let me explain. It appears that the distinction between the characteristic aim of an activity and its side effects is only available once we grasp the point of the activity which is also connected to the function of the created artifact. Unless we understand the purpose of an activity, all effects of that activity are just that: effects, things that chance to happen during that activity. If I observe someone filing away on pieces of iron but remain oblivious as to what the characteristic aim of that activity is, I may be able to distinguish different effects (different kinds of iron things), but I lack the necessary understanding to discern which of these effects are the purposefully created entities and which function they serve. Since I do not understand the characteristic aim of the activity, I do not really have a conception of that activity at all. More generally, if I define only subclasses of effects without reference to function

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or purpose, then the effects of the different categories I have defined are still in view only as effects. Even if I find some way of defining a subset of effects of the activity of carving keys such that only keys are grouped together, I still fall short of understanding them *as* keys, that is, as purposefully created artifacts made to (un)lock doors.

This can also be described in terms of the intension and extension of concepts and sets. Two sets (concepts) may be extensionally equal and yet have two completely different intensions. The intension, however, determines how we understand, or *as what* we group together, the elements in the extension. One of Quine's favorite examples concerns the sets of "creature with a heart" and "creature with kidneys": These sets are equal in the sense that they have the same extension.[34] However, we view the elements in these sets under different descriptions—that is, they come into view under different descriptions depending on whether we think of animals with hearts or animals with kidneys. These descriptions are not synonymous and, therefore, the intensions of the two sets are distinct. The intensions of co-extensional sets can, of course, be even further from each other and it may be a purely contingent matter that these sets are equal. There may be a world in which it is true that the set of persons who are football fans is equal to the set of persons who are left-handed. However, the description under which a person comes into view—whether as a left-handed person or as a football fan—makes all the difference. Similarly, there could be a world in which all—and only—those iron pieces produced by filing that are larger than 2 cm are considered keys. In that world, it would be true that something is a key if and only if it is a filed piece of iron larger than 2 cm. However, this definition has little to do with a useful concept of a key as a purposefully produced artifact meant to (un)lock doors. This highlights the importance of understanding the intended function and purpose behind the creation of artifacts, rather than merely categorizing them by physical characteristics.

If this is correct, and Bentham's Test avoids reference to functions, etc., then the elements in the set that Bentham's Test defines cannot come into view as artifacts or connected to purposeful human action. They come into view as a subset of *mere* effects of legislating and contracting, because this is how the intension of Bentham's Test is constructed. This is simply a consequence of the WR—that is, the specific way the Basic Idea is understood and incorporated into Kramer's theory. Bentham's Test does not make the distinction between purposefully created entities and the side effects available, as the approach consists in taking the WR as its intensional starting point and then introducing further conditions (without reference to function) to limit the extension. Therefore, if we stick to Bentham's Test, then rights cannot be understood as purposefully created entities made to serve certain functions. They are mere effects of the introduction of a norm or the closing of a contract. Thus, as far as Bentham's Test goes, holding

34. WV Quine, "Meaning and Truth" in WV Quine, *Philosophy of Logic*, 2nd ed (Harvard University Press, 1986) 1 at 8.

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a right is merely an effect that the imposition of a duty on another has on a person (their interests).

Here, a dilemma arises from the methodological approach of Bentham's Test to the question of rights or right-holding. It seems to me that Kramer has two options available. He could *either* hold that Bentham's Test only aims to correctly identify instances of right-holding for which reference to the artifactual nature of rights is not necessary, and that it is not supposed to reveal anything about the nature of rights. In that case, Bentham's Test would not be a theory at all. *Or*, Kramer could insist that Bentham's Test is a theory and that the WR reveals something about the nature of rights. That, however, would be a theory with absurd or at least far-reaching and re-visionary consequences.

V.i) The First Horn of the Dilemma: Is Bentham's Test Merely a Detection Device?

Kramer could maintain that Bentham's Test merely aims to achieve extensional equality between the subset of effects that it defines and the design-effects of the norms that establish rights (and duties). This would mean accepting that rights are (or, at any rate, could be) artifacts, but insisting that Bentham's Test works in a way that does not require reference to the characteristic purposes of those artifacts or the activities that create them. In that case, Bentham's Test would not really be a *theory* aimed at explaining the nature or elucidating the concept of rights, but rather a *detection device* whose purpose is identifying instances of rights. Perhaps this is what Kramer has in mind when he refers to his theory as an account of 'right-holding' rather than rights. He writes that his version of the Interest Theory "is better designated as a theory of right-holding. It presents a criterion that enables us to identify the holder of a legal right that correlates with a particular legal duty."[35]

My talk of 'detection devices' as opposed to 'theories' is connected to Van Duffel's discussion of intensional adequacy as an important adequacy constraint for a theory of rights. As Van Duffel puts it, an analysis of rights "should not only identify the appropriate incidents as rights, but it should do so for the right reasons."[36] I am tempted to go even further and hold that, for theory-building, intensional adequacy is much more important than extensional adequacy. This is in contrast to detection devices. A detection device works well if it correctly identifies instances of whatever it is supposed to detect. How it does so, and whether there is an explanatory or merely an accidental connection between the indicators that a detection device picks up on and the phenomena it is supposed to detect, is largely irrelevant. There is nothing wrong with a detection device that detects keys by measuring the length of pieces of iron. Importantly, however, this tells

35. Kramer, *supra* note 13 at 49.
36. Siegfried Van Duffel, "Adequacy Constraints for a Theory of Rights" in McBride, *supra* note 13, 187 at 200.

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us nothing about the nature of a key. To give a slightly more realistic example, a lie detector may work by responding to pupil dilation, and it may work quite well because pupil dilation is a common effect that lying has on the human body. But this, in itself, tells us little about the nature of lies, and handing someone a lie detector does not help them understand what a lie is. Imagine that an alien species visits earth who has no concept of a lie. Saying that 'lying involves pupil dilation' does not explain that concept. More generally, detection devices can function by reliance on purely modal relations, such as true bi-conditionals, while the purely modal relations—even if true—need not reveal anything of importance about the object in question. By contrast, a theory based on the SR assumes a more robust teleological relation between rights and interests that may provide some insight into the nature of rights.

The strategy of providing a detection device whose only purpose lies in extensional equality with function-effects thus abandons or ignores the adequacy constraint of intensional adequacy. Whether the instances of rights are identified 'for the right reasons' is, by way of methodological approach, irrelevant. Regardless, if Kramer's 'theory' is meant to be that thin—that is, if Bentham's Test is meant to operate on a purely modal relation—then we cannot expect it to reveal anything of interest about the nature of rights. In fact, in that case, it cannot even be taken to aspire to yield theoretical insights. In other words, we cannot understand it as a *theory* at all. It is not aimed at explaining or elucidating the nature of rights (or right-holding), but only at detecting when they are present. It would not be an *Interest* Theory, because interests play no explanatory role, only an indicative one. Frydrych, if I understand him, entertains a similar thought:

> Whether focused on the nature of a right, or of right holding, it is not necessarily the Interest or Will Theories' job to identify token rights in any given jurisdiction or domain.[37]

Frydrych thinks that Kramer's project of providing a delimiting criterion to meet the charge of over-inclusivity is misguided because this line of criticism is misguided in the first place. This is because the debate between the Interest and Will Theories is not (or should not be) so much about extensional adequacy (let alone in any possible legal system), but rather about the nature of a right. I would add to this line of thought, however, that not only is extensional adequacy not the primary job of a theory of rights, but the methodological approach Bentham's Test takes is unsuited for taking up the task of elucidating the nature of rights. Additionally, I disagree with Frydrych's suggestion that Kramer should stick to his guns and only provide necessary conditions. This issue will be explored in more detail in section VII. In my view, Interest Theorists would be well-advised to avoid putting their theories in modal terms. Perhaps Kramer is satisfied

37. David Frydrych, "Kramer's Delimiting Test for Legal Rights" (2017) 62:2 Am J Juris 197 at 205 [footnote omitted].

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with such a detection device and is therefore willing to bite the bullet on the first horn of the dilemma. I address this way of responding to the dilemma in section VI.

V.ii) The Second Horn of The Dilemma: A Theory with Absurd Implications?

Instead of leaning towards the first horn, Kramer could instead hold that rights *are*, in fact, merely a subset of the effects of duties; or perhaps he would prefer to say that instances of right-holding are effects of having an interest that is protected by a duty. In other words, he would proclaim that Bentham's Test is a theory in the sense that it reveals theoretical insights into the nature of rights or right-holding, instead of merely operating on a purely modal relation between interests and rights. Since rights are not necessarily or normally connected to the functions, aims, and purposes of duties and the activities that bring them about, rights simply are effects. They are merely things that chance to happen in the course of using or producing artifacts such as contracts, statutes, and norms. We would misconceive of rights by thinking of them as entities purposefully created to serve certain functions. It is not their point (nor the point of underlying norms) to protect interests; that interests are protected is merely something that happens to be an effect of activities such as legislating and contracting. Rights, then, are much more like iron-shavings, the by-product of an activity that is primarily aimed at something else (or nothing at all?).

To my mind, this view is deeply implausible and does not sit well with our practices. Not considering rights as (normally) purposefully created entities comes with significant theoretical costs. Understanding rights as mere effects has repercussions for our understanding of such practices as contracting and legislating. We cannot understand these as activities that are characteristically aimed at conferring rights because we cannot understand rights as artifacts (or function effects) purposefully created by such activities. More generally, we understand activities in part in terms of their characteristic aims. However, when we understand something as the inherent aim of an activity, we no longer view it as a mere effect of that activity. By reverse conclusion, as long as we understand something as a mere effect of an activity, we cannot understand the activity as characteristically aimed at that effect. That, however, seems like an incredibly tough sell. For example, contracting is certainly an activity whose point is to confer rights in order to protect certain interests of the contracting parties.

Moreover, it is difficult to make sense of the political practice of demanding rights, for example, for animals. A natural way of understanding such demands against the background of an Interest Theory would be to say that it is a demand for the establishment of norms to protect the interests of animals. However, this description of that practice is unavailable if we do not view rights as artifacts created by purposeful human action to achieve certain aims. Additionally, this would instead beg the question of what the actual purpose of legislating and contracting is.

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VI. Response 1: Biting the Bullet on the First Horn

One way to respond to the dilemma is to accept the first horn and maintain that Bentham's Test is intended merely as a detection device without explanatory power, such that the charge misses its mark. Some passages in Kramer's earlier work (though I am unable to find them in his more recent writings) suggest that this may be his view: For instance, in "Rights Without Trimmings," Kramer states that his theory of rights "incorporates Bentham's test for identifying right-holders."[38] This appears to imply that Kramer might regard Bentham's Test as a detection device that forms only part of a much broader theory. While questions about the adequacy of Bentham's Test would remain in this case, the more critical points are these: First, it would have to be conceded that referring to Bentham's Test as a version of the Interest Theory, as Kramer and his followers often do in recent writings, is at best misleading, because Bentham's Test is not meant to be a theory at all.[39] It is merely a detection device that may complement an Interest Theory.

Secondly, if Bentham's Test is merely a detection device and does not reveal anything about the nature of rights, then the attention it has received in both Kramer's work and that of his critics appears unwarranted. If Bentham's Test does not address the nature of rights, why should rights theorists, who are concerned with understanding rights, care about it? The substantive aspects of the theory must lie elsewhere. There are hints in the works of Kramer, and more conspicuously in Kurki, that suggest where the real core of their theory might reside. For instance, Kurki connects rights to harmful wronging and compensation through his "*Harm-Compensation Principle*: X can only hold a right to civil compensation if X has been harmed wrongfully."[40] *Wrongful* harming is tied to the holding of a right because to harm someone wrongfully is to infringe their rights. If Kramer's view aligns with this, and Bentham's Test is merely a detection device, then the real characteristics of right-holding are not revealed by Bentham's Test but are instead related to something like a standing to be compensated. In this view, being a right-holder is not merely having an interest protected in the sense of the WR—that is, as a mere effect of the introduction of a legal norm (Bentham's Test). Rather, it involves being in a position where certain remedial duties may be owed to you if someone else fails to meet their duties.[41]

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38. Kramer, *supra* note 1 at 88.

39. For example, Kramer writes that his version of the Interest Theory "presents a criterion" for identifying right-holders, suggesting that this criterion, i.e., Bentham's Test, is central to his theory: Kramer, *supra* note 13 at 49. More examples could be provided. Similar equating of Bentham's Test with the Interest Theory can be found in Visa Kurki's work: see the text accompanying note 41.

40. Kurki, *supra* note 11 at 444 [emphasis in original].

41. Kurki emphasizes that the Harm-Compensation Principle does not provide a sufficient condition for a right to compensation: see *ibid* at 444-45. The key point here is that, according to such a view, there is a significant connection—beyond merely modal relations—between holding a right, being wrongfully harmed, and being owed compensation, which reveals something about the nature of rights.

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It is important to realize here that the sets of individuals identified by the connection of harm, compensation, wronging, rights, and Bentham's Test could well be equal. The difference between them would be the difference between a theory and a detection device. One might argue that the Harm-Compensation Principle reveals something substantive about the nature of rights but is challenging—or perhaps impossible—to formulate in a way that reliably identifies right-holders. This is why it might need to be supplemented with Bentham's Test as a detection device. The Test would then serve as a practical tool to identify right-holders based on the theoretical framework provided by the Harm-Compensation Principle.

Such a view seems more plausible to me, but it does not appear to align with the perspective of Kramer and his students. For instance, Kurki's paper provides compelling evidence to the contrary. First, Kurki refers to Bentham's Test as the Interest Theory, implicitly suggesting that this is the theoretical core.[42] Second, in the conclusion, Kurki claims that his formulation of Kramer's theory, i.e., Bentham's Test, "explains why the infringement of rights, wronging and harming are connected in an intimate way—the holding of a right consists in being one of the parties who stand to undergo typically detrimental development when the duty is breached."[43] Here, Bentham's Test is again referred to as a theory. More importantly, if the Harm-Compensation Principle were considered the core of Kurki's theory, one would expect the direction of explanation to be reversed. The theory would explain why the detection device works, rather than the other way around.

Now, the response of biting the bullet on the first horn of the dilemma is, I think, available to Kramer and his followers. Consequently, however, this would require a serious shift in focus—away from Bentham's Test towards the real core of the theory, such as, perhaps, the Harm-Compensation Principle. These central points (rather than Bentham's Test) would have to be the ones to be probed by critics and refined by Kramerians. This would still leave open the question of how things like the standing to be compensated are connected to the purposefulness of such activities as legislating and contracting; but, in my view, a shift towards discussing these points would be a significant improvement.

Kramerians may also feel inclined to suggest that Bentham's Test is open to a revision that would cover some of the features of the SR. Again, I agree that this option is available, but it would make significant concessions to my argument. The important difference between the SR and Bentham's Test is intensional. The SR conceives of rights as having a certain point or purpose which is constitutive of their nature. If one revises Bentham's Test to capture this thought, one would *ipso facto* change the character of Bentham's Test from a detection device to a theory. The SR and Bentham's Test (considered as detection device) are completely different in character. The SR aims to tell us something about the

42. *Id est*, section 2D of Kurki's article is entitled "Bentham's Test as the Interest Theory" (*ibid* at 438).
43. *Ibid*.

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nature of rights, whereas Bentham's Test aims to identify right-holders, given a duty as input. The intensional character of Bentham's Test is to identify a subclass of the effects of norms and contracts. As long as this intensional character is kept, it cannot really be made to capture features of the SR, because the latter conceives of rights not as a subclass of effects but as purposefully created entities.

VII. Response 2: A Relapse to Purpose-Focused Views? Normalcy as a Solution

One might also question how innocent the assumptions of my argument in the previous section actually are. Specifically, my argument hinges on the idea that rights are purposefully created entities with certain characteristic functions. However, does this not risk falling back into a view that places undue emphasis on intentions or purpose? I have reviewed Kramer's reasons for distancing himself from the SR—such as legislators and contractors having fuzzy, unclear, overlapping, or conflicting intentions; the possibility of them lying about their intentions; and the fact that rights can be conferred unintentionally. These reasons seem well-motivated and provide a substantial critique of purpose-based views. Does my argument collapse in light of these considerations? Does it inadvertently revert to the purpose-based perspectives that Kramer wisely sought to move beyond?

To see that there is a way of avoiding the pitfalls of a purpose-focused theory along the lines of the SR that initially moved Kramer away from one, I cautiously suggest that we should understand theories of rights in terms of normalcy-generic statements. My remarks here are provisional, mainly because a proper defense would be a massive project. My suggestions are of a general methodological nature, and do not only apply to questions about rights but much more generally to conceptual investigations (although perhaps not to all such endeavors). Obviously, I cannot defend this position here, but I hope to establish some initial plausibility and indicate some other authors who have given this more attention. Ideally, my suggestions are a first step towards satisfying the demand voiced by Frydrych for an explanation about what the debate between different theories of rights "actually (do and should) aim to accomplish. Greater clarification in this regard would be edifying to both the debaters and their readers."[44]

At its core, my suggestion would be to focus significantly less on extensional adequacy and necessary and sufficient conditions, and to instead organize the investigation around a notion of normalcy.[45] Consider a statement such as

44. Frydrych, *supra* note 37 at 207.

45. The notion of normalcy plays a crucial role in theoretical philosophy, mainly in the context of the semantics of generalizations. See e.g. Gregory Norman Carlson, *References to Kinds in English* (PhD Thesis, University of Massachusetts, 1977) [unpublished]; Sarah-Jane Leslie, "Generics and the Structure of the Mind" (2007) 21:1 Philosophical Perspectives 375; Nicholas Asher & Francis Jeffry Pelletier, "More Truths about Generic Truth" in Alda Mari, Claire Beyssade & Fabio Del Prete, eds, *Genericity* (Oxford University Press, 2013) 312; Bernhard Nickel, *Between Logic and the World: An Integrated Theory of Generics*

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'Normally, lions live in prides'. It seems that living in a pride is neither a necessary nor a sufficient condition for being a lion. Nor is it true that all lions live in prides. Nevertheless, it seems that this judgment tells us something about what it is to be a lion. We might say it is in the nature of lions to live in a pride. When we discover a lone lioness, we need an explanation that would not be needed had she been part of a pride. Such explanations may be readily available: Perhaps she temporarily wandered off, or hunters killed her pride, or she is injured and had to be left behind.

It might be tempting to understand the word 'normally' in terms of a statistical notion. However, this is not what I (and others) have in mind; the intended meaning is more technical. Consider the statement 'Normally, fish eggs develop into fish'. Statistically speaking, most fish eggs do not, in fact, develop into fish; they are eaten or washed ashore. Nevertheless, it seems that this judgment, too, reveals something about the nature of fish eggs. We can put this in terms of a teleology. There is an inner tendency of fish eggs to develop into fish. This tendency can be disrupted by events that are essentially external to what it is to be a fish egg. In other words, when something is not as it normally is, some external force (e.g., being washed ashore, being eaten, a dried-up pond) explains the absence of a normal feature or development. The upshot of this understanding of 'normal' is that abnormal cases can be frequent and even prevalent.

Similarly, if we were to try to construct necessary and sufficient conditions for something to be a fish egg, it would be a terrible idea to do so in terms of the property 'does develop into a fish'. The extension of such a 'theory' would be laughably inadequate. Nevertheless, it seems to me, we learn something about fish eggs when we learn that they develop into fish. The core idea, then, is that at least some generalizations, such as 'lions live in prides', cannot be understood in terms of necessary or sufficient conditions, standard quantifiers (such as 'all', 'some', 'none'), or statistics ('most', '90 percent of', etc.).

My suggestion, then, is to transfer this idea to the context of rights and the activities that bring them about, which seems reasonable because they, too, have a certain kind of teleology. It is true that this teleology can be disrupted in numerous ways. In part, this is simply due to the enormous complexity of the legal

(Oxford University Press, 2016). It has also been considered in epistemology to explain the difference between 'belief' and 'credence': see Martin Smith, *Between Probability and Certainty: What Justifies Belief* (Oxford University Press, 2016). In practical philosophy, similar ideas have come up under different names: Thompson discusses "natural-historical judgments": Michael Thompson, *Life and Action: Elementary Structures of Practice and Practical Thought* (Harvard University Press, 2008) at 20ff, 199-207. Little develops a particular notion of 'typicality': see Margaret Olivia Little, "On Knowing the 'Why': Particularism and Moral Theory" (2001) 31:4 Hastings Center Report 32 at 37. To the best of my knowledge, the only context in which normalcy has been discussed in legal theory is the so-called 'puzzle of statistical evidence': see Martin Smith, "When Does Evidence Suffice for Conviction?" (2018) 127:508 Mind 1193; Martin Smith, "More on Normic Support and the Criminal Standard of Proof" (2021) 130:519 Mind 943. (Although I suspect similar ideas to underlie Wenar's discussion of roles: see Leif Wenar, "The Nature of Claim-Rights" (2013) 123:2 Ethics 202 at 214-17.) My considerations in the following few paragraphs are based only on the rough idea of a notion of normalcy as it is deployed by those authors, who are disagreeing about many of the important details.

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system. Singular rights, norms, legislative acts, and so on are not isolated phenomena; rather, they are intertwined in an intricately woven social practice that has developed over centuries. The theoretical aim of isolating certain phenomena is necessarily artificial to a certain degree. Kramer says that he has "always deliberately forborne" from formulating sufficient conditions for right-holding because:

> [A] full specification would have to draw upon a theory of the nature of law and upon an account of legal interpretation. Because no exposition of the nature of right-holding should carry so many jurisprudential commitments, there are solid grounds for my disinclination to recount sufficient conditions for the holding of a legal right.[46]

I fully agree. A *complete* theory of right-holding that contains all strictly necessary and jointly sufficient conditions for right-holding would indeed require an overarching theory of law. It may also need to be a theory about a certain legal system during a certain period of time to properly account for the way statutory law is enacted and how it is interpreted, and so on. This would be an overwhelming task.

The notion of normalcy may remind some of the notions of focal meaning or central cases, which have been (more or less explicitly) discussed as a methodological tool for legal theory.[47] However, there is an important difference between normalcy and focal meaning.[48] The idea of focal meaning revolves around resemblance coupled with explanatory or conceptual priority. Roughly speaking, a central case methodology assumes that peripheral cases of some phenomenon resemble the central case in some regards and that the central case has a particular explanatory relevance or priority over the peripheral cases. Accordingly, Finnis claims, we can consider peripheral cases "watered-down versions of the central cases" in which some of the important features of the phenomenon in question are realized to a lesser degree or not at all.[49] Nevertheless, central cases help grasp the peripheral cases. We understand what the latter are in terms of the former.

Normalcy, on the other hand, does not operate over similarities but rather over some kind of inner standard (e.g., function, purpose, teleology, tendency, etc.). The idea is that there is a standard internal to, or constitutive of, the nature of a phenomenon. The normal case is a case in which this standard is realized, whereas in the abnormal case it is not realized due to external, contingent factors. For example, it is a natural inner tendency of fish eggs to develop into fish. A dried-up fish egg is not a "watered-down version" of a fish egg that bears

46. Kramer, *supra* note 13 at 54.

47. For explicit discussion, see Frydrych, *supra* note 5 at 49-53; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011) at 9-11; Alex Langlinais & Brian Leiter "The Methodology of Legal Philosophy" in Herman Cappelen, Tamar Szabó Gendler & John Hawthorne, eds, *The Oxford Handbook of Philosophical Methodology* (Oxford University Press, 2016) 671 at 681-83.

48. See also Fortenbaugh's discussion on the distinction between comparing cases by similarities versus by function: Fortenbaugh, *supra* note 32.

49. Finnis, *supra* note 47 at 11.

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resemblance to a fish egg that does develop into a fish; rather, it is one in which external factors, such as drought, interfere with the tendency to develop. The main upshot of normalcy is that it enables differentiating between what is internal to the nature of a phenomenon and the external factors that explain the non-realization of the relevant standard.

Furthermore, it is thought that these external factors explain the deviation from the normal case. This is why we can say that in abnormal cases something went wrong or is not as it is supposed to be. Of course, that something 'went wrong' or is not as it is 'supposed to be' is to be taken in a very broad, and certainly not a moral, way. It is the sense in which we might also say that a fish egg drying out and not developing into a fish is not how things are supposed be. To repeat this point, the idea is that factors external to the nature of a fish egg (such as a drought, for example) explain the deviation of the process of this specific fish egg from the normal one in which the egg develops into a fish. This should highlight the difference between normalcy and central cases. A peripheral case is a watered-down version of the central case; an abnormal case is an accident. There are, therefore, both peripheral cases that are not abnormal and abnormal cases that are not peripheral. A dried-up fish egg does not seem to be a peripheral case of a fish egg, but it is an abnormal one. A business friendship, to use Finnis' example, may be a peripheral case of friendship, but I fail to see how it would be an abnormal one.[50] Instead, we might say that both friendship and business friendships have certain internal standards which are related by similarities and allow for normal and abnormal instances of both friendship and business friendship.

Normalcy judgments thus entail a certain thin normativity: The abnormal case is a deviation from a standard, where the standard is an internal one—that is, established simply by the nature of the phenomenon in question. In the case of fish eggs, the relevant standard essential to their nature is simply the natural tendency of the eggs to develop into fish. This leaves open whether this tendency itself is good or desirable or valuable, etc., and in this sense the normativity here is rather thin. An Interest Theorist could hold that the relevant standard constitutive of the nature of rights is that rights are purposefully created to protect the interests of those who hold them. There may be abnormal cases of rights, where this standard is not met, which would have to be explained by external factors. For example, it could happen that some legal norm confers rights to parties it was not meant to protect because it just so happens that the interests of these parties are aligned with the interests of those to whom the relevant authority intended to confer rights. The fact that the interests of different parties were aligned is an external factor that explains why the unintended right-holders hold rights that do not meet the standard. Again, however, it would be misleading to consider these instances peripheral cases in the sense of watered-down versions of right-holding. Similarly, an abnormal case of right-holding might involve a

50. *Ibid*.

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situation where the actual purpose of a legal norm is not the protection of the interests of right-holders but rather the consolidation of the authority's power. External factors explaining the abnormality might include the contingent circumstances that the introduction of this norm is a means to achieve this end, coupled with the insincerity of the authority. It would be misleading to view these instances as peripheral cases in the sense of being watered-down versions of right-holding. Instead, they represent deviations from the internal standard due to external factors.

These considerations come with two important caveats. First, if a theorist chooses to build their theory around normalcy-generic statements, they must still (a) provide arguments for why a particular standard is internal to the nature of the phenomenon in question, and (b) demonstrate that deviations from this standard are due to external factors. Simply declaring an instance that does not meet the relevant standard as abnormal is insufficient; a theorist must show that specific external factors explain the deviation from the standard. At this juncture, some might raise more fundamental critiques. For instance, Frydrych might argue that (a) is not feasible because such theses cannot be methodologically justified. While I do not share Frydrych's view, I acknowledge that this paper does not address his concerns. The focus here is primarily on engaging with those who, like me, remain optimistic about the debate on rights.

Second, the problem of how to identify instances of rights or right-holding remains. This task would have to be tackled by a much more comprehensive theory of the law and its interpretation, especially in light of contingencies. Also, norms for devising statutes and contracts may play a role here. In a sense, my suggestions about normalcy are compatible with Bentham's Test as long as the latter is considered a detection device aimed at detecting normal as well as abnormal cases. It may well be, for example, that it is impossible to unearth the intentions of legal authorities and that identifying right-holders would have to be based on something else. However, my main point remains: Identifying right-holders and elucidating the nature of rights are two separate tasks, and I would hold that the second is of far greater theoretical interest than the first. However, as long as rights' nature does not consist in being the effect of legal norms or contracts, Bentham's Test is unable to tackle this second task.

What are the potential advantages of building a theory about rights around normalcy-generic statements? For one, focusing on normalcy could help us avoid thinking in terms of necessary and sufficient conditions. It could lead us to hold certain beliefs about rights, such as that their point is to protect certain interests without being committed to the naïve contention that this is either necessary or sufficient. The idea would be that theories about the nature of rights generalize in light of the teleology of rights, and refrain from stating (merely) modal relations between rights and interests. The SR could be understood in terms of a normalcy-generic statement. That would preclude the concern voiced by Kramer and others about such accounts, as it does not imply that unintentional right-conferring or right-conferring due to authorities' ulterior agendas is impossible or rare.

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Moreover, the discussion of normalcy highlights that many abnormal cases can arise due to various contingencies. Crafting an extensionally adequate theory would require accounting for a wide array of contingencies that might explain deviations from the relevant standards. This task may prove exceedingly difficult, if not impossible. Consequently, this suggests that extensional adequacy might not be a particularly useful meta-theoretical constraint at all. Given that rights are deeply intertwined with complex social practices and contingent circumstances, the sheer number of interacting factors may simply render a comprehensive account of all possible deviations impossible.

Secondly, I should stress that I have not argued for an Interest Theory in this paper. That my discussion has focused on Interest Theories is simply due to Kramer being my opponent. The suggestion to focus on normalcy, however, is a suggestion to think about rights in terms of function, teleology, or point, and abstain from focusing on extensional adequacy or modal relations. This suggestion is compatible with the function of rights being something other than the protection of interests. A Will Theorist could hold, for example, that the point of rights is to provide the right-holder with some measure of control or protect their autonomy or freedom. It is also compatible with a several-functions view, which allows for different kinds of rights that may be related to one another by family resemblance or some such thing. One might also hold that, for example, Hohfeldian claims are the central cases of rights, whereas all the others are peripheral cases, and that they each have different internal standards that help us differentiate between normal and abnormal instances. Relatedly, a focus on normalcy can accommodate the idea that there are various ways in which the interests or will of a right-holder can be protected or vindicated, allowing for different kinds of rights. My argument against Kramer and in favor of focusing on normalcy does not imply any form of monism regarding the function or purpose of rights, nor about the means for achieving these ends. Instead, it offers flexibility and supports a range of perspectives on the nature of rights.

Third, basing theories of rights around normalcy-generic statements allows for some explanatory depths. Saying, for instance, that it is in the nature of rights to protect (in the sense of the SR) the interests of those who hold them, connects rights to a more fundamental notion of interests. It allows us to say that some person P has a right *because* their interest is (deemed) worthy of protection. Of course, deeper explanations may be required: Why think that interests are what rights (ought to) protect rather than something else? And again, these would be tasks to be addressed by much broader theories about the law, its general functions, and even—depending on one's view about this—a somewhat developed axiology. Nevertheless, in answer to the accusation some have leveled against the debate as such, it appears to me that theories built around the idea of purpose or internal standards do provide more than mere stipulations about which normative positions count as rights. Whether they do so on a solid basis is another question, and it may well be that intuition pumping and similar approaches are methodologically dubious.

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VIII. Conclusion

It has been argued that the methodology underlying Bentham's Test leads Kramer into a dilemma. Bentham's Test approaches questions of right-holding by defining a subset of mere effects of legal norms and contracts. As long as we use Bentham's Test, we cannot understand rights as purposefully created entities aimed at achieving certain ends. Kramer could maintain that some version of the SR is or might be true, but that Bentham's Test (a) functions without reference to the artifactual nature of rights, and (b) does not aim to provide theoretical insights into the nature of rights or right-holding. In that case, however, his account cannot justifiably be called a 'theory' at all: It is merely a detection device. Alternatively, Kramer could hold that Bentham's Test does provide a (partial) theory of rights—that is, he could claim that rights are, in fact, mere effects of the establishment of duties. However, this has deeply counter-intuitive implications for our understanding of such practices as contracting or legislating.

Notwithstanding the dilemma, we might do well to build our theories about the nature of rights around normalcy-generic statements. This would allow for a robust reliance on notions such as 'purpose' or 'intention' while also allowing for a wide range of abnormal cases of right-holding.

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