

# *Rights, Harming and Wronging: A Restatement of the Interest Theory*

Visa AJ Kurki\*

**Abstract**—This article introduces a new formulation of the interest theory of rights. The focus is on ‘Bentham’s test’, which was devised by Matthew Kramer to limit the expansiveness of the interest theory. According to the test, a party holds a right correlative to a duty only if that party stands to undergo a development that is typically detrimental if the duty is breached. The article shows how the entire interest theory can be reformulated in terms of the test. The article then focuses on a further strength of the interest theory, brought to the fore by the new formulation. In any Western legal system, the tortious maltreatment of a child or a mentally disabled individual results in a compensatory duty. The interest theory can account for such duties in a simple and elegant way. The will theory, on the other hand, struggles to explain such compensatory duties unless it abandons some of its main tenets.

**Keywords:** rights, legal philosophy, private law, legal theory, tort

## 1. *Preliminaries*

This article addresses the interest theory, one of the two main theories of rights propounded in analytical jurisprudence. It focuses on ‘Bentham’s test’, devised by Matthew Kramer to limit the expansiveness of the interest theory.

In section 2, I provide a general picture of the debate over rights and the two major theories of rights: the interest theory and the will theory. I then show that, in its current form, Bentham’s test is invulnerable to many of the objections that led Kramer to amplify the interest theory with further criteria. The interest theory nevertheless requires further extension because of a novel

\* University Lecturer, University of Tampere, Faculty of Management. PhD (Cantab), LLM (Helsinki), LLB (Åbo Akademi University). Email [visa.kurki@iki.fi](mailto:visa.kurki@iki.fi). I would like to thank Matthew Kramer, Pedro Múrias, David Frydrych, the two anonymous reviewers and General Editor Timothy Endicott for their very helpful comments on this paper in its various stages of development. I am also grateful to the Kone Foundation and the *Makarna Granfeltst stipendiefond* for their financial support.

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objection. Having refined the test, I propose that the whole of the interest theory can, in fact, be explicated in terms of Bentham's test.

In section 3, I focus on a further strength of the interest theory that the new formulation brings to the fore: the interest theory brings together rights, harm and wrongdoing in an attractive and simple manner.

## 2. *Refining the Interest Theory of Rights*

In this section, I introduce a new formulation of the interest theory of rights. I will begin with a methodological discussion of the 'debate over rights' and outline what rights theorists generally view as touchstones of success for their respective theories. I will then present the main features of Kramer's interest theory and argue for a new, streamlined version of that theory.

### A. *The Debate over Rights: A Methodological Discussion*

The debate over rights can be said to concern the nature of rights and right holding. However, this characterisation must be qualified in at least two ways. First, legal rights—which are the focus of this article—are not natural kinds, like atoms and molecules. Rather, they are artefacts that exist mainly as products or components of another artefact, law. Secondly, analysis reveals that the word 'right' is clearly used in different senses, and none of the prominent theories of rights manages to capture all of these senses. Even the widely endorsed claim that all rights would involve correlative duties in some way or other does not underlie all common meanings of 'right'. For instance, so-called bills of rights contained in constitutional and human rights instruments often render the legislature unable to pass certain kinds of laws. In an ordinary case, the legislature is not *prohibited* from passing laws that violate any of the enumerated rights—the legislators are not, for instance, normally subject to legal sanctions should a bill they voted for be deemed unconstitutional. Rather, the bill is simply null and void.

Rights theorists are generally aware of the two issues just mentioned. The theorists usually recognise the heterogeneous usages of 'right'. What they then set out to do can very crudely be divided into two phases: the 'dissective' phase and the 'reconstructive' phase. The dissective phase consists of analysing our everyday understanding of rights in order to identify some more fundamental elements underlying them. A scholar engaged in reconstruction, on the other hand, offers suggestions as to how to use the word 'right' or cognate terms, rather than simply dissecting 'rights talk'. The task, then, is to provide an account of rights that is in some way superior to the everyday understanding of rights as well as to any competing account.

Wesley Newcomb Hohfeld's work is the gold standard of dissection; another prominent example is the work of Alf Ross.<sup>1</sup> Hohfeld does, however, proceed to the reconstructive phase—offering an account of 'a right in the strictest sense'<sup>2</sup>—whereas Alf Ross mostly resists reconstruction. The latter argues that the word 'right' is just a shorthand—'a form of circumlocution in which between the juristic fact and the legal consequence there are inserted imaginary rights'.<sup>3</sup>

(i) *Touchstones of success for reconstructive accounts*

The contemporary, analytical debate over rights is primarily reconstructive in nature. With some exceptions, most scholars build on the insights provided by Hohfeld's dissection and then argue for a given definition of 'right'.<sup>4</sup> The debaters are occasionally accused of talking past each other.<sup>5</sup> They will be talking past each other, for instance, if an interest theorist presupposes or stipulates that children hold rights and then criticises the will theory for not accommodating children's rights. But they need not talk past each other, if they each understand that the other relies on a somewhat different conception of rights and has reasons for preferring their chosen definition of rights.

Rights theorists generally take ordinary language as the point of departure for their analyses. The initial reliance on ordinary language shows why rights theorising should not be described as a stipulative enterprise, as Leif Wenar implies.<sup>6</sup> Stipulation means giving 'a meaning to the defined term' without 'commitment that the assigned meaning agrees with prior uses (if any) of the term'.<sup>7</sup> According to Wenar, Hohfeld simply stipulates that claims are rights 'in the strictest sense'.<sup>8</sup> Hohfeld is, however, quite concerned with ordinary usage when arguing for his chosen definition:

Recognizing, as we must, the broad and indiscriminate use of the term, 'right,' what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative 'duty,' for it is

<sup>1</sup> See in particular A Ross, 'Tu-Tu' (1957) 70 Harv L Rev 812.

<sup>2</sup> WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 Yale LJ 16, 30. According to Hohfeld, claims are rights in the strictest sense. However, he failed to provide a proper account of claims.

<sup>3</sup> Ross (n 1) 818. See also A Ross, *Directives and Norms* (Routledge & Kegan Paul 1968) 134.

<sup>4</sup> Joseph Raz is the most prominent example of a non-Hohfeldian theorist; Neil MacCormick is another. J Raz, 'On the Nature of Rights' (1984) 93 Mind 194; N MacCormick, 'Children's Rights: A Test-Case for Theories of Right' (1976) 52 Archiv für Rechts- und Sozialphilosophie 305.

<sup>5</sup> For instance, Van Duffel has claimed that the debate over rights rests on a mistake because the participants supposedly have not realised that their opponents employ a different conception of rights. S Van Duffel, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 Pacific Philosophical Quarterly 104. However, Van Duffel does not reiterate this claim in his more recent work.

<sup>6</sup> L Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223, 243 and 251.

<sup>7</sup> G Anil, 'Definitions' in *Stanford Encyclopedia of Philosophy* (2015) <<https://plato.stanford.edu/archives/sum2015/entries/definitions/>> s 1.3.

<sup>8</sup> Wenar (n 6) 243.

certain that even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative.<sup>9</sup>

More generally, rights literature is replete with references to ordinary linguistic usage and intuitions. To pick an example somewhat randomly, one of Carl Wellman's arguments in support of the will theory is that 'the active voice is at least as ubiquitous in the language of legal rights as it is in the language of moral rights, and only a theory that places agency central to a right can adequately explain this linguistic phenomenon'.<sup>10</sup> What Wellman is referring to here is expressions such as 'to claim a right' or 'right to sue'. Examples such as this show why describing the debate over rights as stipulative is not appropriate.

(ii) *Debate over rights as explication*

Rather than being stipulative, the rights debate is—to use Rudolf Carnap's term—*explicative*: the participants are engaged in 'making more exact a vague or not quite exact concept used in everyday life ... or rather [in] replacing it by a newly constructed, more exact concept'.<sup>11</sup> What, then, are the standards of correctness for a theory of rights? Carnap himself proposes four requirements for an adequate explication:

- (1) Similarity to the *explicandum* ('the everyday concept').
- (2) Exactness.
- (3) Fruitfulness.
- (4) Simplicity.<sup>12</sup>

Requirements 1, 2 and 4 are likely self-explanatory, but the 'fruitfulness' of an explication of a concept requires elaboration. According to Carnap, '[a] scientific concept is the more fruitful the more it can be brought into connection with other concepts on the basis of observed facts'.<sup>13</sup> In the case of rights, it is virtuous of a theory to connect related aspects of legal and/or moral thought.

As regards the similarity touchstone, Siegfried Van Duffel has specified what aspects of our ordinary thinking about rights should be reflected in a rights theory:

For an analysis of rights, 'better' means that it should more adequately capture our common understanding of which rights there are, how they function in moral and legal thought, and what these rights do for their possessors.<sup>14</sup>

<sup>9</sup> Hohfeld (n 2) 31.

<sup>10</sup> C Wellman, *Real Rights* (OUP 1995) 133.

<sup>11</sup> R Carnap, *Meaning and Necessity* (2nd edn, University of Chicago Press 1956) 7–8.

<sup>12</sup> M Beaney, 'Carnap's Conception of Explication: From Frege to Husserl?' in S Awodey and C Klein (eds), *Carnap Brought Home: The View from Jena* (Open Court) 137. The requirements were laid out in R Carnap, *The Logical Foundations of Probability* (University of Chicago Press 1950). I would like to thank Pedro Múrias for his helpful comments on the distinction between stipulation and explication.

<sup>13</sup> Carnap (n 12) 6. Many contemporary philosophers call this desideratum 'consilience'.

<sup>14</sup> S Van Duffel, 'Adequacy Constraints for a Theory of Rights' in M McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017) 189.

Most rights theorists would likely not object to the criteria proposed by Carnap and Van Duffel, but explication is still not an exact science. For instance, consider the requirement that a rights theory should ‘capture our common understanding of which rights there are’.<sup>15</sup> Authors put very different weight on this desideratum. For Leif Wenar, ‘[t]he test of a theory of the functions of rights is how well it captures our ordinary understanding of what rights there are’.<sup>16</sup> Wenar’s reconstructive work can be said to consist in merely analysing the different usages of ‘right’ that the dissective phase has revealed.<sup>17</sup> Kramer, on the other hand, is highly critical of Wenar’s approach. He notes that

the indiscriminate use of the term ‘right’ to cover each of the Hohfeldian entitlements is strongly conducive to muddled thinking and argumentation ... Philosophers who ... hope to keep in view subtle distinctions that are largely or entirely obscured in everyday exchanges, will be very well advised to opt for a more discriminating vocabulary.<sup>18</sup>

Thus, the word ‘right’ should have one unique and clearly defined meaning. HLA Hart sees the putative uniqueness of the will-theory meaning of ‘right’ as a reason for adopting that theory despite its counter-intuitive implications:

If common usage sanctions talk of the rights of animals or babies it makes an idle use of the expression ‘a right,’ which will confuse the situation with other different moral situations where the expression ‘a right’ has a specific force and cannot be replaced by the other moral expressions which I have mentioned.<sup>19</sup>

As interest-theory rights are simply correlates of duties, they can be adequately explained using the vocabulary of duties—whereas will-theory rights, according to Hart, cannot.<sup>20</sup>

The account I offer here has three main strengths, one *vis-à-vis* Kramer’s theory and two *vis-à-vis* the will theory. First, my account is simpler than Kramer’s account. Secondly, my account captures and brings to the fore the important and oft-invoked connection between rights, wrongdoing and harming.

<sup>15</sup> This consistency can be extensional (a theory identifies rights where intuitions identify rights as well) or intensional (a theory picks out the necessary and sufficient conditions of rights consistently with intuitions). See Van Duffel (n 14) 189–200.

<sup>16</sup> This is also apparent, for instance, in the following passages: ‘Since we would without hesitation call the incidents in these [just-mentioned] 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’ and ‘The great advantage of the several functions theory is its fit with our ordinary understanding of rights’. Wenar (n 6) 238, 248 and 249.

<sup>17</sup> Wenar especially resists reconstruction in his 2005 article on rights; his 2013 article is much more concerned with reconstruction. L Wenar, ‘The Nature of Claim-Rights’ (2013) 123 *Ethics* 202.

<sup>18</sup> M Kramer and H Steiner, ‘Theories of Rights: Is There a Third Way?’ (2007) 27 *OJLS* 281, 296.

<sup>19</sup> HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64 *Philosophical Review* 175, 181. It bears mentioning that Hart later disavows that article: HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 16–17.

<sup>20</sup> Hart, ‘Are There Any Natural Rights?’ (n 19) 181.

Finally, the connection between rights, wrongdoing and harming also provides a response to Hart's 'idle-usage' criticism of the interest theory.

### B. *The Interest Theory*

The gist of a representative interest theory is that Mary holds a right towards John if John has a duty towards Mary, and having a duty *towards* someone (or something) means that a duty of that kind is typically in the interests of entities like the entity in question.<sup>21</sup> Thus, a duty of that kind must be 'typically', 'normally' or 'standardly'—rather than always—in the interests of the duty bearer because the theory would otherwise be under-inclusive.<sup>22</sup> Neil MacCormick mentions 'slum properties subject to statutory tenancies at controlled rents' that are 'more trouble than they are worth and, besides, something of an embarrassment to their proprietor'.<sup>23</sup> Kramer invokes the duty of a son to make monthly payments to his mother who, as a result, 'loses her sense of independence and her desire for independence', 'becomes woefully languid' and then succumbs to alcoholism.<sup>24</sup> Regardless, both cases involve rights according to MacCormick and Kramer because duties of the specified kinds are typically in the interests of the owner and the recipient, respectively.

Interest theories can roughly be divided into two groups. Some theories are meant to explain rights as *reasons* or *justifications* for reaching certain legal and/or moral conclusions. Such is the role of rights in the theory of Joseph Raz. The Hohfeldian theories—such as that of Kramer—mainly understand rights as *conclusions* that have been reached through an interpretation of the relevant legal materials or moral principles.<sup>25</sup> The protection of journalists' sources is typically *justified* by making reference not to journalists' interests, but rather to the interests of the public or the sources. Regardless, one might say that such protection does *result* in some rights for journalists. Hence, it might very well be feasible to employ the Razian and Hohfeldian accounts side by side. Raz's theory could be used to justify some legal conclusion, and the Hohfeldian scheme would then be employed when analysing that conclusion. My point here is to improve upon Kramer's account rather than to defend it from Raz, which is why I will not dwell on the respective virtues of Raz's and Kramer's accounts here.

<sup>21</sup> Which entities can hold interest-theory rights is discussed more extensively in MH Kramer, 'Getting Rights Right' in MH Kramer (ed), *Rights, Wrongs and Responsibilities* (Palgrave 2001).

<sup>22</sup> N MacCormick, 'Rights in Legislation' in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Clarendon Press 1977) 202; MH Kramer, 'Rights without Trimmings' in MH Kramer, NE Simmonds and Hillel Steiner (eds), *A Debate over Rights. Philosophical Enquiries* (OUP 1998) 92–101.

<sup>23</sup> MacCormick (n 22) 202.

<sup>24</sup> Kramer (n 22) 94.

<sup>25</sup> See A Halpin, *Rights and Law—Analysis and Theory* (Hart Publishing 1997) 31–2: 'The [Hohfeldian] legal relation does not present the raw material of the legal sources, statute or whatever, but the net effect of that material on the two persons and one activity in question.' This double nature of rights is also discussed in P Eleftheriadis, *Legal Rights* (OUP 2008).

### C. Kramer's Theory

Kramer summarises his interest theory in the following two tenets:

(IT-1) Necessary though insufficient for the holding of a legal right by X is that the duty correlative to the right, when actual, normatively protects some aspect of X's situation that on balance is typically beneficial for a being like X (namely, a human individual, a collectivity or a non-human animal).

(IT-2) Neither necessary nor sufficient for the holding of some specified legal right by X is that X is competent and authorized to demand or waive the enforcement of the duty that is correlative to the right.<sup>26</sup>

IT-1 presupposes that rights are the correlatives of duties, and affirms that they are held by those beings whose interests are typically served by the performance of a duty, whereas IT-2 constitutes a rejection of the central tenets of the will theory. Kramer does not offer a full list of necessary and sufficient conditions for right holding because

those conditions include the existence of a correlative legal duty—which means that a full specification of those conditions would include the conditions that are sufficient for the existence of a legal duty. Accordingly, a full specification would have to draw upon a theory of the nature of law and upon an account of legal interpretation.<sup>27</sup>

I will be somewhat bolder here by offering both the necessary and the sufficient conditions of right holding—though also recognising that the underlying account of legal duty must be specified before the proposed conditions can be applied.

What is not included in the tenets above is Kramer's solution to a problem of over-inclusiveness.<sup>28</sup> Consider Mary, who lives on social security and regularly uses a certain amount of her monthly benefit to buy food from the only grocery store in the area. The initial formulation of the interest theory—accompanied by an account of legal duties—would conclude that the state's duty to pay the benefit is correlated not merely with Mary's right to be paid the benefit, but also with the *storeowner's* right that Mary be paid the benefit. The interest theory would hence be unintuitively expansive.

Two main solutions have been proposed to address the problem just sketched. Some theorists have proposed that one should look at the 'intention' or 'purpose' of the relevant norm.<sup>29</sup> Thus, a duty would only entail rights for those so intended by the legislator or other legal authority. Kramer, on the

<sup>26</sup> MH Kramer, 'In Defence of the Interest Theory of Rights: Rejoinders to Leif Wenar on Rights' in McBride (n 14) 49.

<sup>27</sup> Kramer (n 26) 54. David Frydrych, on the other hand, argues that Kramer should 'stick to his guns' and only provide necessary conditions for right holding. D Frydrych, 'Kramer's Delimiting Test for Legal Rights' (2017) 62 Am J Juris 197, 204.

<sup>28</sup> Hart paid attention to this problem of over-inclusiveness quite early. See Hart, 'Are There Any Natural Rights?' (n 19) 180–1.

<sup>29</sup> See Kramer (n 22) 85.

**Table 1.** Illustration of the distinction between joint sufficiency and minimal sufficiency

<b>Jointly sufficient set of facts to constitute breach of duty D:</b>	<b>Minimally sufficient set of facts to constitute breach of duty D:</b>
F <sub>1</sub> : The state has the duty to pay benefit B to Mary at T1.	F <sub>1</sub> : The state has the duty to pay benefit B to Mary at T1.
F <sub>2</sub> : The state has not paid B to Mary at T1.	F <sub>2</sub> : The state has not paid B to Mary at T1.
...	...
F <sub>N</sub> : Mary does not buy as many products from the storeowner as she would have otherwise.	<del>F<sub>N</sub>: Mary does not buy as many products from the storeowner as she would have otherwise.</del>

F<sub>1</sub> is a development that is typically detrimental to Mary, whereas F<sub>N</sub> is typically detrimental to the storeowner. Establishing F<sub>N</sub> is never required to establish breach of D, which is why D does not constitute rights for the storeowner.

other hand, has offered a different solution based on some writings of Jeremy Bentham (and Hart's exegesis of those works). According to Bentham's test, when determining whether someone is a right holder under a contract or another legal norm, one needs to examine the facts that would be minimally sufficient to establish that a breach of the norm has taken place.<sup>30</sup> Kramer originally introduced the test in 1998, and presented its most recent version in 2010:

If and only if at least one minimally sufficient set of facts includes the undergoing of [some development that is typically detrimental for a human being, nonhuman animal or collectivity] by some person Q at the hands of some other person R who bears a duty under the contract or norm, Q holds a right—correlative to that duty—under the contract or norm.<sup>31</sup>

In other words: there may be more than one way to establish that a duty has been breached. If at least one such way non-redundantly includes establishing that Q has undergone some typically detrimental development, then Q holds a claim-right correlative to the duty. In the social-security example above, the test trims away the storeowner as a right holder because no set of facts *minimally* sufficient to establish a breach of the duty includes some development typically detrimental to the storeowner. Minimal sufficiency and joint sufficiency should not be confused; their central difference is illustrated in Table 1.

<sup>30</sup> It is quite unclear whether the test in its current form should be attributed to Bentham. The name 'Bentham's test' may not be appropriate anymore. In any case, I will not propose a different label here.

<sup>31</sup> MH Kramer, 'Refining the Interest Theory of Rights' (2010) 55 Am J Juris 31, 36–7.

### D. Bentham's Test as the Interest Theory

Bentham's test is normally understood as a limitation on the otherwise overly expansive interest theory. The heuristics of how one thinks about the interest theory works roughly like this: one first considers which potential right holders typically benefit from a given legal or moral duty and then applies the test to trim off inappropriate ascriptions of rights:

- (1) Determine who or what typically benefits from some duty D.
- (2) Trim off those beneficiaries that are not covered by Bentham's test.

Such is the 'traditional' method of determining who or what holds an interest-theory right. However, instead of using Bentham's test as an additional criterion, we could simply use it as the *primary determinant* of who or what holds the right correlative to some duty. Asking who or what typically benefits from some duty is, in fact, perfectly superfluous. We can employ a one-step procedure instead:

- (1) Determine who or what is covered by Bentham's test.

This gives exactly the same results as the two-step procedure. Kramer seems—perhaps inadvertently—to be implying this result in his 2010 account of Bentham's test: '[i]f and only if ... Q holds a right—correlative to that duty—under the contract or norm'.<sup>32</sup> Kramer uses here the expression 'if and only if' to provide the necessary *and sufficient* conditions for something. However, it is unclear why exactly Kramer employs this formulation. The expressed intent of his article is not to provide an overall account of the interest theory, but merely to focus on Bentham's test, and Kramer draws no attention to his just having provided the necessary and sufficient conditions for right holding.<sup>33</sup>

Regardless of Kramer's intentions, his interest theory can—I claim—be summarised as follows:

#### *Formulation 1*

X holds a right correlative to currently existing duty D if and only if

- (i) X can hold rights and
- (ii) a set of facts minimally sufficient to establish the contravention of duty D includes a fact that affects X's situation in a way typically detrimental for beings such as X.

This formulation can cover all the paradigmatic cases of right holding, as well as the difficult cases mentioned in this article. Condition (i) is included

<sup>32</sup> Kramer (n 31) 36–7. The significance of this formulation was pointed out to me by Mark McBride.

<sup>33</sup> In addition, Kramer maintains in his 2008 article that vicarious interests cannot ground rights, whereas the vicarious/personal distinction is not mentioned in his 2010 account of Bentham's test. I will shortly argue that the vicarious/non-vicarious distinction is irrelevant anyway, but Kramer has deemed it significant. Hence, one would imagine that he would have included a mention of that distinction in his article had he intended to provide the necessary and sufficient conditions for right holding.

because interest theorists such as Kramer and Raz maintain that X's being endowed with interests does not qualify X as a potential holder of rights. For instance, Kramer maintains that plants are endowed with interests, but regardless cannot hold rights because they are not of ultimate value.<sup>34</sup> I will not delve into the question of who or what can hold rights here. Condition (ii) is, roughly put, Bentham's test as presented by Kramer in 2010.

One can also give the test a 'positive' formulation, focusing on the fulfilment or non-contravention of a duty:

*Formulation 2*

X holds a right correlative to currently existing duty D if and only if

- (i) X can hold rights and
- (ii) a set of facts minimally sufficient to establish the fulfilment or non-contravention of duty D includes a fact that affects X's situation in a way typically beneficial for beings such as X.

Formulation 2 gives the same results as Formulation 1.

I should specify two things. First, I have distinguished the fulfilment of duties from the non-contravention of duties because certain duties—primarily prohibitions—are constantly in force and cannot be fulfilled in a way that would extinguish them. For instance, the duty not to hit others is such a duty. It cannot be fulfilled in the same sense as the duty to deliver certain agreed upon goods to a buyer, which is why 'non-contravention' is a more suitable term.

Secondly, 'typically detrimental' in Formulation 1 includes not only detriment *stricto sensu*, but also the withholding of benefit, and 'typically beneficial' in Formulation 2 also includes the withholding of detriment. Hence, Mary's not hitting Quentin can be said to be beneficial to Quentin.

### *E. Assessing the New Formulations*

Presented in this way, the interest theory may seem baffling to someone not yet initiated into the intricacies of rights theories. It could very well be that someone interested in the main features of Kramer's interest theory would be better served by a more traditional exposition which focuses primarily on who or what typically benefits from the duty. The offered formulation does, however, have a number of salutary features.

First, additional tests and exceptions often reduce the persuasiveness of a theory, but the two offered formulations show that Kramer's theory is relatively

<sup>34</sup> See Kramer (n 21). For a broadly similar account, see Raz (n 4) 205. Joel Feinberg, on the other hand, maintains that the holding of interests is sufficient for the capacity to hold rights. However, Feinberg subscribes to a more limited conception of interests, which is mostly limited to sentient beings. Hence, Feinberg and Kramer would mostly agree on who or what can hold rights, even though they would disagree on why that is the case. J Feinberg, 'The Rights of Animals and Unborn Generations' in WT Blackstone (ed), *Philosophy and Environmental Crisis* (University of Georgia Press 1974).

simple and straightforward—even if it contains some challenging elements, such as the logical structure of minimal sufficiency. It thus meets Carnap's simplicity requirement.

Providing the necessary and sufficient conditions of right holding also means that we can dispense with Kramer's second tenet (IT-2), which specifies that X's being able to enforce or waive some duty D is not a necessary condition of X's holding a right correlative to D. As mentioned above, Kramer has resisted providing the sufficient conditions of right holding because such conditions would have to include an account of duty bearing. I have supplied both the necessary and the sufficient conditions here—though I recognise that the offered account does not provide a full explication of the conditions necessary and sufficient for the existence of a duty. As the necessary and sufficient conditions for right holding have now been supplied, we do not need to make any further list of the conditions that are *unnecessary* for right holding.

In addition, both formulations—and Formulation 1 in particular—draw attention to an important intuition about rights: that contravening the rights of someone else constitutes a wrong, and is a necessary condition for compensatory duties such as tort liability.<sup>35</sup> I will focus in depth on this issue below. Before doing that, however, I shall first introduce an amplification of the theory that addresses a problem of the theory regarding criminal and tort law. I will also explain why I have left out of my account the distinction between purely vicarious and other interests—introduced by Kramer in 2008—as well as some other amplifications.

### F. Identification of Some Right Holders

The interest theory is under-inclusive unless amplified in a certain manner.<sup>36</sup> Consider the crime of arson, which prohibits setting fire to the property of someone else. We now want to establish that Andrew is guilty of arson because

<sup>35</sup> It is, however, not a *sufficient* condition of such remedial duties, at least legal ones. The logical structure of the test as well as the qualifier 'typically' both entail that one can neglect a duty without causing any actual harm to the correlative right holder. Tort liability normally requires that actual harm has been caused (except with so-called nominal damages, which I will address below). Kramer does, however, argue that the infringement of moral rights always gives rise to some moral remedial duties, even if such duties may simply take the form of the duty to apologise. MH Kramer, *Where Law and Morality Meet* (OUP 2008) 255ff.

<sup>36</sup> I realised this issue after discussions with Pedro Múrias at the Working Group on Private Law Theory that was organised in conjunction with the IVR 2017 conference. Múrias's main worry had to do with descriptions of facts, and how a suitable description could lead to the interest theory being either over- or under-inclusive. Consider, for instance, Albert's duty not to burn down Britta's house. Let us now assume that Carl's house is right next to that of Britta, and that it is typically detrimental that the house of one's neighbour is burnt down. We could now describe Britta not as 'Britta' but as 'the neighbour of Carl' (or, say, 'the southern neighbour of Carl!'). We would then have established that if Albert violates his duty, not only Britta but also Carl would undergo a typically detrimental development. The interest theory would now be over-inclusive, as Carl would hold a right correlative to Albert's duty. However, we would also have introduced unnecessary facts underlying this description, such as the fact that Britta has a neighbour and that Carl exists. These facts are not necessary for the sufficiency of the set: we do not need to establish anything about Britta's neighbour in order to establish that the duty has been infringed. This is why the offered description is not apposite when employing Bentham's test. On the other hand, the house could supposedly also be identified without making reference to its being owned by anyone—say, by using coordinates. We do, however, need to establish that the house is owned by someone (other than Albert) in order to establish arson.

he set fire to Britta's house. To establish that some X has committed arson, one simply needs to establish—among other things—that the house was owned by *someone other than X*, rather than any particular individual or organisation (either private or public). Knowledge of Britta's identity is not necessary for the sufficiency of any of the sets that could establish Andrew's guilt.

The minimally sufficient set of facts would not show that Britta has undergone a typically detrimental development, but only that the owner of the house—whose identity is unspecified—has undergone such a development. The interest theory must now be amplified in way that relies on the *de re/de dicto* distinction.<sup>37</sup> Even when the party detrimentally affected by the breach of duty cannot be identified *de re* on the basis of every set of facts minimally sufficient to establish that the duty has been breached, that party can be identified *de dicto* (for example, as 'the owner(s) of the asset that was damaged by fire'). We can then proceed to identify the owner(s) of the asset that was damaged by fire, using further facts.<sup>38</sup>

### G. Vicarious Interests

Gopal Sreenivasan argued in 2005 that the test—in its 1998 version—would fail to exclude certain inapposite right holders. Consider Irene, the grandmother of Jack. Jack has the right to receive £100 from Quentin. Let us say that it is in Irene's interests as a grandmother that her grandchildren receive benefits. From these premises, it follows that Irene will also hold the right that Jack receive £100.<sup>39</sup> We should recall that the 1998 formulation was focused on sufficient conditions. One can indeed establish that Quentin has breached his duty by showing that Irene has suffered a vicarious detriment because Jack has not received the £100 that was owed to him.

To resolve this issue, Kramer in his 2007 reply excludes purely vicarious interests from the scope of the interest theory. The interest 'cannot reside wholly in the furtherance of somebody else's interests'; rather, one must also have a 'personal stake' in the matter.<sup>40</sup> However, the 2010 version of Bentham's test—focused on minimal sufficiency—is not at all vulnerable to Sreenivasan's argument.<sup>41</sup> Consider these two statements:

- (a) Quentin has not paid the agreed-upon £100 to Jack.
- (b) Irene's interests as a grandmother are set back because of (a).

<sup>37</sup> See the 'The *De Re/De Dicto* Distinction' supplement to T McKay and M Nelson, 'Propositional Attitude Reports' in EN Zalta (ed), *Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), <<https://plato.stanford.edu/archives/spr2014/entries/prop-attitude-reports/>> accessed 10 November 2017.

<sup>38</sup> This solution to the problem was mainly devised by Kramer.

<sup>39</sup> G Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 OJLS 257, 264.

<sup>40</sup> Kramer and Steiner (n 18) 303.

<sup>41</sup> I am puzzled by Sreenivasan's treatment of Bentham's test in his most recent piece on rights, as he seems to completely ignore the changes made to the test in 2010. G Sreenivasan, 'Public Goods, Individual Rights and Third-Party Benefits' in McBride (n 14) 137–8.

By establishing (b), we have also established (a). Establishing (b) is hence *sufficient* for establishing the contravention, but it is not *minimally* sufficient—we can do without (b) when establishing the breach of duty. Kramer's distinction between vicarious and personal interests is unnecessary for our purposes here.

A rather similar point can be made regarding another one of Sreenivasan's counter-arguments in his 2005 article. Sreenivasan contends as follows:

Furthermore, if we examine the notion of what 'suffices to establish' a breach a little more closely, a different sort of trouble soon emerges. Consider the special case where X's brother waives X's duty to pay X's sister. In this case, X's sister's detriment is not 'sufficient to establish' a breach of X's duty. Having once seen this, we should then recognize that her detriment does not suffice even when X's brother does not waive X's duty, since he might have done. In fact, even X's brother's ... detriment does not really suffice to establish X's breach, since detriment on his part does not, strictly speaking, entail that he did not waive X's duty. Kramer's test therefore fails to vest the one uncontroversial claim-right holder—the promisee—with a claim-right against X.<sup>42</sup>

Kramer makes certain modifications to his theory in his 2007 response. I will not delve into these modifications—involving conditional clauses—here because the introduction of minimal sufficiency takes care of the problem on its own. The detriment to X's sister is obviously not sufficient to establish the breach of duty here, but it is part of a set of facts minimally sufficient to establish the breach. The set will include at least the following facts:

- (a) X has not paid his sister within the allotted time.
- (b) X's brother has not waived the duty.

A fact similar to (b) is always included in any set of facts minimally sufficient to establish the breach of a waivable duty.

### 3. *Harms, Wrongs and Rights*

Rights are only entailed by *directed duties* (duties that are held towards someone or something).<sup>43</sup> One must then ask what we mean by describing a duty as directed towards some X. A will theorist would say that such directedness, at least in its focal instances, has to do with X's competence to enforce and/or waive the duty. As regards the interest theory, the traditional explanation would say that a duty's being directed entails that the duty affects X's situation in a

<sup>42</sup> Sreenivasan (n 39) 264, cited in Kramer and Steiner (n 18) 305.

<sup>43</sup> I am neutral here with regard to whether all duties are necessarily directed duties. The Hohfeldian framework, which Kramer relies upon, does stipulate that all duties are correlated by claim-rights. See Kramer (n 22) 22ff.

way that is normally beneficial for beings like X. Merely benefiting from some duty does not seem to be an important normative position, which is why many have criticised the interest theory. Hans Kelsen called such rights ‘reflex rights’ and took them to be superfluous ‘from the point of view of a scientifically precise description of the legal situation’ because ‘the reflex right of one consists solely in the obligation of the other’.<sup>44</sup> Hart held that we should not

extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment, for the moral situation can be simply and adequately described here by saying that it is wrong or that we ought not to ill-treat them or, in the philosopher’s generalized sense of ‘duty,’ that we have a duty not to ill-treat them.<sup>45</sup>

But the taxonomy provided by Hart here is unable to account for a significant amount of legal doctrine.<sup>46</sup> The interest theory—as formulated here—can better explain why we may need to compensate children and mentally disabled people for our wrongdoings that affect them. The interest theory connects wronging, remedial duties and rights, and does this in a very natural way. The will theory, on the other hand, offers solutions that are both more complicated and less compelling.

### A. *Wronging as Infringement of Rights*

The connection between rights, harming and wronging is often emphasised. Joel Feinberg distinguishes numerous senses of the word ‘harm’. First, the verb ‘harm’ can be used in a ‘transferred’ sense, as when one says ‘Harm someone’s windows’. Feinberg maintains that this is a transferred sense of the term because ‘we don’t feel aggrieved on behalf of the windows . . . nor are they the objects of our sympathies. Rather our reference to their “harm” is elliptical for the harm done to those who have interests in the buildings.’<sup>47</sup>

The second sense is ‘the thwarting, setting back, or defeating of an interest’.<sup>48</sup> Feinberg is employing here a relatively narrow view of interests, according to which—roughly put—only sentient beings can have interests. This second sense is non-normative in the sense that the harmed party is not wronged by the harming. The harm is caused either by a natural event (such as a flood) or by an agent who is acting permissibly: for example, a police officer can permissibly harm a fugitive and an enterprise can permissibly cause harm to its competitors by making better products.

In the third sense of ‘harm’, ‘[t]o say that *A* has harmed *B* . . . is to say much the same thing as that *A* has wronged *B*, or treated him unjustly’.<sup>49</sup> Thus, in

<sup>44</sup> H Kelsen, *Pure Theory of Law* (tr M Knight, The Lawbook Exchange 2005) 128–9.

<sup>45</sup> Hart, ‘Are There Any Natural Rights?’ (n 19) 181.

<sup>46</sup> Hart was addressing moral rights in the cited passage. However, similar arguments have been made regarding legal rights by eg Hillel Steiner.

<sup>47</sup> J Feinberg, *The Moral Limits of the Criminal Law. Volume 1. Harm to Others* (OUP 1987) 32.

<sup>48</sup> Feinberg (n 47) 33.

<sup>49</sup> Feinberg (n 47) 34.

this deontic sense, harming entails wronging. Wronging, in turn, is connected to rights:

One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right, and in all but certain very special cases such conduct will also invade the other's interest and thus be harmful in the sense already explained.<sup>50</sup>

This connection between harming, wronging and rights is readily intelligible: it would, for instance, be odd to say that 'You have violated Mary's rights but you have not wronged her'.<sup>51</sup> Harming in this third sense—which I will call 'wrongful harming'—is pertinent to numerous legal and philosophical issues. For instance, the so-called harm principle limits (according to liberal thinkers) the justifiable scope of criminal law: only conduct that wrongfully harms others may be criminalised. Feinberg's analysis of harming is mostly intended to illuminate such issues. I will instead focus on the role of wronging in extant Western legal systems, where wronging is also a necessary condition of various forms of liability. It is well documented that certain will theorists deny the existence of children's rights, the rights of severely mentally disabled individuals and so on. However, it is less frequently pointed out what implications this limited scope of right holders has for wronging and compensatory duties. The emphasis is on civil wrongs here. As private law is often taken to be an area of law where the will theory is at its strongest, the criticism should be particularly damaging.

I maintain that will theorists—insofar as they deny rights to children and mentally disabled people—are unable to account for the point of civil liability, which is to compensate wrongfully harmed parties. The central point is expressed in the harm-compensation principle:

*Harm-Compensation Principle:* X can only hold a right to civil compensation if X has been harmed wrongfully.

I should stress that wrongful harming is not a *sufficient* condition for a right to compensation—legal systems do not always attach consequences to wrongful

<sup>50</sup> Feinberg (n 47) 34.

<sup>51</sup> See also eg L Haworth, 'Rights, Wrongs, and Animals' (1978) 88 *Ethics* 95. However, some moral philosophers have claimed that moral rights and wronging are not, or do not need to be, always connected. See eg N Cornell, 'Wrongs, Rights, and Third Parties' (2015) 43 *Philosophy and Public Affairs* 109. I will not respond to Cornell here because my article is concerned with legal rights. Simon May, on the other hand, holds that wronging does not—or might not—always entail an infringement of a right: '[T]here could be restrictions internal to the concept of rights that constrain possible right holders: perhaps only agents can hold rights and only against other agents. But it would not follow that Sigrid could not wrong her dog by mistreating it or that she could not wrong herself by leading a life of servility and degradation. Solutions to the direction problem must capture the phenomenon of wronging but should not also be held captive to considerations about the nature of claim-rights.' SC May, 'Directed Duties' (2015) 10 *Philosophy Compass* 523, 524.

conduct. In some cases, behaviour can be found to be wrongful but excusable: one has wronged someone but is not liable for the harm.<sup>52</sup>

There is one exception to this principle: it does not cover situations where X transfers the right to compensation through an exercise of legal competence.<sup>53</sup>

### B. *Test Case*

Let us consider the different approaches that the interest theory and the will theory take towards a scenario where one tortiously ill-treats an infant. Say that Gilly causes some injury to baby Sam and incurs the remedial duty to pay £5000. We should first note that, at least as far as Western law is concerned, tortiously ill-treating an infant does indeed result in the duty to pay compensation; acknowledging that such a duty exists must be a point of departure in our analysis. The relevant questions then are: (1) whose right has been infringed; (2) who has been wrongfully harmed; and (3) who holds the right correlative to the remedial duty to pay compensation?

Analysing our test case with the interest theory is quite straightforward. Let us recall Formulation 1 of the offered version of the interest theory:

#### *Formulation 1*

X holds a right correlative to currently existing duty D if and only if

- (i) X can hold rights and
- (ii) a set of facts minimally sufficient to establish the contravention of duty D includes a fact that affects X's situation in a way typically detrimental for beings such as X.

By establishing that Gilly has breached her duty not to mistreat Sam, we establish that Sam has undergone a development that is typically detrimental for human beings. Sam's right has therefore been infringed, and he has been wronged because his right has been infringed. The same can be said of the duty to pay £5000. That duty is held towards Sam, who holds the correlative right. Even if Sam is an infant and therefore cannot dispose of the money independently, his legal guardians hold the fiduciary duty to dispose of the money in a way that is in his interests.

The story told by the will theory is much less clear. We should now distinguish 'soft' and 'hard' will theorists. Soft will theorists allow for children's rights under certain conditions, whereas hard will theorists do not. Even though HLA Hart later became a soft will theorist, he outlined in his seminal article 'Are There Any Natural Rights?' a will theory that excluded children's

<sup>52</sup> In addition, many moral wrongs are quite aptly not treated as legal wrongs, as one reviewer helpfully pointed out. If one partner in a romantic relationship is unfaithful to another partner, the infidelity is a moral wrong but not a legal wrong (in most circumstances in any liberal-democratic system of governance).

<sup>53</sup> Legal competences are a proper subset of legal powers. See VAJ Kurki, 'Legal Power and Legal Competence' in McBride (n 14).

rights. According to Hart, the distinctive usage of ‘right’—where the term does not simply serve as a correlate of a duty—is where the right holder can waive or enforce the duty of another.<sup>54</sup> As infants are psychologically unable to perform such feats, they cannot hold rights. Infants should of course be protected in numerous ways, but this ‘moral situation can be simply and adequately described here by saying that it is wrong or that we ought not to ill-treat [infants] or, in the philosopher’s generalized sense of “duty,” that we have a duty not to ill-treat them’.<sup>55</sup> Many will theorists share the conclusion that infants, as well as severely mentally handicapped individuals, cannot hold rights, including legal rights.<sup>56</sup> I will now focus on hard will theorists and then say some words about soft will theorists.

### C. *Test Case and Hard Will Theory*

Three questions were asked regarding the scenario with Gilly and baby Sam: (1) whose right has been infringed; (2) who has been wronged; and (3) who holds the right correlative to the compensatory duty?

Hard will theorists deny that infants can hold rights, so Sam’s right cannot have been infringed; neither can Sam hold the right to the compensation. Thus, a partial answer to questions 1 and 3 is ‘not Sam’. There are now numerous routes the hard will theorist can take to explain the situation. He or she can (a) maintain that Sam has been wronged but deny that wrongs and rights infringements are connected, or (b) argue that the wronging and the rights infringement have been directed at someone else—or no one.

If a will theorist concedes that the injured baby has been wronged by the perpetrator, she must disassociate wronging from rights: one can be wronged without having one’s rights infringed. Such a disassociation is strange, although conceivable. The will theorist must then proceed to provide an account of wronging and how it is distinct from rights.

The will theorist could also stand firm and hold that there can be no wronging without an infringement of a right. This would amount to claiming that the duty not to ill-treat Sam is either a non-directed duty or is a duty held towards the representative of Sam or towards the general public. In either case, the will theorist would now have to concede that the battered baby has not been wronged in any way by the ill treatment. Critics of the will theory could then add this to the list of the unintuitive implications of the will theory.

<sup>54</sup> ‘If common usage sanctions talk of the rights of animals or babies it makes an idle use of the expression “a right,” which will confuse the situation with other different moral situations where the expression “a right” has a specific force and cannot be replaced by the other moral expressions which I have mentioned.’ Hart, ‘Are There Any Natural Rights?’ (n 19) 181.

<sup>55</sup> Hart, ‘Are There Any Natural Rights?’ (n 19) 181.

<sup>56</sup> Carl Wellman, among others, insists that infants cannot hold rights, even if he admits to having “suffered a period of intellectual and emotional crisis” after realizing this implication of his will theory. Wellman (n 10) 114. Hillel Steiner has also denied consistently that young children could hold rights, as has Nigel Simmonds (regarding moral rights).

Some hard will theorists (such as Steiner) maintain that rights seemingly held by children and mentally disabled people are in fact held by their legal representatives or officials. Such a view has numerous problems when applied to the scenario at hand. Let us assume that Sam is represented by a parent. Hard will theorists should explain why ill-treating Sam entails wronging Sam's parent and infringing the parent's rights. I can think of only one potential explanation: Sam is the property of his parent. In addition to its repugnancy, this explanation is also unable to make sense of the relevant legal doctrines. For instance, the compensation is normally treated as separate from the property of the parent. In civilian jurisdictions, the child holds the title to the money, which cannot be used to cover the debts of the parent. In common-law countries, a trust would likely be set up for the child. In either case, the parent (or some other guardian) will likely be able to control the money, although he or she will be under the fiduciary duty to use the money in accordance with the child's best interests.

The option remaining for the hard will theorist would be to understand the duty not to abuse Sam as a non-directional duty, borne towards no one. This approach would be in line with Hart's early thinking on rights, but it is unable to explain and justify the duty to compensate. There are two issues. First, tort law is generally built on the ideas of harm (caused by wronging) and rights violation.<sup>57</sup> These ideas both justify and render intelligible the main features of tort law.<sup>58</sup> Why should anyone compensate anyone else, if no one has been wronged and no one's rights have been violated? The second issue has to do with the direction of the compensatory duty. That a compensatory duty could be borne towards no one in particular is strange to the point of being unintelligible. What does it mean to have an undirected duty to pay £5000?<sup>59</sup> The compensatory duty could also be borne towards the general public (the state, municipality or such) or some other private party (the child's representative). It is, however, peculiar to maintain that the duty not to ill-treat children is not held towards anyone but that a dereliction of the duty would nevertheless result in a duty to compensate someone. Compensatory private-law duties should be held towards the same party as their accompanying primary duties.

To sum up, understanding rights in terms of the hard will theory results in very unsatisfactory conclusions as regards civil liability. Hard will theorists must (1) reject the intuitive and widely accepted connection between rights, wronging and compensation, (2) maintain that beating a child actually involves

<sup>57</sup> See eg s 1.1 in G Coleman, J Herschovitz and S Mendlow, 'Theories of the Common Law of Torts' in *Stanford Encyclopedia of Philosophy* (2015) <<https://plato.stanford.edu/archives/win2015/entries/tort-theories/>> accessed 15 November 2017.

<sup>58</sup> A utilitarian might of course hold that the *justification* of tort law lies primarily in considerations other than wronging and rights violation. They could regardless accept that these concepts are useful in *explaining* tort law doctrine.

<sup>59</sup> Gilly's duty to pay £5000 to a charity of her choosing could perhaps be described as undirected. Such a duty could arise as result of a settlement, but not as a matter of tort law.

wronging someone else and that the resulting duty to compensate is borne towards that party as well or (3) claim that both the duty not to maltreat children and the compensatory duty are borne towards no one, which is unintelligible.

#### D. *Test Case and Soft Will Theory*

Soft will theorists generally do allow for children's rights. How exactly they accommodate such rights varies. Here, I will only address Hart's version. Hart—who was depicted above as a hard will theorist—later became a soft will theorist, at least as far as the legal rights of children are concerned. In *Essays on Bentham*, he wrote:

Where infants or other persons not *sui juris* have rights, such powers and the correlative obligations are exercised on their behalf by appointed representatives and their exercise may be subject to approval by a court. But since (a) what such representatives can and cannot do by way of exercise of such power is determined by what those whom they represent could have done if *sui juris* and (b) when the latter become *sui juris* they can exercise these powers without any transfer or fresh assignment; the powers are regarded as belonging throughout to them and not to their representatives, though they are only exercisable by the latter during the period of disability.<sup>60</sup>

This approach to children's rights is quite influential, and has since been endorsed by, for instance, Nigel Simmonds.<sup>61</sup> However, Hart's treatment is very brief and leaves undetermined exactly whom he intends to include among potential right holders in this extension of the will theory. Phrases such as 'when the latter become *sui juris*' and 'period of disability' suggest that Hart is mainly thinking of cases where an individual is *alieni iuris* for a period of time before becoming *sui iuris* (children of sound mind, individuals with temporary mental disorders and so on). Let us call this alternative WT1. This interpretation would exclude individuals who can never attain the requisite mental status to exercise their rights, such as severely mentally disabled individuals. As regards our test case of civil compensation, WT1 would now have exactly the same problems as hard will theories if we replaced children with severely mentally disabled individuals.

WT1 is likely the correct interpretation, though it is possible that Hart intended permanently mentally disabled individuals to be included among right holders, even if his criterion (b) is inapplicable to these individuals. This version of the will theory—let us call it WT2—is not susceptible to the criticism above. It does, however, depart considerably from the initial premises of the will theory; one might even ask if we are talking about a will theory at all

<sup>60</sup> HLA Hart, *Essays on Bentham. Jurisprudence and Political Theory* (Clarendon Press 1982) 184–5.

<sup>61</sup> NE Simmonds, 'Rights at the Cutting Edge' in MH Kramer, NE Simmonds and H Steiner, *A Debate over Rights. Philosophical Enquiries* (OUP 1998) 226–7. Simmonds only accepts that children can hold legal rights.

anymore. After all, WT2 ascribes rights to beings that do not—and can never—possess the relevant kind of will. For instance, if we adopt WT2, it is rather difficult to see why non-human animals could not also hold legal rights, given that the appointed representative clearly cannot represent the *will* of the principal, only his, her or its *interests*. The representative is thus, roughly put, a trustee rather than an agent of the principal.<sup>62</sup> Consider the fact that in some US states, pets can be the beneficiaries of trusts.<sup>63</sup> It follows quite straightforwardly that such pets hold WT2 rights: they hold an equitable title to property, and the relevant ‘powers and the correlative obligations are exercised on their behalf by appointed representatives’, to use Hart’s choice of words. I do not find this ascription of rights objectionable at all, but animal rights do not fit well with the basic tenets of the will theory.

### E. *Summing Up*

Most versions of the will theory do not manage to explain why the wrongful harming of children and severely mentally disabled people can result in compensatory duties. The interest theory, on the other hand, offers a straightforward and intelligible explication of this feature of tort law.

The interest theory can also explain the common-law institution of nominal damages. According to this practice, courts award a symbolic sum—typically £1 or so—in recognition that the plaintiff has been wronged without having suffered a compensable loss. Awarding nominal damages can typically result from two types of circumstances, both of which the interest theory can readily explain. The defendant can either (1) have violated some interest of the plaintiff—an interest protected through rights—that is not economically quantifiable or (2) have failed in his duty in a way that is typically detrimental for the plaintiff but has in this particular case not resulted in any detriment. In both cases, the plaintiff’s right has been transgressed even though he or she has not been harmed.

### *Conclusion*

A simpler formulation of Kramer’s interest theory has been offered here. This formulation explains why the infringement of rights, wrongdoing 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. To go back to Van Duffel’s adequacy constraints, the offered

<sup>62</sup> The distinction between these two types of representation has been highlighted by Carl Wellman. Wellman (n 10) 114–15.

<sup>63</sup> The *New York Times* wrote in 2005 that 27 states allowed pet trusts. M Mott, ‘And to My Dog, I Leave a \$10,000 Trust Fund’ *New York Times* (22 May 2005) <<http://nyti.ms/1KUUmJ9T>> accessed 15 June 2016.

account of the interest theory manages to bring to the fore how rights ‘function in moral and legal thought, and what these rights do for their possessors’.

The interest theory is also not vulnerable to Hart’s and Kelsen’s argument that interest-theory rights ‘make idle use of the expression “a right”’.<sup>64</sup> Rights are the correlatives of directed duties, but the nature of this correlativity is intricate and connected to a number of important legal concepts and institutions, such as tort law. Interest-theory rights *could*, of course, be described by using the related concepts—such as duties and wrongdoing—but this would be cumbersome. In any case, the will theory is no less exposed to the same argument, as will-theory rights can be described using concepts such as power and competence.

<sup>64</sup> Hart, ‘Are There Any Natural Rights?’ (n 19) 181.