Interest Theory without Trimmings: Kramer's Account of Rights

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ABSTRACT
From 1998 to the present, Matthew Kramer has developed a highly sophisticated and influential analysis and theory of rights. In this article, I reconstruct that account, identify its main strengths and weaknesses, and attempt to offer a partial alternative.

KEYWORDS
Matthew Kramer, right-holding, interest theory, theories of rights, legal philosophy

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1. *Introduction*

In this paper, I critically analyse the account of rights developed by Matthew H. Kramer (from now on I will refer to him as "K"). My aims are as follows. First of all, I reconstruct K's theory and analysis of rights; this is a task worth undertaking in itself because, from a metatheoretical point of view, they are and have been deeply influential for several contemporary approaches to rights, and because, from a theoretical point of view, they have a number of merits.

On top of it, and more interestingly, I evaluate the results that K arrives at, and I criticise several elements of the approach and of the solutions of K's account of rights. From now on I can advance that some of the main merits of his explanation consist in his analysis of the structure and the combinatoriality of rights (the "structural" or "formal" character of his analysis, as I will explain shortly) and some of the elements of his theory understood as a tool for the identification of right-holders. For his part, some of the main shortcomings of his explanation lie precisely in this limitation (and other limitations) and in the various argumentative moves that K is forced to make in order to maintain his restrictive position coherently.

Thus, the order I observe in this paper is as follows: first, after a brief characterisation of K's theory, I unpack his definition of "holding a right", both in its main theoretical elements and in its metatheoretical presuppositions. Indeed, some of the main shortcomings of K's proposal are to be found in the very metatheoretical commitments it assumes and those it (pretends) not to assume.

Second, I analyse the lynchpin of Kramerian theory of right-holding, the tool for identifying right-holders: the so-called "Bentham's test". Among other things, this test is excessively and partly unnecessarily complex, so I present alternative right-holder identification guidelines for the sake of theoretical simplicity.

Thirdly, I study the meanings of "right" covered by Kramerian theory. It restricts itself to the legal system, to legal rights at a stage of enactment where they are already "defined", and, among the various basic (structural) meanings of "right", it focuses on Hohfeldian claims. These decisions are, in part, unduly restrictive and, indeed, Kramerian stipulations concerning the "*genuine* type" of "right", studied by a "*genuinely* legal philosophical" approach, namely defined legal claims, need to be criticised.

As I will show, K leaves various aspects of rights unexplained and argues, sometimes illegitimately, that it is metatheoretical and methodological reasons that impose this abstinence.

Precisely, in the fourth place, I critically address some metatheoretical and methodological questions about justification of rights and about the possible and desirable purposes of a theory of rights: I examine which tasks are covered by K's theory and which tasks should be covered

* This is a revised and a slightly shortened version of the Chapter VII of FERNÁNDEZ NÚÑEZ 2023.

by a theory of rights, as well as the actual and possible evaluative-justificatory commitments of such theories. As we will begin to see below, despite K's many precautions against making excessive theoretical commitments, his theory does make them, and it is worth unravelling them and carefully assessing their degree of solidity.

2. *Characterization of K's account of rights*

2.1. *A brief classification of K's explanation*

In order to understand the main points of this paper, let us briefly explain the meaning and the basis of the previous considerations. Let us therefore outline the metatheoretical considerations that are useful for classifying K's theory and then let us characterise the theory itself.

In fact, what do I mean by "structural" or "formal" character of K's theory? Under different names and sometimes in an unclear or somewhat criticisable manner, in the philosophical literature about rights is commonplace to distinguish the analyses, mainly "descriptive" or "reconstructive", of the analytic-conceptual elements of rights, of the formal traits of rights (e.g., which structure can have a normative position designed as "right" and which relation can entertain such a normative position with other relevant normative notions), from the investigations, frequently "evaluative" or "justificatory", about the *raison d'être* of rights, about the material traits of rights.

The most notorious example of a theory of the first kind is Hohfeld's: Hohfeld proposes a conceptual regimentation of the vocabulary of rights and he distinguishes basic eight normative positions corresponding to what are usually and generically referred to as "rights" and "obligations". The basis for such a distinction is structural, "syntactical" so to say: it depends on the different logical form of the normative position concerned, and this form can also be defined in virtue of the relations that the normative position entertains with other normative positions (precisely, its correlative normative position and its contradictory normative position)[1]. So, in a nutshell, Hohfeld offers an inventory of the atomic normative positions according to their logical form and he offers rules for their composition and derivation. On his side, we can find as notorious example of theories of the second kind the so-called "dynamic" conception of rights, formulated by authors such as Raz, MacCormick, Marmor and Waldron. These authors are concerned with the justificatory dimensions of rights and their functions as a source of material conditions for the validity of new legal norms and with the capacity of rights of justifying the establishment of new normative notions[2]. It should be noted that K's theory, beginning in 1998 and continuing to the present day[3], forms a kind of critical and historiographical bridge, embracing the reaction to the dynamic conception of the last three decades of the twentieth century and the reaction by and to the new proposals, alternative to the classical oppositions, of the twenty-first century (mainly Wenar and Sreenivasan). The opposition with the dynamic conception will play an important role in this work.

As I have said, if the above distinction between two kinds of approaches to rights can and should be traced (with some qualifications, as we will see), K's is mainly a theory of the first kind and hardly a theory of the second kind –in fact, as we will see immediately, it is, to a

[1] As we shall see, the deductive properties of correlativity and contradictoriness are relevant for the identification of right-holders.

[2] The opposition between these two theoretical enterprises so understood is obvious: the question of the justificatory dimension of rights is quite different from the question of the structural dimension of rights; the question of the capacity of rights to serve as inconclusive but reasonable grounds for other normative concepts is quite different from the question of the deductive derivation of other normative concepts from rights.

[3] In fact, in 2022, K announced an imminent book (Kramer 2022, 363 f.).

great extent, a vindication of Hohfeld's account of rights from the attempt of refutation by the defendants of the dynamic conception of rights–, and its merits are patent if it is understood as a theory of the first kind. At any rate, we will also see that this distinction should not be taken as too clear-cut and, in particular, that we can distinguish different ways of understanding the question of the justification of rights. These nuances will become important, also because many of the shortcomings of K's theory, in fact, have to do with the (explicit) lack of recognition of the second dimension of a theory of rights (together with the desirability of introducing nuances in this second dimension). But we will see such shortcomings in due course; before is important to characterise K's theory of rights.

The Kramerian model of rights can be characterised as the careful combination of a structural model and a functional model of rights. More precisely, the core of such a model can be found in the intersection of two premises: [1] the Hohfeldian thesis of correlativity of rights and duties and [2] the defining clause subscribed to by any version of the Interest theory.

[1] Correlativity is a basic thesis of the Hohfeldian theoretical proposal: to say that one normative position is correlative with another means that there is a relation of biunivocal correspondence (of a logical and existential nature) between the two normative positions. That *T* and *T'* are correlative means that, necessarily, *T* takes place between Giulia and Marta with respect to φ if and only if *T'* takes place between Marta and Giulia with respect to φ. According to the Hohfeldian table, the following four pairs of basic normative positions are correlated: claims and duties, liberties and no-rights, powers and liabilities, immunities and disabilities[4]. The first basic normative positions of each pair are often and generically referred to as "rights", the latter as "duties"[5].

A basic implication of correlativity, central to the understanding of Hohfeldian biunivocal correspondence, and especially relevant to the work of identifying the law, focuses on the deontic consequences of entitlements. By assuming that «the right to φ of Fatima with respect to Hanan" is equivalent to «the duty to φ of Hanan with respect to Fatima», then one subscribes that the norm N_1 «Fatima has a right to φ with respect to Hanan" is equivalent to the norm N_2 «Hanan has a duty to φ with respect to Fatima". Therefore, if an authority produces N_1, it has, by equivalence, produced N_2. Assuming RAxy ↔ OAyx, and assuming RAxy, it is concluded by *modus ponendo ponens* that OAyx.

[2] The defining clause subscribed by any version of the Interest theory can be stated as follows: «The function of a right is to protect (secure or promote) an interest of the right holder». It can also be stated, as a qualification, that «that by virtue of which an individual has a right is the fact that an aspect of his well-being is protected by the law». This is a jurisprudential qualification about the normative effects and relevance of certain legal institutions, rather than simply a qualification of legal science oriented towards the identification of law. K uses this qualification, in the first sense (i.e. the effects and relevance of institutions), with a view to carrying out the qualification in the second sense (i.e. the identification of law). Although we will look at K's more idiosyncratic definitions below, this definition also fits his theory. Indeed, even with caveats, K posits a theory where the question of «who has a right» (as well as, of course, the answer to that question) is equivalent to the question of «who benefits from the correlative obligation»[6].

[4] I am not going to detail the famous Hohfeldian table (cf. HOHFELD 2010; cf. KRAMER 1998, 7-22; cf. PINO 2017, 82 f.; cf. GUASTINI 2011, 92-98; cf. GUASTINI 2006, 38-41; cf. LINDAHL 1977, 25-27). I will refer to its categories, with the designations I have just used, subscribing to (most of) the Hohfeldian teachings.

[5] K speaks of "entitlements" and "correlatives" respectively.

[6] As I will show soon, K speaks not only of "benefit", but also, more recently, of "normative protection" and of "inherent and deontic protection". Of course, this introduces some change in the configuration of K's theory as a usual version of the Interest theory.

The Kramerian theory of rights constitutes a fragment of a theory of the application of law whose function is to identify the normative subject or primary addressee of rights-attributing norms (as we will see, especially imperative norms) in cases of epistemic insufficiency. In a nutshell, the theory can be summarised as follows: «Specifically, what the Interest Theory does is to articulate the basis for the directionality of any legal duty. In other words, it recounts the general considerations that determine to whom any legal duty is owed» (KRAMER 2010, 31 f.). The fundamental idea behind K's theory, as set out in this quote, is relatively simple: given that all duties are directional, that is, they are imposed vis-à-vis someone, and that what determines against whom they are imposed is the benefit they bring to that individual, in order to know who is a right-holder one has to ask who benefits from the duty correlative to the right we are inquiring about.

The identification of the right-holder rests then on [A] the content of the relation (does a certain normative position have the same content as the duty we already know?), on [B] the correlativity thesis (is that normative position correlative to the duty we already know?) and on [C] the defining clause of the interest theory (who benefits from the duty we already know?). These are important lessons that can be drawn from K's theory and analysis and with which a tool for identifying right-holders can be constructed (which I elaborate and propose in the second section of this article). K presents another tool, more sophisticated than the one I propose, but more complex and involving more significant problems, the so-called "Bentham's test". As we shall see, the greater epistemic ease of identifying duties, the idea of knotting a direct benefit with the directionality of duties as a basis for identifying rights-holders and the mechanisms with which to do so are Hartian teachings addressed to interest theorists that K incorporates into his proposal. So, the two elements referred to above ([1] the contribution of the Hohfeldian table and the correlativity thesis and [2] the defining clause of the Interest theory) are channelled by [3] the Hartian technical-legal contribution. With negative effects.

2.2. *Key to K's definition of "to hold a right"*

In this first section, starting from a definition of K's Interest theory, I examine the most salient properties of the theory, while critically breaking down the *definiens*. The following is K's most recent stipulation of "the holding of a right by a subject *X*"[7]:

> «Necessary and sufficient for the holding of a legal claim-right by *X* is 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* (namely, a human individual or a collectivity or a nonhuman animal)» (KRAMER 2022, 372).

A slight change from his penultimate stipulation is that K now refers to "deontic and inherent protection", where before he spoke of "normative protection", and now he refers to "legal claims", where before he spoke of "legal rights"[8]. These are by no means simple notational changes; they are significant explicit moves toward duties and claims, on which there will be occasion to dwell; for the moment, I will refer to "legal rights", since I understand that most of K's theory is directly applicable to any basic meaning of "right", and not only to claims.

First of all, in order to understand K's proposed definition, it is worth noting that it responds to a metatheoretical view about definitions in general and about the definitions of "holding a right" that a theory such as K's should offer in particular, which is far from peaceful. Until recently, K only

[7] Cf. KRAMER 2021, 1.
[8] KRAMER 2019, 3.

formulated his definition in terms of necessary conditions[9]. The reason for this was his conviction that providing necessary and sufficient conditions of having a right implied excessive jurisprudential commitments, a theory of the "nature" of law and a theory of legal interpretation[10]. He has recently overcome his earlier reservations, as he considers that such excessive commitments are made only by a theory of rights and considers that his is only a theory of right-holding, and thus a fragment of a theory of rights that need not adhere to such commitments[11].

Indeed, one may object to K's decision in two directions. First, there are reasons to doubt that a theory of rights must take on so many commitments –or others, such as the conditions of existence of rights– in order to be able to call itself a theory of rights[12]. This wrongly presupposes that such a theory must pronounce on a certain set of questions and that it must treat them exhaustively. On the face of it, what is questionable is to provide a definition of "holding a right" in terms of necessary and sufficient conditions, and not so much because of what a theory of rights must pronounce on or be silent about, but because it is too demanding and unpromising an aspiration to provide an exhaustive set of conditions of use for any occurrence of the term "rights". The problem, as I understand it, is not that of any theory of rights that claims to pronounce on general questions, but that of a theory that explains rights on the basis of definitionism[13]. Indeed, identifying the necessary and sufficient defining conditions of "right" is a very demanding task, unduly arduous for an institutional concept like "right"[14].

Second, there is reason to doubt that his strategy of considering his theory as a "theory of right-holding" is apt to avoid a number of compromises that K seeks to avoid: to the not negligible extent that such a theory answers questions typical of theories of rights, in many versions (what counts as a right? what counts as a benefit, protected by the right?), it is a theory of rights, just like the others, except for the name K has chosen to give it (or to emphasise). I will return to the important problem of what K means and what is to be understood by a "theory of rights".

Incidentally, and in order to settle the question of the status of the conditions that make up the Kramerian definition, it is worth noting that another condition for being able to speak of "rights" consists in the existence of norms: legal rights have their source in legal norms[15].

To this set of necessary conditions is added, as we shall see later, another condition, relating to the holding of rights. A proposal such as K's would surely distinguish levels of abstraction and place the enactment of a norm and the membership of a subject in the set of holders at a different level, as a sort of more abstract precondition. So, the concurrence of these necessary and, if my reconstruction is exhaustive, jointly sufficient conditions, is not problematic; not, at least, internally to the Kramerian proposal, regardless of the greater or lesser viability of definitionism.

9 See KRAMER 2016, 1.

10 See KRAMER 2016, 9.

11 From a personal conversation with K 2020.

12 Although, as I say, in K's case, he already has a pre-constituted view of what content should be present in any theory of rights, which is highly debatable.

13 For definitionism and its shortcomings, see PRINZ 2002, 32-49.

14 Setting such demanding criteria produces undesirable consequences, namely the undue imputation of combinatorial vagueness to multiple linguistic uses of the expression "rights". Some problems of definitionism are analogous to the problems of providing a lexicographical definition of the type "a right is X", well known to the analytical jurisprudence of rights, since Hume and Bentham. In fact, Hart's position on this is very significant. In several famous passages, Hart also defends definitionism as a conceptual model of rights (e.g., see HART 1955, 180; see HART 1982, 187 f.). In others, however, he does not seem so strict (see HART 1982, 192 ff.). Most significantly, his famous definition, in *The Concept of Law*, of "legal order" as a union of primary and secondary norms departs from definitionism.

15 KRAMER 2008, 418; KRAMER 2010, 33. In some passages, K identifies the existence of a "law", a norm or decision that confers a specific type of right on a given individual, as the second necessary condition for the possession of rights according to the Interest theory (the inherent, deontic protection of some aspect which is beneficial to the right-holder) and the third necessary condition according to the Will theory (competence, i.e. the factual capacity to deliberate and choose, and authorisation, i.e. the legal capacity to demand and waive the fulfilment of an obligation).

As should be obvious by now, the configuration of K's Interest theory is eminently legal technical and has the manifest pretension of precluding any reference (beyond those that K considers strictly unavoidable)[16] to the justification of rights. The fundamental purpose of this theory is to serve as a tool for the identification of the holder of a right through knowledge of the correlative duty. In K's view, this allows the researcher to refrain from alluding to the justification of duty[17]. Moreover, in general, the justification of a certain legal relationship can be right-based or duty-based and in either case the defining clause of the Interest theory could be applicable[18]. The typical scenario of the Kramerian identification tool is that of a subject duty-bounded to do something: given that we know the content of a duty and given the different non-normative facts that determine the fulfilment of that duty, we apply the defining clause of the Interest theory to them, which allows us to determine who holds the right[19]. In other words, we can know in the first place the "existence", the content and the subject bound by a particular (defined) duty without knowing to whom that duty is owed; on this data, K's Interest theory provides the additional information that makes it possible to identify the holder of the correlative right.

If the argumentation of the dynamic conception of rights has led, from the 1970s onwards, to the tendency to see the Interest theory as closely linked to the dynamic conception of rights – for it is precisely the "interest" that, for the dynamic conception, denotes the justificatory dimension of rights–, K's Interest theory is the most notable exception to this linkage, since its distinctive aspects are antithetical to those defended by the dynamic conception of rights, traditionally hegemonic among the defenders of the Interest theory[20]. Interestingly, although sometimes K circumscribes a definition almost identical to that I have quoted at the beginning of the section to his own theory[21], in previous works has argued that such a definition was suitable to capture other (legal philosophical) Interest theories[22]. However, some of the most important Interest theories (namely, the advocates fo the dynamic conception) do not coincide with that definition. K would certainly retort that these theories are not genuine legal philosophical theories but belong to the field of political philosophy. This is in fact K's attempted retort to Raz[23]. However, such a retort would entail begging the question. As I show in this paper, the decision to focus primarily on the identification of right-holders and to configure the Interest theory as a legal-theoretical tool is a thematic choice, which can be seen as restrictive. On these metatheoretical disagreements I will dwell at the end of my essay. Not only should K devote more effort to proving the significance of what is clearly no more than a thematic choice, but he cannot presuppose that explanations such as his are the only valid legal

[16] Such references constitute what K calls the "thin evaluative stance" of the Interest theory, a rather cryptic name inspired by the Rawlsian "thin theory of the good" (KRAMER 1998, 91). In the final section of this paper, I will address this issue.

[17] See KRAMER 2016, 2.

[18] As can be seen, the two theses I have just referred to are opposed to the theses of the aforementioned "dynamic conception" of rights. For the dynamic conception of rights, rights have a conceptual priority over other normative position, precisely because rights are not (at least not primarily) identifiable with a clearly determined normative position, but with the very reason for the attribution of normative positions, which will be successively determined. Classical reconstructions and critical appraisals of the "dynamic conception" of rights include KRAMER 1998, 22 ss; SIMMONDS 1998, 149 ss; CELANO 2013 [2001], 65 ff; contemporary reconstructions and critical appraisals include POGGI, 2013, 78-81; PINO 2017, 90 f; and, in more detail, FERNÁNDEZ NÚÑEZ 2023, 202-246.

[19] Cf. KRAMER 2010, 32.

[20] The echo of the founding work KRAMER 1998 has been remarkable. And one can speculate that it has been to the extent that notable analytical jurisprudence defences of the dynamic conception have been fewer and fewer since the 2000s and, especially, Raz and MacCormick have virtually ceased to write about rights.

[21] See KRAMER 2016, 1.

[22] In fact, K has claimed that his definition can account for any version of the Interest theory formulated in a legal philosophical key (KRAMER 2010, 32), for most versions (KRAMER 2013, 246), or for the most capable versions (KRAMER 2008: 417).

[23] KRAMER 2010, 31.

philosophical account of rights. This is why K can be accused of *petitio principi*: K takes for granted what he should prove, namely that the tasks he undertakes are theoretically valuable and do not constitute an undue restriction, because they are indeed the only valuable tasks. For even if it were legitimate for K to attend to certain aspects that a theory of the function of rights can deal with and neglect others, and his preference reflects full congruence with his metatheoretical and methodological presuppositions, he should not label theories that attend to the aspects that K neglects as "non legal philosophical". In any case, as a matter of principle, and leaving aside the possible criticisms I might make, the lack of agreement between the dynamic Interest theorists and K's definition is due to at least two reasons. Firstly, because the latter enumerates the type of entities that can be right-holders and the resulting list can be considered under- or overinclusive[24]. Secondly, and more importantly, because of its "static" and "retrospective" way of expressing the relationship between rights and duties. Indeed, K's treatment of rights is characterised by an approach that [1] is entirely in line with the correlativity thesis as conceived by Hohfeld; [2] is eminently confined to legal positions; [3] concentrates on legal positions when they have been determined, i.e. when their components are sufficiently determined, when they have taken the form of "defined entitlements".

The theoretical disagreements between K and the advocates of the dynamic conception are accompanied by metatheoretical and methodological disagreements[25]. However, many of the criticisms made by the advocates of the dynamic conception are, taken per se, not accurate[26].

The point is that, according to K, in order to establish the content of rights (or rather, more precisely and modestly, to identify the holder of a right) we are not forced to pursue an enquiry into the point of rights or the reason by virtue of which duties have been imposed. We are not obliged to inquire into their justification in order to understand their semantics. And, since conceptual and justificatory issues are distinct spheres, it is unfounded to base something like the conceptual priority of rights over duties on justificatory grounds[27].

[24] Cf. KRAMER 2001, 29 ff.

[25] Linked to the delimitation of the object is also the understanding of the tools, the type of conceptual analysis that should be used to account for rights. Paraphrasing my earlier definition of the "dynamic conception of rights", two of the main theses advocated by the dynamic conception of rights can be described as follows. [4] Rights and duties are asymmetrical; since rights have more semantic content than duties, it is possible to know the content of duties through rights, but not vice versa (see RAZ 1986, 184-186; see MARMOR 1997, 3). [5] It is not possible to understand the conceptual dimension of rights (i.e. something like the Hohfeldian structure and combinatorics) without taking into account their justificatory dimension. The second thesis has a significant bearing on the first, since "semantic content" means "conceptual and justificatory content", as for both Raz and MacCormick the justificatory priority determines the conceptual priority of rights over duties.

[26] Regarded from the perspective of [1], we can consider both [4] and [5] unsound: [1] the correlativity thesis is an illuminating tool for multiple conceptual analyses of rights; [4] and [5] justification (the justificatory priority) need not affect the semantics (the conceptual priority and content) of institutional concepts. To argue otherwise would be to adhere to a institutionalist conceptual model à la Dworkin and not be able to distinguish an (eminently) descriptive second-level discourse from an (eminently) evaluative first-level discourse. More interesting, however, are [2] and [3]: it may be considered (il)legitimate to focus theoretical attention exclusively on legal rights and to focus exclusively on the moment when they have been established. What is problematic is not only that this leaves moral rights unexplained, but that it leaves unexplained any justification and any *de lege ferenda* elucidation of legal rights. And not only in discourses of justification, but also in discourses about justification. And this comes to bear on a more open-minded reading of [5], for an adequate understanding of rights (rectius, a more comprehensive theory of what it means to "have a right") also involves dealing with these levels that Kramerian theory leaves largely unattended. What it means "to hold a right" is a question that mobilises the question of "what is a right for". K answers both questions in a somewhat oblique and fragmentary way, without addressing many of these questions; and when he does address some of them, he does so covertly. The freedom of manoeuvre of a positivist theorist to tackle these problems also seems to be a determining element of K's decisions, but K's precautions are too cautious. I elaborate on these criticisms at the end of this article.

[27] Cf. KRAMER 2005, 188.

It is clear, then, that there is, so to speak, life in Interest theory beyond the dynamic conception of rights. Thus, for K., despite the insistence of many legal philosophers (notoriously, MacCormick, Raz, Waldron and Marmor), whoever holds the Interest theory is not obliged to claim that inquiring into the underlying justification, purpose or *ratio* of a norm is crucial to determine whether a norm confers a right on someone[28]. Interests are not understood as the basis, the raison d'être of the attribution of rights, but are employed by K as the key to determine what normative positions of advantage concur in a case and who is the holder of such normative positions of advantage[29]. What is relevant is to identify the details of the right, once it has been established, or at least once we, as observers of the law, are in a position to know whether it has been established or not. It is the effects of norms, not their ratio, that K considers relevant. In other words, it is not relevant for K [1] why there has been a certain right (or has not been) or [2] why there should be one (or should not be).

But there is also more room for the explanation of justification than K explicitly acknowledges, and here it is worth making an important distinction that K does not contemplate. For if [2] consists of a prescription of what ought to happen in a certain legal order, of the rights that ought to be conferred and the reasons why they ought to be conferred (a theory of justification, a substantive doctrine in a first-level discourse), on the other hand, [1] can consist of a description of something that happens in a certain legal order, of the rights that are conferred and the reasons why they are conferred (a theory about justification in a second-level discourse). It can be concluded, using Kramerian metatheoretical categories, that [2] pertains to political philosophy; [1] to legal philosophy. For, understood in certain senses, the justification of norms is also relevant for the legal philosopher, and there are uncommitted ways of inquiring into this justification. Thus, it is not true that a dichotomy must be drawn between the ratio and the effects of norms and that the positivist legal philosopher must only pay attention to the latter: one way of reconstructing what some positivist legal philosophers who defend the Interest theory do and indeed a sensible application of the Interest theory consists in explaining how the effects of norms are valued by the normative authorities, by their addressees or by legal operators[30].

Between an approach such as K's, focusing on the effects of norms, and a teleological perspective, about the *ratio* of the norms, there need not be radical differences. And it does not have to because we can understand, for example, the point of the rights-conferring norms as the will of the normative authority to confer some benefits, and in this reading, there is no significant difference between effects and *ratio*, since in both there is a causal incidence of the norms and their valuation by the authority that dictates them. In a somewhat extreme scheme, it would be a sort of "descriptive sociology", which accounts for the evaluations of the normative authorities and the normative addressees. In a more objective reading, which I do not suscribe to, the purpose of the norm is understood as an objectified notion[31].

Leaving aside the possibility that I have suggested of matching approaches, K focuses on the effects of the norm, applying correlativity thesis and the defining clause of the Interest theory to the normative scenario to explain it. Thus, *X* being a person, collectivity or non-human

[28] KRAMER, STEINER 2007, 289; cf. KRAMER 2013, 261; cf. KRAMER 2016, 16.

[29] See KRAMER 2016, 50.

[30] I have developed the basis for a functionalist approach to rights in FERNÁNDEZ NÚÑEZ 2023, 448-457.

[31] And according to the latter understanding, there is no clear separation between the second-level discourse of the detached observer and the first-level discourse of the enacting authority. Authors such as MacCormick and Raz think in this second reading when they propose to investigate the *ratio* of norms and also K when he opposes this research to the study of normative effects. K himself has reasons to consider his approach –his problematic approach and most of its development– restrictive, because between, on the one hand, a (at least partly and allegedly) legal-technical theory, focusing on the identification of defined right-holders, and, on the other hand, more markedly philosophical-political approaches, the legal philosopher is left with a wide range of tasks in which to employ the Interest theory. I will return to these tasks at the end of my essay.

animal, if the terms of a norm or decision imposing duties are such that the satisfaction of them necessarily (or "inherently", as K formulates in his later work) entails the protection of some aspect of *X*'s situation that is generally beneficial to a class of individuals such as the one to which he belongs, then *X* possesses rights under that norm or decision[32].

The Cambridge professor is rigorous in setting out from the outset, as a presupposition for a cautious analysis, the breakdown of the Hohfeldian teachings, on the one hand, and the application of the Interest theory, on the other, in the following lexical and categorical distinction: with "entitlement", K designates any of the four basic normative positions which make up the Hohfeldian table and which are generically called "rights" by ordinary speakers and jurists –the same applies to the Hohfeldian normative positions generically called "obligations", which are called by K "correlatives"– but the main distinction of the notion of "entitlement" from that of "right" (*stricto sensu*) lies in the fact that the entitlements have not yet passed the filter of the defining clause of the Interest theory. That is to say, we can conclude that a certain normative position constitutes a certain entitlement for strictly structural reasons –basically, by virtue of what configuration it presents and what position it has as a correlative or as a contradictory– without having to know or pronounce on its beneficial status. Thus, we can ascertain that there is a certain duty of an individual *X* to φ, with which there must be a correlative claim with identical propositional content attributed to another person (a predicate) *Y*. Only if we apply the defining clause of the Interest theory to the available information will we be able to determine whether (the subject which is an instance of the predicate) *Y* is the holder of that claim (for now, an entitlement) and, in a further step, whether he benefits from it, i.e. whether he is the holder of a right. I believe that being able to distinguish (eminently) *structural* analyses from (eminently) *functional* analyses is a remarkable utility of the notion of "entitlement", with the stipulative definition that K presupposes. This distinction is, in fact, a sign of K's programme of vindication of Hohfeld and his formal teachings in the face of dynamic confusions aimed at deliberately and unconsciously covering up or minimising any consideration of rights that is not formulated in a evaluative-justificatory key. The use of this kind of technical notion, aimed at clarification, makes it possible to deal more fully with eminently structural problems, where what is at issue is whether there is a entitlement and its correlative, and where the appeal to "rights" could be somewhat misleading[33]. All the more so since the expression "rights" has a positive evaluative illocutionary force. By way of example, this consideration sheds light on K's treatment of the case of a Nazi law that confers a supposed "right" on Jews not to receive unprovoked physical attacks during the obligation to clean latrines. In such a case, K would consider it peaceful to speak of "entitlements", although he considers it inappropriate to speak of "rights", since such a normative position, qualifiable, for structural reasons, as a "entitlement", does not entail the benefits that are generally associated with rights for their holders[34].

Moreover, the use of this kind of vox media has, in K's analysis, another virtue: it allows him to clearly express that not all normative positions that are, according to structural patterns, entitlements are, according to functional patterns, rights. For example, as we will have the opportunity to see, and as his most recent definition already shows, K tends to link the

[32] KRAMER, STEINER 2007, 289 f. Such is the development of the definition of Interest theory, explicitly formulated as a tool for identifying Hohfeldian claim-holders (the so-called "restricted version" of the Interest theory). It can be extended, however, to the other Hohfeldian meanings of atomic normative positions generically called "rights".

[33] Such is the case of the Scottish law of succession, confusingly analysed by MacCormick (see MACCORMICK 1977) and analysed in an alternative and precise way by K using the Hohfeldian categories and theses (see KRAMER 1998, 28 f.).

[34] See KRAMER 1998, 96 f. Incidentally, contrary to K's contention, I believe that the entitlement in question brings a benefit to its holders, for the Jewish individual is somewhat better off with this title than without it, because he is protected from unprovoked physical attacks, even if this benefit is extremely meagre, precarious and contingent –it is an instrumental right– on the extremely burdensome obligation to clean latrines.

beneficial character with the deontic character, which would aim to leave out of the field of the Interest theory powers and, in general, normative positions attributed by norms of competence (they express the anankastic logical modality). But the latter is still a tendency, since on many occasions, as we shall see, K considers anankastic notions (most frequently, powers) to be advantageous. The problem raised by the vox media itself is precisely what K calls the "thin evaluative stance": that to speak in terms of "rights" is to speak in terms of "benefits" or, in a deeper sense, not problematised by K, by positions that are normatively justified. I examine this problem at the end of this article.

Indeed, the tool, the definition I presented two paragraphs ago can be reformulated to accommodate each of the four entitlements, the four normative positions into which Hohfeld disaggregates the ambiguous term "right" (the "extended version" of the Interest theory, in K's terms). Such an extension can be expressed as follows: if a norm or decision attributes a entitlement to *X*, and if the possession of that entitlement is typically beneficial to someone in *X*'s situation, then *X* is the holder of a right under that norm or decision[35]. Take the performance of responsibilities in the context of an occupation: if a rule confers a power on a judge and if its possession is such that it should be regarded as ordinarily beneficial to someone in the position of judge –that is, if such powers promote the interests of that individual in the circumstances– then the rule is attributive of a right[36]. A further development of these definitions in operational terms and, specifically, in terms of decision procedures for identifying right-holders is the so-called "Bentham's test", which I discuss in the next section[37].

When do these beneficial normative effects occur? K does not consider rights to be always beneficial to their holders, but only typically so. The Cambridge professor claims that a duty of *Y* (or a right of *X*) is a position typically in *X*'s interest. Incidentally, it is worth noting that although in his 2008 article K predicts the protection of the interest at the hands of the right, without any allusion to the correlative duty[38], in subsequent works predicts the protection of the interest at the hands of the correlative duty[39]. This nuance is significant, as it exposes K to the charge of Hartian redundancy levelled at (some) Interest theorists, namely that if rights are understood as the normative situation of benefiting from duties, what can be expressed in terms of rights can also and better be expressed in terms of duties[40]. Indeed, in the following sections I will adduce additional arguments that lead to the accusation against K taking shape.

It is important to characterise the quantifier with which K qualifies the benefit to the duty holder. Duties are typically beneficial, not always. "Typically" here expresses a generalised quantifier, which quantifies for an entire domain of potential holders of a certain category (i.e. humans, collectivities or non-human animals). In rare exceptions, the individual may consider the content of a certain right she holds to be non-beneficial[41].

[35] KRAMER, STEINER 2007, 290.

[36] KRAMER, STEINER 2007, 290. It should be recalled that for K, the issue at stake is the beneficial status of certain entitlements as rights, not the justification for the attribution of such beneficial entitlements (see KRAMER 2016, 13, 15).

[37] A decision procedure is a set of rules that are employed to process certain data, such as inputs, in order to reach a judgement on alternative hypotheses in the decision of a problem. This test is the reformulation of some of Hart's suggestions to the Interest theorist. K considers that at this point Hart has not done a work of criticism and improvement, but of exegesis of Bentham's work (KRAMER 2010, 38), which does not seem to be the case. Of course, that K has called his test "Bentham's" does not help to show that Hart himself presented it as a proposal for redefinition.

[38] KRAMER 2008, 417. The reconstructive nature of the work in question, aimed at capturing a wide range of Interest theories, may have influenced this configuration.

[39] KRAMER 2010, 32; KRAMER 2013, 246; KRAMER 2016, 1.

[40] HART 1982, 181 f.

[41] See KRAMER, STEINER 2007, 292 f.; cf. KRAMER 2016, 11. What happens is that even before embarking on such investigations it is already plausible to predicate the beneficial status of a subjective position attributed by a norm. Indeed, K argues, an interest theorist must distinguish between integral and incidental features of a norm, between intrinsic effects and extrinsic effects, and if a norm has –as far as the first elements of each pair are concerned–

Sometimes it is not so much that the entitlement (or the correlative) is not beneficial, but that, even if it is indeed beneficial, it also integrates some detrimental element. To return to K's definition, an entitlement is a right iff the correlative normative position «inherently and deontically protects some aspect of X's situation which, all things considered, is typically beneficial». If I have already clarified what "typically" means, I must now explain what the qualification "all things considered" means. It is not just that sometimes an entitlement is simply disadvantageous for the right-holder; much more usually, the beneficial element can be combined with a detrimental element. With precision, K recognises different situations in which the advantageous element of the rights can, in one way or another, be intertwined with a disadvantageous one[42]. The first set of scenarios consists on what are traditionally called "mandatory rights"[43]. The second set of scenarios consists on much more controversial rights[44].

Before delving into the configuration of the Kramerian Interest theory as a theory of right-holding, it is worth making an incidental historiographical observation on the identification of rights-holders as an enterprise of the Interest theory. Kramerian theory owes a profound debt to Hartian legal-technical recommendations addressed to Interest theorists. As in the aspirations and theoretical approach –the construction of a tool to guide the jurist in the application of law – K has also sought to observe in detail the various Hartian legal-technical suggestions addressed to Interest theorists[45]. He has followed the instruction to attend to those benefits "necessarily" attributed to individuals, understanding by such benefits those that respond to the intrinsic effects of norms[46]. In this way, the Interest theorist can, among other things, dispense with recourse to the legislator's intention. But, more generally, K has also adhered to Hart's problematic approach which

beneficial effects, then this supports calling a certain legal position a "right" in ordinary parlance (see KRAMER, STEINER, 2007, 292 f). This is a formally rigorous explanation of cases of "disinterestedness". A simpler, only partly overlapping explanation consists in the general and abstract character of legal precepts: such norms grant normative positions to a generic class of individuals, although some particular and concrete individual belonging to that class may have no interest in the content of their right. Once again, it should be pointed out that K rarely makes a judgement about who determines what is considered beneficial for whole classes of subjects, or, in other words, whether the interest that the right protects and promotes is a subjective or an objective interest. As we shall see, his treatment of the question, the few times it is raised, is in favour of objectified approaches.

[42] Bentham had already observed this possibility (cf. FERNÁNDEZ NÚÑEZ 2023, 104-106).

[43] In those scenarios, such as the right to education, what is normally denoted by "rights" is, on the face of it, a molecular normative position composed of two categories of normative positions –i.e. entitlements and correlates or, better, rights and duties– and we have to discern the advantageous effects of the right –in this case, the legal right to receive education– and the disadvantageous effects of the duty accompanying the said right –the legal duty to attend school, in the example–. See KRAMER 2001, 79-81; for a similar resolution of these scenarios, see FERNÁNDEZ NÚÑEZ 2023, 483-485.

[44] In those scenarios, it is more arduous to identify and describe the competing normative positions and qualify them as advantageous or disadvantageous, such as, for example, the "right to be tortured". Indeed, the beneficial status of such a right could be affirmed for a very limited group of persons, for example, subjects who intend to engage in masochistic practices. Even for such persons, however, it could be argued that such a normative position also entails some detrimental elements, consisting in the harmful effects of injuries. As far as being tortured against one's will is concerned, K considers that «no one can have a legal right to be tortured or betrayed against one's will» (KRAMER 2000, 496). This statement without qualification may contravene the thesis of the social sources; a thesis that every theorist should subscribe to in order to be considered a legal positivist. I will come back to this point later. According to K, we must proceed in two steps. First, it has to clarify precisely what entitlement their alleged holders claim to have. Here the observer and interpreter must adapt her conceptions of human interests to the particularities of the specific context. Secondly, she has to seek the correct designation of the right, emphasising or de-emphasising its favourable or unfavourable character, demarcating the right and inscribing it in other, more general, encompassing rights. In short, the interpreter can assume an understanding relative to the specific context of the interests or can give new meaning to a peculiar legal right in such a way as to show its connection to interests that transcend the specific context.

[45] See HART 1982, 174-181: cf. FERNÁNDEZ NÚÑEZ 2023, 120-136.

[46] K explicitly introduces two notational modifications into the Hartian proposal (see HART 1982, 178 f.; see KRAMER 1998, 81 f., 90 f.; see KRAMER 2010, 38).

emphasises identifying the right (in fact, as a "claim") by looking at the correlative duty, as well as the concern to have a mechanism for delimiting the relevant beneficiaries of the norm (ruling out third party beneficiaries). These two theoretical guidelines are intertwined, since the way to determine whether an individual entitlement is a right and whether an individual subject is the beneficiary of such a entitlement is precisely by applying a certain decision procedure to the available information on duties. The "Bentham's test" is such a decision procedure. Let us see what it consists of, applying Bentham's test to a case of epistemic insufficiency, in order to carry out its critique and, subsequently, the application of alternative, simpler resolution criteria, which show a Kramerian influence (in their Hohfeldian matrix, but not in their Hartian matrix).

3. *Right-holding at the core of the theory: Bentham's test*

As is evident, having rights is a central theme in K's theory; not for nothing has K called it a "theory of right-holding"[47]. In any case, this feature should not be magnified, since it is not so unique. First, because every Interest theory aims, in one way or another, to determine the potential or actual right-holders. Second, because it is true that K's theoretical and methodological approach takes the form of a proposal centred on the holding of rights, but what is truly characteristic of his theory is the approach and not so much the selection of the object in which this approach is materialised. That is, if in any way K's Interest theory is a circumscribed theory in terms of its ambitions and applications, this is because it is configured as a *technical-legal* mechanism for the identification of right-holders. Third, because, in his analysis, K talks about what counts as a "right" and not only about what counts as a "right-holder", going beyond the strict scope of this technical-legal mechanism.

Bentham's test reads as follows:

> «If and only if at least a minimally sufficient set of facts includes the undergoing of a detriment by some person *Q* at the hands of some other person *R* who bears a duty under the contract or norm, *Q* holds a right –correlative to that duty– under the contract or norm» (KRAMER 2010, 36 f).

Although such a test focuses on harm, it can be reversed to formulate it in terms of "benefit". This is what Kurki has done with the following enriched paraphrase:

> «*X* holds a right correlative to currently existing duty *D* if and only if: [1] *X* can hold rights and [2] 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 to beings such as *X*» (KURKI 2018, 439).

While the thesis presented by K in the definition that opens this section captures his Interest theory in a more general and definitional vein, Bentham's test and Kurki's reconstruction give an accomplished formulation to K's Interest theory as a "decision procedure", as the main piece of the mechanism with which to identify rights-holders. Precisely, the second condition pointed out by Kurki is a reformulation of K's Bentham's test. The first necessary condition refers to the status of "*X*" as a potential right-holder.

The Bentham's test is a standard for identifying individual holders of defined rights, correlative to defined duties, a right and a duty of definite content that are in force[48]. As I have

[47] It is a theory of the identification of individual right-holders. For the delimitation of the generic set of potential right-holders see KRAMER 2008, 419; see KRAMER 2010, 35; for a thorough discussion of some criteria for doing so see KRAMER 2001, 34 ff.

[48] KRAMER, STEINER 2007, 305; KRAMER 2010, 36.

pointed out, K speaks of "minimally sufficient facts" for a duty to be considered violated. A set of facts is minimally sufficient for a violation of a duty if and only if: [1] the set is sufficient to constitute such a violation and [2] every element of the set is necessary for the sufficiency of the set (it can be said, using Alchourrón's terms, that those elements are "contributing conditions"); that is, the set does not contain redundant elements. The individual who benefits from an event redundant to the set is not to be considered the holder of a right under a certain contract or rule.

Consider the case of an employment contract between an employee and her employer: under her contract the employee is a holder and at least one set of facts sufficient to constitute a breach of contract (rather, of contractual duty) includes the failure to pay the amount due to her[49]. Add to the case the owner of the supermarket, who has no rights under the contract. The employee bears a duty to spent her wages in the supermarket, but she has not spent it because she has not been paid by her employer. While her failure to be paid (along perhaps with other conditions, which remain in the background) is in itself minimally sufficient to constitute a breach of contract, her failure to spend money at the supermarket is not a member of the set of facts minimally sufficient to constitute a breach. The Bentham's test theoretically supports an ascription of a contractual right to the employee and no ascription of a contractual right to the supermarket owner; the latter's detriment is a redundant element of the breach of duty.

Although K's argument is technically sound and his proposal is a viable way to delimit normative position holders, employing the minimally sufficient facts test for breach of duty as a criterion for determining the relevant beneficiary (i.e. the right holder) has some drawbacks. Some drawbacks have already been addressed, so I will only mention them. One consists in its exclusively retrospective character: the test does not allow us to know to whom and why a right will or should be attributed, according to a theory about justification, but only to know who has and had a right when the correlative obligation was violated and –if the proposition can be reformulated as a counterfactual judgement– who would have a right if the correlative obligation was transgressed[50]. It is a question of defined entitlements and obligations, already in act. Of course, tied to the retrospective character, another drawback of the approach is its silence on questions of justification. By incorporating Hartian recommendations, K endorses this problem. By the way, this is a general problem with the Hartian explanation of rights (except in his theory of constitutional needs and immunities): neither the Choice theory he defended nor the version of the Interest theory as Hart intended to reformulate it, as his best dialectical rival, are prospective theories and, in particular, they are not suitable for capturing discourses *de lege ferenda* or discourses of justification or about justification. They are discourses *de lege lata*, where the rules are already given (in Kramerian idiolect, "defined rights").

An internal and salvageable limitation of K's theory is its restriction to claims and duties. It is salvageable, because there is no inconvenience in extending it to other Hohfeldian positions. If any drawback can be found in such an extension, it may be due to a deeper problem. K assumes that it is simpler (epistemically, semantically, technically) to identify duties than to identify claims. To some extent, on the other hand, this is a justified assumption: duty is an active position, so that the action or omission that is the object of the normative relation is the one that the obligated subject has to perform or refrain from performing. The duty, moreover, expresses the deontic modality "obligatory", while it is not clear what deontic modality the claims would express. This means that, although the content of the relation is identical for each of the normative positions, it is simpler (on an epistemic, semantic, technical level) to start from the duty for the identification of the right. To a certain extent, this is an unjustified assumption, since it can often be more difficult to identify the obligation, the content of the obligation and the holder of the obligation than to identify the claim

[49] KRAMER 2010, 37.

[50] If I speak in terms of "right" and "obligation" it is to show that K's analysis can be extended to any precise atomic instance of both generic terms.

(replace "duty" and "claim" by the other three pairs of Hohfeldian atomic normative positions). Difficulties in the interpretation of provisions enunciated in terms of rights, peculiar evidentiary problems and the ascription of responsibility are variables that may make the determination of duty-bearers more difficult than that of rights-holders. In short, apart from these problems, a basic thesis defended by K is that for the specification of the content of the relationship between claims and duties the conduct of the obligee is the one of necessary inclusion[51].

These important shortcomings may draw attention to a problem of identity and the functions of the Kramerian model. Precisely, another drawback, also internal to K's theory and particularly relevant, is that Bentham's test is too complex. There are ways of explaining normative relations (individual and generic) that are equally suitable, but less intricate than the one provided by Bentham's test to explain cases such as those exemplified by K. I will now develop what I consider to be a suitable and simpler alternative method for identifying effective right-holders in similar scenarios.

3.1. *A right-holder identification tool, alternative to the Bentham's test*

Without abandoning the hypothetical case posed by K, if we identify, by virtue of the (interpretation of the) norm in question, the action that is the object of the right and the obligation and we understand the relationship as triadic predicates, [1] the employer's duty to pay her employee's wages and [2] the employee's claim that the employer should pay her wages are normative positions referring to the same action, the employer being the agent in [1] and the employee the counterpart and the employee being the agent in [2] and the employer the counterpart[52]. It is clear, then, that the supermarket owner is excluded from this bilateral regulatory relationship. If the employee had entered into an agreement with the supermarket owner by which she is obliged to spend a part of her salary in the supermarket, such a normative relationship, also bilateral, would be different from the one just mentioned. A tripartite contract between employee, employer and supermarket owner would be equally conceivable, although within such a contract it should be possible to identify bilateral jural relations.

In what follows I present an alternative tool to Bentham's test, albeit one based on important Kramerian and Hohfeldian lessons, which avoid multiple paralogisms and help in the resolution of multiple rights problems. If this is so, it is not necessary to refer to the minimally sufficient facts of the transgression of an obligation in order to identify the relevant beneficiaries of different normative relations[53]. Instead, the application of the Hohfeldian taxonomy (by tracing a legal situation back to Hohfeldian atomic rights or some "molecular" compound of such atomic rights), the Hohfeldian thesis of the interdefinability of positions (from the already identified normative positions or, especially, from both positions simultaneously, as a mutual corroboration) and a minimal defining clause of the Interest theory suffice. The Kramerian formulation violates the principle of simplicity, which is a significant drawback insofar as K's proposal, as a working definition of legal rights, should also be usable by jurists in general. The limitations I have just pointed out, even if they are particularly manifest and pressing in the Bentham's test, cannot be confined to that test alone, but must be predicated of K's theory as a whole, if one considers the

[51] From a personal communication with K 2020.

[52] For the understanding of this point it is important to grasp the role of the atomicity of fundamental normative positions and Hohfeld's strict bilaterality thesis. As I cannot dwell on them, I take the liberty of referring to Fernández Núñez 2023, 202.

[53] That the owner of the supermarket is not a party to the employment contract between employer and employee is a basic empirical fact, easier to establish than the conditions of non-compliance with the rule in question, and if he were to be included in the employment contract, the bilateral nature of the jural relations would show that he is not part of that normative relationship.

Bentham's test to be something like the operational version with which to act out the basic theses of K's theory. Bentham's test is an adaptation, a "notational variation", which resolves in a decision procedure –and, specifically, in terms of minimum sufficiency– the main task of the Benefit theory as reformulated by Hart, that is, the identification of right-holders by assuming a certain approach –technical-legal– and delimiting in a certain way the relevant variables –in terms of those affected by a rule that attributes direct benefits–. In fact, to depart from Bentham's test is to depart from this Hartian configuration of the Interest theory and of its metatheoretical and methodological constraints, to which I referred earlier.

I propose an original case, in order to present more clearly my alternative reconstruction proposal and to develop its stages. My proposal, although it is an alternative, is especially consonant with the Kramerian proposal for the identification of normative positions in individual cases –not in its Hartian matrix dimension, but in its Hohfeldian matrix dimension– and is simpler than Bentham's test. I elaborate on the above criticisms and add others. Think of a war scenario, and the legal duty of Volodya, a soldier, to shoot a prisoner, Lesya. A first reading of such a duty might conceive of it as non-directional: Volodya's duty is owed to anyone. It could be a duty in some sense "public", non-directional, as the duties that make up the Decalogue have usually been understood[54]. However, this duty can also be understood as directional: it would be owed to Volodya's hierarchical superior, the lieutenant in charge of the squadron of which Volodya is a member. Thus, Volodya's duty to shoot Lesya can be traced back to the lieutenant and the lieutenant's correlative right to have Volodya shoot Lesya.

Applying the Kramerian toolkit, Volodya's letting Lesya escape is a minimally sufficient fact of Volodya's breach of duty to the lieutenant. Conversely, Volodya's letting Lesya escape is not a minimally sufficient fact of Volodya's breach of duty to Lesya, which means that Lesya is not a party to the normative relationship with Volodya. This diagnosis, which, if I am not mistaken, I assume is what K could reach, is correct, but the reason for it is more trivial and consists in the fact that Lesya does not have a right to be shot, under any legal relation with Volodya[55]. The only relevant normative relationship that concerns Volodya's duty to shoot Lesya, if there is such a duty and if it is directional, is vis-à-vis the lieutenant. On the one hand, because the order to shoot is usually issued by and can be considered to be *owed to* the lieutenant (the lieutenant would then have to be considered a secondary addressee of this obligatory norm, the primary addressee of which is the soldier); on the other hand, because it can be argued that the lieutenant benefits from having this right and from its fulfilment, either because the effectiveness of this order (as an individual case of his generic orders) is important to safeguard his hierarchical authority and his employment status, or because the success of the war operations may depend on the shooting of prisoners (such as the one under consideration) and this may be the only way for him to prosper or to survive. The result is in any case that certain normative effects (or, more generally, practical consequences) follow from compliance with a rule, and that these effects, in a subjective understanding of the case, are considered beneficial by the rule-maker (by a principle of sufficient reason): either for the authority itself, or for the normative addressee, or for a wider group, or for the community as a whole. Besides the fact that, as I have already pointed out, we may doubt that cases such as the one I have raised are cases of non-directional duties, of course, it is also arguable that the lieutenant benefits from the obligation and that it is precisely the lieutenant who benefits; among other things, the relevant beneficiary may be a hierarchical superior of the lieutenant, but attribution of responsibility or epistemic obstacles make it difficult for us to identify her. That said, if my analysis is sound, it is possible to think of a normative relation referring to a triadic predicate between Volodya and the lieutenant.

[54] Cf. EDMUNDSON 2004, 9.

[55] I do not address in this reconstruction Lesya's eventual right not to be shot.

To unravel these individual cases in which the identification of right-holders is difficult –and especially those cases, such as the hypothetical case I have just raised, in which it is disputed that there is such a thing as a right-holder– it suffices, in my view, to apply the Hohfeldian theory and the Interest theory, without having to resort to Bentham's test. First of all, it is necessary to determine the content of the normative position-attributing norm, the object on which the duty falls and, consequently, the alleged correlative right, "to what is one entitled?". In this case it is not only a question of interpretative difficulties relating to the statement expressed by the norm in question, but also of the difficulty of describing a normative situation as a "right of φ". This has to do with the second stage, concerning the determination with the advantageous character of the (content of the) right, as well as the identification of the parties to the normative relation, "who benefits from a certain normative position?". Thirdly, although that was not the issue in Volodya's case, it is a matter of qualifying the action and the situation in which the parties to the relationship find themselves, "what kind of action is involved (natural or normative)?" "in what position are the parties in (active or passive)?" The Hohfeldian table discriminates clearly in this respect. On the one hand, if the subject benefiting from the action benefits from a natural action, he will be the holder of a claim or a liberty (conferred by a prescriptive norm); if he benefits from a normative action, he will be the holder of a power or an immunity (conferred by a competence norm). On the other hand, if the subject is in a passive position (he receives the action or omission), he will be the holder of a claim or an immunity; if the subject is in an active position (he carries out the action or omission), he will be the holder of a liberty or a power. Of course, from the combination of the last two variables we should be able to obtain the type of atomic right that is involved in each case. In turn, with the identification of several atomic rights we will be able to obtain the identification of the molecular right that they form. For the identification of competing positions, the logical relations of correlation and contradictoriness are an extremely useful tool. A certain normative position serves as an inferential basis for determining the correlative or contradictory one, or it is even sensible to think of a simultaneous determination, from the interpreter's point of view, as a kind of reciprocal corroboration between determinations. Given the interdefinability of correlative concepts and contradictory concepts, the "triangulation", the confluence of variables should support a kind of mutual verification. Thus if, for example, there is a liberty of φ on the part of X, then there will be no duty of $\neg\varphi$ on the part of X, and there will be a no-right of φ on the part of Y, the counterpart. Contradictoriness and correlativity, then, support a reciprocal corroboration of normative positions. Also, the three stages I have just identified follow an order of increasing epistemic complexity, but this does not mean that this order has to be observed; rather, a holistic assessment and a mutual adjustment between the answers to the different questions contributes to the robustness of the solution[56].

I consider that these operations are sufficient and that it is a diagnosis that is not merely convergent, but substantially coincides with some of K's pretensions, since it applies the fundamental Hohfeldian theses, his taxonomy and the defining clause of the Interest theory and does so in a spirit of clarification and systematisation in accordance with K's contributions. Bentham's test, on the other hand, while certainly more determined, less elusive than the method I have just presented, is more complex. In fact, it is excessively and, in part, unnecessarily

[56] Incidentally, neither the Bentham's test nor the alternative model I have just proposed have the disadvantage of being overinclusive, i.e. they do not run the risk of qualifying third party beneficiaries as right-holders: that the supermarket owner is not a party to the relationship between the employer and the employee in K's example and that Lesya is not a party to the relationship between Volodya and the lieutenant is not only due to the fact that neither of them has a direct benefit –as an Interest theorist willing to embrace Hartian amendments would want– but also to the fact that they are not addressees of the norm in question (of the contract stipulated between employer and employee, and of the order issued by the lieutenant to the soldier). Thus, Frydrych is wrong to consider Bentham's test as overinclusive in terms of identifying right-holders (see FRYDRYCH 2017, 203 f).

complex. For the core of his proposal is the idea of "benefit" and the crucial reference in his decision procedure is the reference to "necessary benefit" (or "necessary harm"), rather than the reference to what constitutes a «minimally sufficient fact of the transgression of an obligation». But also relevant of both tools is the reference to directionality, and of its virtuality to check cases in which it is often argued that directional duties are not present. Because, in fact, if in cases such as the failed shooting it is often argued that there is no directional duty, this responds to the counter-intuitiveness of speaking of something like a "right to be shot". This is not only because the prisoner does not benefit from being shot, so that the interpreter might tend to think, correctly, that the fact that she does not benefit from the obligation means that she does not have a correlative right, and to think, incorrectly, that if she does not have a correlative right, then no one else does and we are dealing with a non-directional duty. It is also due to the fact that the obligation to shoot her is not vis-à-vis to her and, of course, it is not owed to her, but to the lieutenant or some other hierarchical superior. The prisoner is the object (of the action) of the obligation, not one of the parties to the normative relationship[57].

These considerations draw attention to another issue, which should be addressed. This is the correlativity thesis and its status, the examination of which leads to an amendment of some Kramerian considerations. K affirms that any obligation is owed, in addition to another person, to the state[58]. This thesis, in a case such as that of the failed shooting, does little to clarify the directionality of the duty: should we conclude that, in addition to the lieutenant, the duty is owed to the state? Is it a public duty tied to another public duty? Should we conclude that there are two normative relations with the same content? The admissibility of such duties vis-à-vis the state in relations between private persons may be even stranger. The thesis is surely a trick to exclude the possibility of non-directional duties from the outset. But, as we shall see, this is not K's only intention. The thesis in question responds to K's understanding of the correlativity thesis as an axiom. That the correlativity thesis is no more than an axiom is debatable. More basically, implied by the axiomatic character, K regards the correlativity thesis as an analytical statement and therefore, by definition, not falsifiable by empirical counterexamples. This is true. What is not true is that attempts to except or test the explanatory power of the correlativity thesis are totally wrong, as K claims. It is not true because the correlativity thesis need not be taken solely as a postulate, but can be, as often is, and should be used as a building block within explanatory models of legal institutions. Models that are intended to account for specimens of institutions, not empirical, but which do exist in social reality, in legal systems, and which are evaluated, among other variables, for their descriptive adequacy (not their "empirical adequacy", as K puts it to invalidate attempts more or less akin to the one I am suggesting)[59]. Therefore, the assessment of the suitability of the correlativity thesis as part of an explanatory model does not leave unchanged its capacity or inability to account for cases such as the one I have just presented.

To take stock of what I have argued at the end of this subsection, the correlativity thesis can be understood as a postulate, infallible and true by definition. Complementary to this reading, the correlativity thesis can be understood as a thesis embedded in explanatory models, of which descriptive (in)adequacy to explain institutions can be predicated, in addition to any other virtues or shortcomings. Integrating this second reading allows for greater receptivity to the multiple linguistic uses of "rights". As I have shown, the correlativity thesis can be applied even in cases where it is sometimes understood –by theorists and jurists alike– not to be applicable, and I have done so in order to assess the robustness of alternative descriptions to the more usual

[57] The confusion between rights and the object of rights has already been identified by HOHFELD 2010, 162.

[58] Cf. KRAMER 1998, 59.

[59] Moreover, K himself speaks of the usefulness of the correlativity thesis in terms of its «heuristic strength and adaptability» (KRAMER 1998, 35). How could such features be evaluated if such a thesis were only a postulate and not, instead, a thesis within a model of which greater or lesser explanatory power can be predicated?

ones[60]. In doing so, one should not dogmatically wait for the Hohfeldian mould to have the last word on linguistic usages: if what we are doing is to collect and explain linguistic usages, we cannot but note that certain linguistic usages do not conform to Hohfeldian teachings, think, for example, of many doctrinal understandings of human rights. It is another matter that these linguistic usages may be imprecise and that it would be better to bring them into line with the thesis of correlativity, and to criticise these usages for their imprecision. Be that as it may, it is valuable to examine the explanatory performance of the correlativity thesis and for that purpose it is necessary to depart from K's axiomatised understanding.

4. *Scope of the Kramerian theory*

4.1. *What rights? Defined legal rights*

The Kramerian account of rights is primarily a theory of legal rights; the legal domain is the almost exclusive field to which K's theory refers and applies[61]. I deal with his brief treatment of moral rights in the following section, given the relevance of that treatment for understanding the very limited presence of the justificatory dimension in Kramerian theory.

K rigorously delimits three moments of determination or stipulation of legal entitlements and decides to confine his attention to the last stage, that of defined entitlements. K emphasises the distinction of "interests" and "entitlements" and the distinction of various stages in the establishment of entitlements, while preserving the Hohfeldian theoretical framework and, with these purposes in mind, K proposes a tripartite taxonomy. [1] people's interests –including interests not to be constrained–; [2] inchoate entitlements, i.e. judgements that certain interests deserve some moral protection or some legal protection, even if at the moment this is indeterminate; [3] defined entitlements, whether genuine or nominal, whether general or concrete (or, in von Wright's terminology, "particular")[62]. K's theory is focused on the moment [3] and seeks to establish the directionality of the defined duty, i.e. to identify who holds the correlative defined right[63]. As I have shown, according to K, the Interest theory and the Will theory articulate the basis of the directionality of duties[64].

It is now appropriate to dwell on the question of normative protection, and then to deal with genuine rights (as opposed to nominal rights). Within the Kramerian distinction, the protection of rights is determined in the transition between [2] and [3]. For the question of protection and, more precisely, for the question of the effectiveness of rights, the distinction between genuine

[60] I take the liberty of referring the reader to my analyses: FERNÁNDEZ NÚÑEZ 2023, 228 ff., 336 ff., 418 ff.

[61] KRAMER 2010, 31; KRAMER 1998, 8.

[62] KRAMER 1998, 46. In order for an inchoate right to become a defined right or a set of defined rights, two stages of specification are necessary. First, the type of moral or legal protection has to be determined, which requires a decision about the relationships that would safeguard the protectable interest: for example, a liberty or a bundle of liberties, claims, powers and immunities. Secondly, the direction of the correlative has to be established, i.e. who has to bear the situation correlative to the entitlement (duty, no-right, disability or liability), to whom the protection is incumbent. There is a conceptual connection, one cannot specify an instance of a Hohfeldian right without having specified its correlative position (KRAMER 1998, 33).

[63] At this point, it will not go unnoticed that with the tripartite distinction K also intends to correct an error in the dynamic conception of rights. K reproaches Raz for misleading his readers into confusing interests with the moral or legal protection of those interests. In doing so, Raz endorses the blurring of [3] and the equating of [2] with [1]. Moreover, the semantic potential of the notion "right" lies in the impossibility of capturing, once and for all, the possible developments of normative positions founded by the right, and that leads proponents of the dynamic conception to be reluctant to recognise [3] as a discrete and stable position and as the primary meaning of the expression "right".

[64] KRAMER 2013, 245; cf. KRAMER, STEINER 2007, 298.

and nominal rights is central. K argues that every right to be genuine must be exercisable and waivable by its holder or by another person[65]. The second condition is that the right must be equipped with immunities that prevent the right from being taken away; immunities play an important role in molecular rights in giving stability to other rights[66].

The first condition should be explored further, as it is problematic. Competence and authorisation to demand or waive the performance of the duty correlative to the right are relevant for K's theory, though not as relevant as for a Will theorist. They are not as relevant as for a Will theorist, insofar as they are not properties that must be present in a normative position in order to call it a "right"[67]. They are, however, normative properties that must be present in order to be able to speak of a "genuine right"; otherwise the normative position in question must be described as a "merely nominal right". Moreover, the Will theorist claims that the claim or waiver of the performance of the duty can only be asserted by the right holder himself (the one who asserts his will), whereas K considers that it can be claimed by a third party[68].

As to the first distinction, K's decision is somewhat open to criticism: his claim that the difference between him and the will theorist is that for him such rights are "genuine rights" while for the Will theorist they are, plainly and simply, the only admissible "rights" suggests a play on words. Indeed, one might wonder how important the lexical difference in the two qualifications is. In any case, apart from this consideration, K can argue that exercisability or justiciability is important in some rights although he has to show that it is not the most important thing and that it is not even important in many rights, which he does with some prolixity, as an objection to the Will theory[69]. In fact, with respect to exercisability, as well as on other theoretical points, K ostensibly points out –certainly much more ostensibly than other rights theorists– the symmetrical character of both theories: the explanations and answers offered by the will theory contrast and in certain cases are even contradictory to those offered by the Interest theory[70].

As far as the second condition is concerned, although the integration of immunities into the Kramerian model of rights has raised some perplexities in relation to the possibility that there are different senses in which a right can be called "genuine"[71], is worth mentioning that it has also been embraced by prominent rights analysis[72].

[65] KRAMER 1998, 64, 78. This dichotomy must be distinguished from that of in/operative titles (see KRAMER 2001, 65 ff.). Whereas nominal rights and duties are not exercisable or enforceable, inoperative rights and duties are simply not enforced; for example, a duty –even a genuine duty– is to be considered inoperative when the constant exercise of powers of renunciation of that duty causes it to remain unenforced (see KRAMER 2001, 67). The recognition of the two dichotomies is important, since Will theorists only require that rights are enforceable and are not forced to assert that rights must be systematically enforced (see KRAMER 2001, 69).

[66] KRAMER 2008, 417 f.

[67] KRAMER 2016, 2. Incidentally, this means that K had already provided, in earlier works, the necessary and sufficient conditions for possessing rights, according to Will theorists.

[68] Contrary to what Hart argued in 1982, no will theorist can accept representation by proxies, on pain of incurring the fallacy of *ignoratio elenchi* (see FERNÁNDEZ NÚÑEZ 2023, 257-259).

[69] Cf. KRAMER 2013, 248 ff.

[70] Consequently, K explicitly argues that affirming the failure of the former theory –and he affirms such a failure– is tantamount to affirming the success of the latter (see KRAMER 2013, 245, 263; for a more cautious judgement, see KRAMER 1998, 78). *Tertium non datur*: Kramer is manifestly reluctant to recognise explanatory power to proposals other than the Interest theory and Will theory (cf. KRAMER, STEINER 2007, 310; KRAMER 2013, 263). Sreenivasan's theory, being a hybrid theory, is a peculiar case.

[71] KURKI 2022.

[72] EDMUNDSON 2004, 124. Indeed, integration does not seem to pose any problem: the impediment not to be deprived of a certain entitlement is the most basic conceptual ingredient for the effectiveness of such an entitlement. The only drawback of such a solution is the increase in structural complexity, since every right would become a complex right consisting of at least two entitlements, an immunity relating to some entitlement and that entitlement.

Taking stock of what we have seen so far, if the condition of the exercisability of the right (set out in [1]) is maintained, every genuine right, in the Kramerian sense, would consist of some entitlement –the most suitable candidate for such a entitlement is a claim, given the restricted version of the Kramerian Interest theory–, an immunity attached to that entitlement (so that it is minimally effective) and a power of enforcement and waiver (so that the entitlement is exercisable).

Digging deeper, we approach one of the hard bones of Kramerian theory. In fact, at this point, the postulation of a "genuine right" in these structural terms raises some difficulties, difficulties that can be put down to the choice between a restricted and an extended version of the Interest theory. Thus, K can argue that the claim is the atomic right that paradigmatically or exclusively performs the function that Interest theory ascribes to any normative position that can reasonably be called a "right". But even if this were so, such an atomic right must be complemented by immunities and powers, at least in the frequent and relevant cases where the right can be qualified as "genuine". It may be that K attaches more importance to claims in the molecular right and posits powers and immunities as instrumental (and leaves them unexplained) or it may be that, as we shall see, it is the claims that are in some sense instrumentally valuable. It must be concluded that the structural model of the genuine "right" of the Kramerian Interest theory coincides essentially with the model of the Will theory. As is well known, the model of the Will theory (in the sophisticated Hartian Choice theory version) is made up of a power (of control) in respect of a duty, a claim correlative to that duty and a bilateral liberty (to decide whether or not to exercise that control), to which are added immunities so as not to be deprived of each of those entitlements. In short, either K defends a unitary model, where prominent (atomic) rights are only the claims, or he defends a model of molecular rights very close to that of the Will theory. Let us examine the second horn of the dilemma and devote the next section of the article to the first.

It should be noted that this is not simply a structural convergence, corresponding to an «extensional equivalence over a wide range of situations»[73], but affinities in the conceptual model itself, an "intensional proximity" one could say with a lexicon close to K's, since the reasons for defending the concurrence in the model of "rights" consisting on powers, claims and immunities –the functions that each atomic right plays in a molecular right and, of course, the configuration of a molecular right itself– are the same in the Will theory and in the Interest theory, under this reading. The difference would lie only in the different emphasis on powers and claims and on the functions (or, according to other authors, values) that these normative positions perform. The Will theory emphasises the role of powers –and of bilateral liberty– as a realisation of the autonomy of the holder, while the Kramerian Interest theory considers this role relevant (albeit secondary) only for genuine rights, without even alluding to liberties. Vice versa, the Kramerian Interest theory emphasises claims –duties, in fact– as the element of "normative protection" par excellence, and the Will theory assigns claims a secondary role, insofar as duties are the element on which to exercise the protected choice. That is, structural and functional identity of molecular rights, albeit different emphases on the atomic particles of the molecular right. If this diagnosis is conclusive, the disagreement between Kramerian Interest theory and Will theory would be very circumscribed and, in fact, peripheral.

The dilemma is blurred, as both readings coexist in K's texts; with this coexistence, although the dilemma is diluted, the problems of one and the other horn are conjugated, but K shows a greater propensity for claims, for the first horn of the dilemma. In fact, K tends to affirm the paradigmatic character of claims as "rights", as the most relevant normative position within any molecular right. Most often, in fact, the enunciation of his theory and his analysis are

[73] I am using K's terminology (cf. KRAMER 2012, 129).

formulated in terms of "claims" and "duties". I devote the next subsection to examining the soundness of this thesis, the most peculiar of K's stipulations.

4.2. *What rights? Claims*

Theories of the function (or of the "nature") of rights often focus on or emphasise certain normative properties, neglecting others and developing their thesis to extremes where the intensional specification ends up implying an extensional restriction of the concept of "right" that such theories aim to or succeed in explaining. Of the possible contexts of "rights" in which such limitations occur, surely that of the structural meanings of atomic rights and, specifically, claims, is one of the most surprising. It is surprising given the broad and deep-rooted ordinary and technical linguistic usages relating to the remaining senses of atomic rights, and the importance of capturing those usages by a theory that is not purely normative. A theory of rights which is not merely normative, which disciplines linguistic uses of lawyers or legal theorists (i.e. not analogous to a linguistic stipulation), but which is also explanatory of certain uses (i.e. which makes it possible to account for, by describing and explaining certain linguistic uses) must account for all those (atomic or molecular) positions which are usually called "rights", if it is to have any extensional adequacy.

That not all the entitlements identified by Hohfeld should be qualified as "rights" is a thesis on which, as we have seen in the previous sections, K insists a lot. Only those (tokens of) normative attributions that meet the defining clause of the Interest theory deserve that label. The defining clause of the Interest theory takes the form of the beneficial or advantageous character of a normative position. Concretely, K has been specifying that what is relevant for this clause can be found in the attribution of normative protection[74] and, more recently, in the inherent and deontic protection[75]. This property would be, for K, distinctive of the claims. The study of this characteristic property and how it characterises claims will be the subject of this subsection; first, however, it is worth clearing up some misunderstandings concerning the putative ancestry of the stipulation in Hohfeld.

As is well known, at one point in Hohfeld's rational reconstruction, interrupting this reconstruction, Hohfeld calls the claims «rights in the strictest sense»[76]. The only textual evidence of the reasons in defence of such a stipulation is a very concise passage.

> «Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative» (HOHFELD 2010, 31).

The passage presents some interpretative difficulty. The association of ideas between "claim" and "duty", it could be argued, also occurs between "right" (generically, under any of the four meanings) and "duty". The problem is that if Hohfeld makes clear what he means by "claim" and "right", he does not make clear, or rather seems to exclude, that "duty" can refer to any other position of disadvantage than the one he himself designates as "duty", excluding no-rights, liabilities and disabilities. What K calls "entitlements" are given a name in the Hohfeldian table (for they used, before the Hohfeldian reconstruction, to be called "rights", as Hohfeld acknowledges), but "correlatives" are not (for Hohfeld suggests, but does not openly

[74] KRAMER 2019, 3.

[75] KRAMER 2021, 1.

[76] Indeed, the Hohfeldian project of linguistic recognition and regulation did not need to attribute any kind of priority to any of the meanings arising from linguistic discrimination.

acknowledge, that all such positions were called "obligations"). But if this is so, Hohfeld's decision, as he formulates it explicitly, is a recognition of a linguistic practice, which is based on a not entirely clear association of ideas and is apparently the result of, so to say, a lexical bias or prejudice. This prejudice consists in the fact that the highly relevant idea of "duty" seems to be associated with that of "right" (both in the sense of "claim" and in the generic sense of "right"). Since obligations (*generic*, one might say) are assumed to be relevant, and the precise position correlative to the "claim" is called "obligation" or "duty", this leads to calling the "claim" «right in the strictest sense». In some sense, linguistic equivocity can be thought of as the point of strength and weakness of duties[77]. In many theories of rights, "claim" has become the exemplar of "right".

Be that as it may, it is the case that Hohfeld generated (or maybe consecrated) an asymmetry about a pre-eminence of claims and duties as paradigms of correlative normative status. This asymmetry is also enshrined and amplified by K's Interest theory, for it presents claims as paradigm of the normative situation of advantage. Although, as we shall see, with a development that responds to different reasons. The amplification of the double asymmetry, in short, arises from the fact that the extended version of the Interest theory refers to the beneficial effect of rights (of entitlements), without mentioning the correlatives, while the restricted version of the Interest theory refers to the beneficial effect of duties. The combination of these versions yields, as I say, a double asymmetry: claims are more relevant entitlements than any other –they constitute the paradigmatic class of "rights"– but this is precisely because of duties. On the other hand, entitlements that are not claims are more relevant than their correlatives, which do not contribute anything in terms of the Interest theory. Thus, a mysterious double order of priority is created between the restricted version and the extended version of the Kramerian Interest theory. It is now important to look at the priority of duties over rights.

In view of the above, it is worth stressing that K's reasons for restricting his attention to claims are not internal to Hohfeld's work. K claims that the Interest theory is in conformity with the Hohfeldian lexicon and the discordance of the Will theory is in disagreement with the Hohfeldian lexicon. It is true that the expression of the disagreement about what counts as "right" is partly formulable in Hohfeldian terms, i.e. it is true that the differences between the models of "right" of the Interest theory and the Will theory are also reflected in structural terms, expressible through Hohfeld's taxonomy, but this does not mean that the Hohfeldian proposal pronounces on these theories or gives us clues to resolve disagreements that are not purely taxonomic[78]. Of course, the promotion of autonomy that concerns the Will theory or the protection of wellbeing that concerns the Interest theory are embodied in the emphasis, respectively, on powers and claims, but the choice of one theory or the other is more a matter of how they account for the function, the foundation of rights, and not so much of the structure[79]. The convergence and divergence with Hohfeld lies, says K, in the fact that the Interest theory

[77] As I see it, the question remains open whether what Hohfeld calls "duties" is a category coextensive with all the notions to which jurists prior to Hohfeldian linguistic discipline referred when they spoke of "obligations" or "duties" generically, and whether such linguistic usages inspired Hohfeld in his stipulation of claims. In any case, whether or not claims and duties are the paradigmatic normative correlative positions in which jurists habitually thought and think (so that Hohfeld's solution would not be stipulative, but rather that of a redefinition), in some sense this paradigmatic character has crystallised in numerous conceptual models.

[78] Indeed, some of K's ambiguous statements would suggest the opposite (see KRAMER 2010, 33; see KRAMER 2008, 418).

[79] Of course, if we associate, as K correctly does, the aspect (or value) of protection with claims and the aspect (or value) of empowerment with powers, this allows us to see that the Will theory often confuses the two aspects (see KRAMER 2001, 64 f.). In this sense, the Interest theory is more analytically accurate and this is in line with Hohfeld's analysis, but these observations are not enough to settle deeper theoretical disagreements, the ones that most determine the confrontation between the theories and that concern the functions or the values that each theory defends as proper to the concept of "right". Hohfeld's theory is relevant to clarify some terms of the disagreement, not to eliminate it.

allows "right" and "claim" to be understood as [1] interchangeable denominations, since a claim [2] can be qualified as a right even if it is not accompanied by other entitlements[80]. However, as can be seen, the first reason ([1]), the Hohfeldian one, is presented as a linguistic decision; the second reason ([2]), the Kramerian one, is a decision proper to a theory of the function of rights. For its part, the Will theory claims all four entitlements in order to qualify a position as a "right" and is therefore incapable of giving an autonomous explanation of each entitlement. There is some truth in this, but there is also some confusion. If the Interest theory has a real explanatory superiority over the Will theory, it lies not in (being able to) consider "claims" as "rights", but in considering any of the four Hohfeldian entitlements as "rights". Why? Because the restriction to claims is an undue stipulation, which excessively and unduly reduces the structural explanatory power of the Interest theory (it leaves three of the four Hohfeldian meanings unexplained in terms of their function) and because K's reasons for restricting his theory to claims are not properly Hohfeldian. Indeed, as K himself states on several occasions, Hohfeld's project remains neutral with respect to investigations of theories of the function of rights[81]. Indeed, K also acknowledges that the theories of the function of rights complement Hohfeld's model, and that we have no textual evidence that Hohfeld advocated either the Will or the Interest theory[82]. It is also K's view, in a Hohfeldian spirit, that the restriction to the category of claims is a suitable means to obtain more precision in the discussion of rights, disciplining a use that would otherwise be entangled and lead to paralogisms. In short, Hohfeld formulates, and in an unclear way, a few reasons why "claim" should also be understood as «right in the strictest sense», and these reasons pertain, so to say, to "descriptive linguistics" of some linguistic associations, and have little to do directly with those relevant for a rights function theorist, for, among other things, Hohfeld, does not focus on the semantics of rights, on the function of rights. Some encounters between the two approaches could be found, but K is reluctant to engage in something like a "descriptive sociology" of linguistic uses. Indeed, as we shall see below, K gives other reasons, not always clearly, for restricting his theory to claims.

In one paragraph, K points out the characteristic role of claims:

> «The distinctive role of claim-rights in this area is different. Where powers and liberties consort with claims that protect the power-holders' and liberty-holders' ability to exercise their respective entitlements, the presence of those claims is what commonly elicits the application of the term "rights" to the powers and liberties. Because claims are unique in performing that particular function, the singling out of them as rights is hardly an arbitrary stipulation» (KRAMER, STEINER 2007, 298).

As evidence, K adduces the fact that liberties are usually considered to be accompanied by duties of non-interference in order to qualify as "rights"[83]. The Kramerian shows some affinity with the Hohfeldian passage, consisting of attention to the linguistic practices that qualify something, with a certain rigour and in a convergent way at least, as a "right". Of course, the thesis about liberties is sound, if it is understood as referring to assumptions such as what Hart called "naked liberties", but it falls short of proving what K intends to prove. For such assumptions, the content of the generalisation would have to be extrapolated to other normative positions, in other cases, which is what is at issue here. To be sure, in certain cases, the claim is relevant: for example, with vested liberties. But for instance, in other cases, what is relevant is the bilaterality of liberties or the inclusion of powers. The question, then, is what this particular

[80] KRAMER 2010, 33; KRAMER 2013, 246 f.

[81] KRAMER 1998, 62. What I call the «theory of the function of rights» is usually called the «theory of the nature of rights». Such a label is unclear and reminiscent of ontological Realism (if not of Natural Law).

[82] KRAMER 1998, 65, 61.

[83] KRAMER, STEINER 2007, 296 f; KRAMER 2016, 5.

function consists of and why claims perform it uniquely well. The relevant property of claims, when they complement other entitlements (i.e. as part of molecular rights) is the «possibility of imposing a protective injunction», of «protecting the exercise of other entitlements»[84]. It should be noted: not «protecting the wellbeing». It is the existence or performance of the duty that is typically beneficial[85]. These statements make the claim, in some (structural) sense, a second-order entitlement, because it presupposes the existence of other entitlements, and thence necessarily referring to other entitlements, at the very least, to other powers, and make the role it plays relative to the effectiveness of other rights. These are accessory roles, which are only instrumentally connected to the wellbeing of individuals and which, rather, bring the Interest theory closer to the Will theory, in its emphasis on the exercise of normative powers[86]. In other words, the key to the Kramerian Interest theory, the emphasis on claims and duties, is an immediate protection of the other entitlements (basically, liberties and powers, in molecular rights). But if this diagnosis is correct, then the connection between duties, other entitlements and wellbeing becomes somewhat nebulous.

Precisely, except initially, K's theory does not understand "protection" as «protection (and promotion) of the wellbeing», as is usual in Interest theories, but above all as "normative protection" and, more particularly, as «deontic and inherent protection»[87]. K argues that, for the Interest theory, the main desideratum for the subject is protection or, in an alternative formulation, security. In what sense the claims are especially protective or more protective than other positions is something that K has not made explicit until recent work[88]. Thus, it is only in his most recent work that K has broken down the terms of normative protection into "inherent and deontic protection". This characterisation says very little: "inherent" only designates, as I have said, a necessary and objectified character of protection, and "deontic" simply refers to the logical modality[89]. But if to the question of what kind of protection the duties dispense, the K's answer is simply a repetition of the question and it incurs in circularity. It may be that K intends only to refer, but there is no explicit evidence to this effect, to the idea that the duty expresses the deontic modality "obligatory" and the reference to it is clearer than the reference to claims, or than the reference to other normative positions. In that case, such an argumentative move would be apt to explain why duty is more explanatorily relevant than claim or other rights, though not, not explicitly, why duty performs the function relevant to the Interest theory model ("normative protection") more strongly than any other normative position. For, in truth, the thesis that normative protection is carried out by duty is not so much a thesis about the functions of rights (nor about the values of rights), but rather about Interest theory as a theory of right-holders identification, for K argues that the relation between claims and duties is to be explained by the conduct of the duty-bearer (an active position), not of the claim-holder (a passive position, so that its holder, strictly speaking, neither performs nor omits any action as the content of that right). As I have already pointed out, claims have to be specified by reference to the actions of the persons subject to the correlative duty[90]. This, of course, also has to do with the deontic modality and not only with the action. However, K, as we shall see below, does not seek to confine himself to the field of the identification of law, as one might expect. Normative protection (and, one

[84] From a personal communication with K 2020.

[85] From a personal communication with K 2020.

[86] Indeed, if my reading is correct, there is no significant difference between Kramerian "normative protection" and the "exercise" of the Will theory.

[87] At first (KRAMER 1998), what was relevant for K was the advantageous character of rights, a thesis contained in the "thin evaluative stance".

[88] The explicit manifestation of the protective function can be found in KRAMER 2016, 29, 48.

[89] On the other hand, the Kramerian definition shows remarkable affinity with the formula of the "deontically infused good", as a basis for directional duties, that Cruft talks about (see CRUFT 2019: 97-100).

[90] KRAMER 1998, 13.

might argue, advantageousness), for K, is carried out by duty. K insistently preaches the protective character of duty, rather than of the correlative claim[91]. This assertion falls into the Hartian accusation directed at Interest theorists[92], for claims, in some Interest theorists' accounts, are redundant in relation to duties: it is the latter that have more evident, more relevant information and those that protect other normative positions. The reference to claims is then superfluous. Of course, from a logical-conceptual point of view, it is just as well to speak of one term as the other, by virtue of the correlativity thesis (if so understood, the accusation would be ill-founded)[93], but from the point of view of the identification of the right and the function of rights, which were the variables that Hart took into account to formulate his accusation, K's proposal is exposed to this accusation.

In any case, these answers draw attention to another, and more salient peculiarity of K's analysis, which seems to be in solidarity with the one I have just pointed out: it tends to predicate the beneficial character of deontic notions and the neutral character of anankastic notions. So, the question, reformulated, is "why normative protection is only (or mainly) deontic protection?" In this way, the Kramerian argument, as I have reconstructed it in the previous paragraphs, presents an additional implicit thesis, this one no longer strictly linked to the identification of right-holders and the application of the right: the deontic and the protective character are somehow knotted. Of course, as I have argued above, this thesis is not sufficient to answer the question of the paradigmatic character of duties or claims for a Interest theory, but it does put us on the track of a better reconstruction of K's position, to be complemented, surely, by the clarifications I raised shortly before on how "normative protection" is to be understood. For K, powers and liabilities have a neutral character, which means that their identification does not rest, as in the case of claims, on valuational assumptions and that one cannot judge whether they are beneficial or harmful without assessing their content. Also, interestingly, K considers that claims, like types, are positions of advantage, but are also some tokens of liabilities and disabilities. Thus, the question remains open as to whether certain correlatives and not only certain entitlements could be considered beneficial[94]. This picture presents different problems; a general one is the renunciation of Interest theory to deal with what are generically called "rights" by speakers, in order to deal with normative positions (entitlements and correlatives) that become, in some sense, positions of advantage. Precisely, an even more remarkable problem is that of confining liberties and powers outside the Interest theory, if they are not complemented by claims. Some correlatives would be advantageous, and so qualifiable as "rights", and some entitlements would not be advantageous and thus would not qualify, for K, as "rights".

In addition, there is a peculiar oscillation of the structural model, between molecular rights or atomic rights, and between claims as determining but accessory elements or as paradigmatic elements in molecular rights. Indeed, if normative protection is the relevant property for molecular rights and is also the main contribution of the claims, the latter become instrumental. Not only that, but a singular shift also emerges from what has been said in the last paragraphs: the displacement of Kramerian theory from the common defining clauses of the Interest theory, relating to the protection and promotion of wellbeing (an objectified or subjective conception of wellbeing), as it is manifest in MacCormick's Interest theory, and a placement in an idiosyncratic version, which understands "protection" in the semantic field of "normative

[91] KRAMER 2010, 32; KRAMER 2013, 246; KRAMER 2016, 1.

[92] As I have already mentioned, for Hart, if for an Interest theorist to have a right is as much as to benefit from another's obligation, the reference to right is redundant with respect to the more fundamental and clearer reference to "obligation". This accusation is not true of Bentham, but it is, to a large extent, true of Raz.

[93] That is, as we shall see, the path undertaken by K.

[94] By the way, we should say that the content and the possession itself is what could be considered beneficial in any kind of entitlement.

security", which is characterised not only as "deontic", but also as "inherent", suggesting an objectivist view of protection. This view is combined, as we shall see below, with a rather more objective version of the individual's wellbeing, with a strictly normative notion of "interest".

In short, the result is somehow peculiar: both in its structure, as a molecular right, consisting of liberties, powers and claims necessary for effectiveness, and immunities necessary for stability, and in its function, insofar as normative protection is central (i.e. the realisation of normative positions of a lower order than the protective position), the extended Kramerian model of "right" is similar to the model of the Will theory. On the other hand, the model restricted to claims is not viable, because the role of the correlative duties is precisely the normative protection of other atomic positions, so that there are only "rights" as molecular rights for K, and the different problems of the restricted model and the extended model of "right" are combined.

5. *On the justificatory dimension of K's theory and theories of rights*

Before turning to some considerations about the justificatory sphere of K's theory and of any theory of rights, I consider it important to examine a relevant substantive aspect: what conception of interests does K defend? As we shall see, this is an aspect somewhat neglected by the Cantabrigian professor, who, as I have pointed out, explicitly claims that his theory avoids making value judgements (apart from the strictly necessary according to the nebulous "thin evaluative stance"). While it is true that K devotes considerable attention to some substantive aspects of detail on which it may be appropriate for an Interest theorist to pronounce[95], there are some on which his response is unsatisfactory. One notable one is the subjective or objective character of the interests that rights protect or promote. K claims that the conception of welfare he promotes «is objective, rather than accommodatingly subjective»[96], and explains such a claim as a deference to the evaluative judgements expressed by individuals in most contexts, but also to the need to confront such judgements when they are erroneous or short-sighted. This is often the case when the class of potential incumbents consists of children or the incapacitated, and a fortiori nonhuman animals[97].

Before presenting his conception of "interests", K puts the problem itself in the following terms: he defines his conception of interests as "pre-ethical", in that it takes into account what a certain person desires (subjective element) as well as what a person should desire (objective element)[98]. It is wholly inappropriate to call such an understanding "pre-ethical" and, in fact, it is certainly an ethical view (of a cognitivist type) and can be described as one that oscillates between subjectivism (of individuals' preferences) and objectivism. When addressing the understanding of, but not adherence to, controversial rights such as the eventual right to be tortured, K seeks to settle the question by indicating that he defends the same view as Hart's clarification of Mill[99]. The problem is that this does not settle the question at all, at the moment Hart redefines Mill's treatment of sensible/wrong desires, and it is not clear what position Hart takes in the partially reformulated reading of Mill. At this point K can be reproached for clearly denying that he is undertaking an operation of moral evaluation (in a first-level discourse).

[95] For example, the criteria on the basis of which classes of potential right-holders can be selected, KRAMER 2001, 34 ff.

[96] KRAMER 2001, 80.

[97] KRAMER 2001, 80, 91.

[98] See KRAMER 2016, 48.

[99] KRAMER 2001, 95; HART 1963.

It is now time to delve into the justificatory dimension of K's theory by first examining his account of moral rights. As I have already mentioned, K's allusions to moral rights are rather infrequent and their treatment is minimal. It is true that K has presented some differences that would show legal rights to be different from moral rights[100]. Among these differences, it should be mentioned that, unlike in the legal realm, remedies (remedial duties) are a necessary component of rights in the field of critical morality. This is tantamount to saying that nominal moral duties are not duties at all. He has also recently explored very briefly the extension of his Interest theory to moral rights. K presents the hypothetical case of kidnappers forcing the kidnapped to perform certain tasks by force, addressing the problem of whether such duties are owed to the kidnappers, in which case they would have a correlative right[101]. In line with his resolution, K formulates the following «extended Interest theory for moral claim-holding»: A person *P* has a moral claim correlative to a moral duty *D* if and only if [1] *D* inherently and deontically protects some aspect of *P*'s situation that, all things considered, is generally beneficial to a being like *P*, [2] the existence of *D* is not due to some moral wrong perpetrated by *P*, and [3] P belongs to the class of potential claim-holders[102]. If so, the extension to the field of moral rights is meagre, since it is restricted only to [2], which is an exception clause, relating to when a moral right is not to be given[103]. Moreover, [2] responds to a rather elementary principle for a critical morality, the wrongful nature of profiting from illicit acts. Precisely, K's theory cannot be extended, at least not easily and widely, to the moral domain, because of its configuration as a decision procedure for the identification of right-holders, of a decidedly technical-legal character, and, what is more significant, because of a manifest lack in K's approach, which lies in the lack of reference to the justificatory dimension of rights. I refer to a lack of explicit and developed reference, as we will see at the end of the paper that it does contain a not very explicit and fragmentary reference. And, of course, the "thin evaluative stance", the thesis that to speak of "rights" (deontic and, to a lesser and particular degree, anankastic positions) commits us, at least to a minimal extent, to employ valuations, in particular, concerning the advantageous character of rights, is a timid enunciation of what I intend to assert. It may happen, de facto, that legal practices refer to or enshrine in their interpretations and legal constructions unjust rights, but often, especially in contemporary constitutional states, they assume the idea of a minimum of justice in legal relations.

Indeed, the study of justification as a significant datum of rights should be peaceful for an inclusive legal positivist and incorporationist like K[104], for what datum is more peaceful concerning a constitutional order than the possible inclusion of substantive criteria in the identification of the right by legal operators?

However, a neutral description of law, respectful of the social sources thesis, should not use the beneficial character as a requirement to qualify a certain normative position as "right" (consider the case of the Nazi law, mentioned above), unless the system itself, contingently, does not incorporate the valuation of the beneficial character as a criterion for the identification of rights. In a certain system, according to the thesis of social sources, there are the legal positions conferred by the rules promulgated by the authority, in accordance with their textual formulation (explicit rights, the result of interpretation) and their deontic consequences, or legal norms derivable from one or more legal norms, express or implicit, previously identified (implicit rights, the result of legal construction)[105]. Thus, for an interpreter to qualify a certain

[100] KRAMER 2004, 249-294.
[101] KRAMER 2021, 1 f.
[102] KRAMER 2022, 379. Incidentally, this implies per se the recognition of non-directional duties, a possibility that Kramerian theory otherwise does not admit.
[103] KRAMER 2021, 2 f.
[104] For a defence of inclusive positivism, see KRAMER 2004, 3 ff.
[105] Cf. PINO 2013, 248; cf. NAVARRO, RODRÍGUEZ 2004, 117.

normative position as a "right" is at least a function of the fact that the provision in question is formulated in terms of some legal entitlement (think of a rule such as "everyone can go to the forests" or "everyone has the liberty to go to the forests"), or in terms of their contradictory positions ("no one has a duty not to go to the forests") or from the formulation of an implicit norm, resulting from a weak permission, in the light of the set of legal sources, under which there is no prohibition to go to the forests. For the qualification of a normative attribution as a "right", the linguistic, structural identification I have just referred to could suffice. Thus, reference to the justification and valuation of normative positions would not be necessary; whether or not access to forests is beneficial might not be relevant for qualifying such positions as "rights" if we are merely describing legal norms in force[106]. Of course, it could qualify as a "right" even if it is a trivial right, indifferent to wellbeing. In a discourse of legal science aimed at identifying the law in force, one would not have to resort to the beneficent criterion, unless, contingently, the legal system itself established it as a criterion for identifying positive norms, in a perspective of methodological legal positivism. This is the task that the Kramerian Interest theory is primarily concerned with, which raises the question of whether the beneficent element as a tool for identifying law (and not as a description of the actual practices of identifying law) is well suited to methodological legal positivism. Interest theory can legitimately engage in these tasks in different ways and for different reasons, but it ceases to be a second-level technical-legal theory reconstructive of legal practices if the condition that the legal system establishes beneficence as a criterion for the identification of rights is not met (in addition to the adhesion to some version of incorporationism or inclusive legal positivism).

It is quite another thing, indeed, that we try to account for what certain operators actually do and not to guide their actions, and that what they do is more or less in line with the theses of methodological legal positivism[107]. For these users, who make use of technical language or ordinary language, the beneficial character as a criterion for the use of the expression "right" to qualify a normative position may be relevant.

Such a second-level discourse is certainly not necessarily a discourse of justification but about justification, and retains its descriptive character, although it includes some evaluations and deals, among other things, with evaluative-justificatory discourses[108]. In order to carry out such tasks, it is not necessary to adhere to inclusive positivism and incorporationist theses, since it is possible, among other things, to carry out a description, in a broad sociological sense, of what normative addressees and legal operators consider to be "beneficial". In any case, the "sociological" one is not a path that K is interested in pursuing. Whatever the case, a correct methodological and metatheoretical understanding of the possible tasks of the legal philosopher means that he does not have to be over-precautious and embark on a greater quantity and quality of theoretical tasks than those that occupy K.

In fact, unlike K, we must distinguish between discourses *of* justification and discourses *about* justification. The discourse of justification answers questions such as what is the value that rights are to serve, what rights are to be conferred, given adequate justification, the answer to such questions consists in the formulation of norms. Thus, it forms a discourse in a evaluative-justificatory key, committed to ethico-political values and with which a normative model of rights (a doctrine of rights) is constructed. A discourse about justification, on the other hand, answers questions such as: what is the value that rights serve in certain legal systems (or, more

[106] This would be a linguistic formulation in terms assimilable to "rights" (prerogatives, powers, licences, etc.), often through the lexicon of the deontic and anankastic modalities.

[107] But, in fact, K is mainly concerned with the second-level discourse, prescriptive of practices, as a first-level discourse, and does not claim only to account for actual practices with a second-level descriptive discourse, and K's analysis is very limited in its dedication to the description of actual legal practices.

[108] In fact, discourses of and discourses about justification can and should be distinguished.

generally, in certain normative systems); the answer to such a question consists in the formulation of normative propositions. It forms a descriptive discourse, models that explain rights. Of course, also in the discourse about justification it is about capturing evaluative-justificatory discourses and not only analytical-conceptual ones, but it is mainly oriented towards explaining practices, or, punctually, towards explaining theories, rather than providing a mould to which theory and practice should fit, as normative models, discourses of justification, do instead. Interest and Will theories, used as tools of empirical revelation of current uses, of how legal theorists and practitioners use expressions such as "right", are, implicitly or explicitly, discourses of descriptive metajurisprudence and descriptive metatheory. The possibility of a value-neutral second-level description of law is preserved in discourses about justification. As Hart stated, «description may still be description, even when what is described is an evaluation»[109]. Indeed, the kind of explanation of rights that Hart inaugurates is a kind of conceptual analysis that deals with, among other things, valuations and, precisely, the point of rights. K would do well to incorporate this distinction and to state clearly which of these two poles he is at.

A few words should be devoted to K's theoretical aspirations. It is not so much theoretical positivism that determines the restriction of K's attention to legal rights as methodological positivism. K, he asserts, is primarily concerned with legal philosophy in the strict sense and aims to formulate a «theory of the nature of legal right-holding». Furthermore, K understands the explanation of the fundamental features and functions of rights as analytical questions[110]. In doing so, normative questions can be largely avoided. But that, in any case, does not mean that, at least, as K himself acknowledges, Interest theory does not entail deep moral implications and does not, to some extent, assume value elements.

As has become apparent, some substantive elements do not receive the attention that might be expected from a theory of rights and other elements are simply assumed as implicit presuppositions. K argues that the main desideratum that corresponds to a theory of the function of rights is normative protection[111], but it turns out that this justification is presupposed and remains lacking in a detailed articulation.

On the other hand, there are aspects of the justificatory dimension that K develops; to this extent, he underestimates the valuational commitment of his proposal. K does not merely show –although his defining clause and Bentham's test claim to do so– who is the holder of a right in the sense of which individual occupies a position that is simply identifiable in analytical-conceptual, structural terms (related to the breach of a defined duty). When K details different arguments by virtue of which an individual can be considered a right-holder[112], he is not just making a logical pronouncement about whether that individual is the counterpart in a given relation, which has certain structural features, but he is making a pronouncement about what counts as a right and what does not. If the first task may be strictly analytical-conceptual, syntactic, the same cannot be said of the second, which is evaluative-justificatory, semantic, or, at the very least, deals with value-justifying matters. It is precisely the second task that a rights theorist has to undertake when he has to articulate some fundamental theses concerning the function of rights.

The disparity of tasks is thematised in the labels K uses; but the labels, precisely, minimise the presence of the task not prioritised by the chosen label. Let me explain. As I have repeatedly pointed out, K prefers to call his proposal a "theory of right-holding"[113], and specifies that it is

[109] HART 2012, 244.
[110] See KRAMER, 2008: 414-415.
[111] Cf. KRAMER, 2008: 418; cf. KRAMER, STEINER, 2007: 289.
[112] A significant example can be found in KRAMER, STEINER 2007, 290-292.
[113] KRAMER 2016, 1.

focused on determining the basis for the directionality of duties. But what is the basis for the directionality of duties? what makes a certain obligation of one individual owed to another person? The "basis of directionality" cannot but depend, sooner or later, on an argument of a evaluative-justificatory nature. Even if we limit ourselves to describing that such a valuation has taken place and, above all, without prejudice to the fact that the instruments we use to determine the scenarios in which we usually say that a certain individual has a right may be eminently formal. If we follow K's theory, we can determine a right (a defined entitlement) by reference to the correlative duty (its fulfilment or transgression) and, jointly, by reference to the beneficial effects of the duty. The explanation of rights as the correlative position to a duty can be carried out in analytical-conceptual and, basically, neutral terms. However, this is not the case when we stipulate as a condition for considering a certain normative position as a "right" its generally beneficial character for the holder. The notions of "benefit", "interest", "advantage", while theoretically illuminating, show a valuational commitment; of course, not necessarily on the part of the interpreter who gives a detached account of this commitment, describing it in a second-level discourse. Identifying the content of rights with the protection of wellbeing or the promotion of the will, and privileging one understanding over the other, is a matter of justification; a justification formulated by the legal system (if the theorist is engaged in describing it) or by the author himself (if the theorist is engaged in prescribing). The moment K asks about the "intrinsic effects" of norms, the effect he is specifically interested in is the normative property of "benefiting" and aims to analyse and collect sets of cases in which an individual can be said to be "benefited" by a norm, K decisively crosses the Rubicon of evaluative-justificatory considerations.

Although K proposes a «Interest theory without political trimmings»[114], cannot avoid a commitment to valuation. K explicitly acknowledges that his theory, like any theory about the function of rights, «must adopt at least a thin evaluative stance»[115]. What does K mean by that? That talk of "rights" necessarily entails some valuations; in particular, about the advantageous character of rights[116]. But K's acknowledgement of this does not adequately account for the commitments that any theory of rights must make if it is to interrogate, in any depth, the questions that K is asking[117]. Of course clarifying the function and content of rights is a theoretical enquiry, guided by explanatory-theoretical desiderata[118]. However, it is not only that. The fundamental characteristics and basic functions of rights are analytical questions[119], but they are also, and to a very significant extent, matters of assessment and justification, at the very least, in an (eminently) descriptive second-level discourse with reference to an (eminently) evaluative first-level discourse.

To speak of a «theory of entitlement or possession of rights» or to speak of a «theory of rights» is not just a matter of labels, for K. The American philosopher argues that a theory of right-holding is a theory encompassed within a broader theory of rights[120]. If the latter has to

[114] KRAMER 1998, 91.

[115] KRAMER 1998, 91.

[116] Cf. KRAMER 1998, 96-97. Although not, apparently, of the anankastic positions, if we stick to the singular Kramerian theses I have examined above. But this is mistaken. There is no difference between deontic and anankastic entitlements, and it is the content which might be considered beneficial, in any case.

[117] Indeed, K's critique of other positions highly charged with substantive ethico-political content and the eagerness to present a proposal free of substantive beads have led the American theorist to relativise and mince words about the value dimension of his enterprise. In any case, it cannot be argued that (any version of) the Interest theory is necessarily a more neutral proposition than (any version of) the Will theory, as Kramer suggests in several passages (KRAMER 1998, 91 ff.). Of course, K would surely concede that Hartian Choice theory is more value-agnostic than the Interest theory proposed by Raz.

[118] See KRAMER 2008, 420; see KURKI 2018, 433.

[119] See KRAMER 2008, 414.

[120] See KRAMER, 2012, 129.

encompass other components and thereby assume a broader set of theoretical commitments, it follows that the former can evade them. A theory of the nature of legal right-holding would thus be a fundamentally theoretical-explanatory enquiry, primarily focused on the necessary and sufficient conditions of the existence of right-holding[121]. It turns out that we can know a few things that do not constitute "theories of right-holding" for Kramer: [1] a theory about the "nature" of moral rights, [2] a political theory of the rights we possess, or [3] a theory prescribing what legal rights should be attributed (a political philosophy)[122].

As far as the metatheoretical approach is concerned, the distinction of K's theory of legal rights holding from [1] is of little importance, either because of the author's inclusive positivism, or because of his recognition that most aspects of his theory are transferable to the "holding" of moral rights. Again, the difference would not lie so much in the object –K insists that one can speak in either case of "theory of right-holding" without the need to speak of "rights theory"– as in the approach. That is to say, if K seeks to investigate moral rights, the path succinctly followed so far is not suitable, and, precisely, he would have to move considerably away from the field of Bentham's test and the Hartian dictates that animate it, circumscribed to the determination of legal rights and which study the legal phenomenon *de lege lata*, not *de lege ferenda*.

The distinction with respect to [2] is more capillary. It is relatively common, of course, it is by no means exclusive to K, to thematise a division of tasks between analytical-conceptual enterprises and evaluative-justificatory enterprises, understanding, among other things, that the former is oriented towards understanding the "nature" of rights –rights already positivised– and the latter, enclosed in [3], oriented towards determining which rights should be attributed to which subjects. But that the distinction is operationalised in this way is highly dubious, fragile and unconvincing: the second element seems to be an example of legal politics or moral critique of law, but it is by no means exhaustive of the territory of the evaluative-justificatory critique of rights, as I have shown. Secondly, if it is intended as a distinction between description and prescription, the distinction presents a certain instability in a component of social reality with a notable positive evaluative charge, such as rights. Or, in another less charitable hypothesis, it is naïve and essentialist if the aim is to discover the "true nature" of rights. Rather, the problem under discussion lies in the possibility that for rights we may have pure models of what we have apart from what we ought to have (strictly descriptive models, capturing only the right as it is) and pure models of what we ought to have apart from what we have (strictly prescriptive models, capturing only the right as it ought to be). Even at the risk of repeating some considerations, I think it is important to reiterate that I do not claim that there are not two broadly differentiated approaches, an analytical-conceptual one, whose most sophisticated exemplar is Hohfeld's theoretical project, and a evaluative-justificatory one, whose paradigmatic formulation is the proposals of MacCormick and Raz. What I am arguing is that any theorist who tries to pronounce on some key aspects of what it means "to hold a right" falls into the second set of questions, the semantic set, and that the distinction between one approach and the other not only has some blind spots, but is also, more often than not, poorly framed. Not to say that, as I have shown, K sometimes fails to maintain the most recognisable core of this distinction. So it could be argued: even if the distinction itself is sound, it has dubious points (when we ask what counts as a right), and the development of that distinction, the division of spheres of enquiry, is not always entirely sound.

On the other hand, K's downplaying of the substantial contributions contained in his theory does not mean that his theory, even with K's inadvertence, satisfactorily covers the set of justificatory questions that a theory of rights could and should answer. Most of the limitations

[121] See KRAMER, 2012, 132.
[122] See KRAMER 2012.

that beset K's theory have already been referred to in this paper. Kramerian theory owes much to Hohfeld's thesis and taxonomy and to Hart's fundamental operational suggestions. Perhaps its main limitations lie in the fact that, like Hohfeld, it seeks to remain largely on an analytical-conceptual plane and, above all, as Hart suggests to the Interest theorist, it focuses on the violation of duties and remains on a retrospective, not a prospective plane (*de lege lata*, not *de lege ferenda*). The Kramerian contribution makes it possible to identify the holder of a right as aggrieved or (effectively) benefited[123], but does not offer any criterion for determining this ex ante or for understanding the arguments aimed at conferring rights on an individual. Precisely, and this points to the restriction of [3], it is unreasonable that K does not deal with the prospective justification of rights and the processes that lead from people's interests to defined entitlements from the moment he goes into such detail on the problems of to what extent and on what occasions a norm is to be understood as retrospectively benefiting a subject. K's approach to this implies that there is no choice between a substantive theory that prescribes when there should be an interest-based right and a formal theory that determines the addressees of a norm. As I have argued in this essay, it turns out that the specification of such addressees as "beneficiaries" and the characterisation in detail of such a benefit creates a sort of alternative that brings the second option closer to the first.

That K might opt for the restrictions I have pointed out and for metatheoretical reasons was already noticed by Simmonds.

> «Interest theorists may be tempted by the identification of rights with those interests the encroachment upon which would be sufficient to establish a breach of duty. This preserves the positivism of the theory, but at the price of disconnecting the theory from its broader significance» (SIMMONDS 1998, 198).

However, contrary to Simmonds' suggestion, this is not the only way to preserve the positivism of interest theory. If K provides elements of analysis and conceptual and theoretical tools of Hohfeldian inspiration that constitute a valuable corrective to different aspects that are little and inadequately treated by the defenders of the dynamic conception, these defenders pronounce themselves on aspects of justification that are neglected and that should be attended (explicitly and lenghtly) to by K[124]. It is noteworthy that K follows Hart in his ambition to reconfigure the Interest theory as a legal-technical theory, but that he is more succinct than his predecessor in investigating the justificatory dimension of rights.

The last drawback of K's proposal that needs to be pointed out is his insistent assertion that the claim-holder benefits from the correlative duty. Note that, significantly, the extended version of the Interest theory predicates the beneficial character of the entitlements and not of the correlatives. Thus, a first asymmetry arises, since, as far as the claims are concerned, the rights must be specified by reference to the actions of the persons subject to the correlative duties, as I have said, while as far as the other rights are concerned, the relevant action (and its qualification) is that of the holder of the right, if we follow the tenor of the extended version of the Interest theory. In addition, a second asymmetry is added, and that is that K gives precedence to the restricted version over the extended version of the Interest theory: that is, duties are given precedence over claims –under the restricted version– and the remaining three meanings of "right" are given precedence over the correlative elements, under the extended version, but it must be conjectured that the notion of "duty" is given precedence over any other,

[123] The qualification of "effectively" simply seeks to make it explicit that the test can be carried out only from the moment the benefit or damage occurs. It is not intended to evoke the question of third-party beneficiaries, which K resolves, in my view, in a conclusive manner.

[124] Cf. KRAMER 1998, 41, where he acknowledged a similar claim to the dynamic conception.

by virtue of the preference of the restricted version over the extended version. Vice versa, for the extended version, correlatives are explanatorily poorer than entitlements, while for the restricted version claims are explanatorily poorer than duties.

Of course, K can counter that if claim and duty are correlative, it is the same to predicate the beneficial character of one position as of the other. But, in fact, the problem does not concern the logical-conceptual correlativity of claims and duties, which is the way in which K erroneously replies to Hart's accusation[125], but concerns the very vocabulary of rights. The problem lies in the fact that K gives, without sufficient grounds, as I have pointed out at several points in this article, explanatory priority to duties and turns a large part of his proposal on their explanatory potential in relation to the Interest theory. For it should not be forgotten that K's theory of the function of rights is aimed at compensating for epistemic deficiencies. On the other hand, if this is so, what makes us think that it is in any case of knowledge more certain the holder and the content of a duty than the holder and the content of a right? That question can be asked of each of the eight atomic normative positions that make up the Hohfeldian table, with the notable difference –for which, as I say, K does not provide sufficient argument– that the position that is most informative is not the "correlative" but the "entitlement". Hart's accusation of redundancy, rightly so[126], that the notion of "obligation" can express more semantic content and more effectively than rights, is applicable to Kramerian theory: although rights still have conceptual autonomy vis-à-vis the other normative elements, they are somehow relegated to an ancillary plane by the importance of duties. The fact that Kramerian Interest theory repeatedly focuses on the normative protection of duties makes rights redundant. If it is permissible to draw such a conclusion, it is striking that the tools Hart has provided the Interest theorist with are supposedly the best instrument with which to study rights, while at the same time they are the weapon with which to cement their irrelevance.

[125] See KRAMER 1998, 26 f.; see KRAMER 1991, 286 f.
[126] FERNÁNDEZ NÚÑEZ 2023, 137 ff., 167 ff.

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