

If exploring the works of maccormick, hart, kant

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If one were to presume that we already understand what a right is, what is it that makes us rights holders? Are the things that people rights holder to do with our species membership and do they apply to all members of our species or could we extend this thinking to non humans. In order to understand this one must question the very nature of what makes our rights enforceable by exploring the works of MacCormick, Hart, Kant and Hohfeld.

Hillel Steiner said " A right exists when the necessary and sufficient condition of imposing or relaxing the constraint on some person's conduct is another person's choice to that effect" H. L. A. Hart's choice theory coincides with this view and dictates that it is through desire and the choices we make that our rights derive. Hart claimed that the most basic right of all is freedom which is a moral right. Essentially any other right is a specific protected freedom whether the right is moral or legal. Limiting anyone's freedom always requires the authorization of others' rights; and the subjects of rights remain free to " claim" them or not. One of the great problems that this theory raises is its applicability to animals.

Under will theory animals cannot have rights. Without a concept of basic freedom and an understanding or the idea of limiting of rights it is difficult to believe they could comprehend the idea of having rights. It can be said that animals have desires as humans do in the most primitive form. However even if animals could understand rights they would not be able to communicate this to the wider world and therefore the basic underpinning of will theory would fall down as they would not have the power to accept or waive rights and thus would have none at all. If this line of thinking was applied to humans it would be arguable that those unable to communicate

such as individuals in a vegetative state such as Bland in *Airedale v Bland* would not be able to claim or waive their rights and therefore have none.

Another issue with choice theory is that there are no inalienable rights. One of the fundamental points of the theory is that people have the choice to waive their rights including the freedom to waive their right to not accept payment for their human rights. Arguably someone could barter away their rights to the highest bidder.

In reality the ECHR protects the rights of all humans and therefore the idea that some rights can be ignored is not applicable in everyday life. Young children and disabled people don't make decisions for themselves and are unable to claim or waive rights. In the case *Airedale v Bland*, Bland was crushed at the Hillsborough disaster and subsequently left in a vegetative state, the case stemmed from the question of whether if the doctors removed treatment, nutrition and hydration, would it be homicide? A point that was raised was that although the general standard is that you should act in the patient's best medical interest aligning with choice theory this wasn't possible in this case because Bland had no interests due to the extent of his brain damage. Through this line of thinking Neil MacCormick argues that this shows choice theory is inadequate and interest theory is a better choice. Interest theory describes our rights as a product of our interest. Jeremy Bentham was arguably the initiator of choice theory despite being reluctant to accept the idea of moral rights.

Since Bentham is utilitarian all the interests in his opinion would be for welfare and happiness however this theory can still be applied. Interest

theory states that your having a right to something means that it is in your interest, or is to your benefit, and someone else has a duty to provide it. Unlike will theory, choice theory can be extended to prove that animals could have moral or legal rights, as long their interests are enough to hold someone under a duty. Without an ability to translate their interests it is unclear whether the interest would be strong enough to create a duty. One of the alternative issues with interest theory is the third party implications. For example if a neighbour asks you to care for their child, you have a duty to look after them and they have an interest in your duty. According to will theory that child has a right to your care however it is the neighbour who holds the right. This is a very basic example but according to this theory people could potentially hold a right over someone who does not even know who they are as they have an interest in their behaviour.

Another question that this theory opens up is at what point does a duty become strong enough to invoke a right. For example, we all have a right to have sex but it would be odd to suppose that any person or institution has a duty to provide it. Here we can see that certain rights don't imply a correlative duty. Although Immanuel Kant does not discuss the idea of rights in detail we might be able to develop an understanding of them from an account of duties.

Kant believes we have duties to the human race, because humans have a dignity that is "beyond all price". Kant describes people as creatures with a certain type of intellect but more specifically an ability to reason that not only makes them different from animals but better. Reasons allow you are to confer value on the world and are subsequently a source of value. Therefore <https://assignbuster.com/if-exploring-the-works-of-maccormick-hart-kant/>

if you have a moral status then you have a right to be treated in a certain way. Arguably Kant believes that our rights are inextricably linked to being human, nothing more. Following this line of thinking one is lead to believe that non humans should not have legally recognisable rights. In his Lecture on Ethics, Kant said “ But so far as animals are concerned, we have no direct duties.

Animals (...) are there merely as means to an end. That end is man.” Without the ability to reason animals are not above a dignity “ beyond all price” but rather what Kant described as value only in so far as they serve human purpose and therefore do not deserve rights.

In a less hypothetical sense there are other types of people who are not legally recognised as having all their rights. For example prisoners lose their right to freedom. A Kantian point of view would claim that rights are internally complex and possession of a right entails a number of consequences, for example an exercise of a right must be permissible and inviolable. If a prisoner were to have their right of freedom it is possible that this would lead to a violation of someone else’s rights through further crime. If some criminals were to be given their right to freedom it would impose on the autonomy of others. Therefore their loss of a right is necessary or arguably not a claim of a right in the first place as the exercise of this right is violable. *Hirst v United Kingdom* is a European Court of Human Rights case, where the court ruled that a blanket ban on British prisoners exercising the right to vote is contrary to the European Convention on Human Rights.

In this case we can see correlation with Kant's theory again despite it being another potential form of punishment to strip prisoners of this right, the loss of this right would be immoral as it is a permissible and inviolable. One could argue that there are so many different types of rights that the word "rights" is an umbrella term for a variety of different terms. Wesley Hohfeld claimed that the language of rights in different contexts mean a range of different things, he attempted to provide an account of all the different elements that go into making something a right. The four categories include claims, liberty, power and immunity. Hohfeld went on to explain that one simple right such as our right to property is actually underpinned by a number of different rights such as the right to use, the right to exclude others or the right to sell. The point of this being that the term right is subjective and can be understood in many different ways. The vast scope that rights cover supports the idea that perhaps each theory plays into different types of rights. For example Hohfeld treats the law as if it all works under the principles of private law where in reality this would be difficult to apply to that of criminal law.

However the big problem with this argument is that it seems very ad-hoc. If we believe that rights come from a range of sources, this creates the issue of solving conflicting rights claims. The statement in question asks if all humans and non humans should be recognised as having rights by law. Arguably many rights do not fit choice theory particularly well such as the rights of children and animals. However interest theory does not explain what is distinctive about what a right is and how significant the duty placed on another has to be to create a right.

On the other hand practically, human rights and rights protected by the law better fits interest theory than choice theory. A potential solution to recognise the full extent of right within humans would be a hybrid theory. For example interest theory but where the only interest sufficient enough to create a right is freedom, this would limit the amount of rights humans could hold but it would be clear what kind of duty creates a right. To extend this theory to rights for animals ensures that those who do not have the capacity to accept and waive rights such as children or those who are mentally or physically incapacitated are also protected by the law. To not do this would be a failing of these people and their basic human rights. One must conclude that human and non human rights must be protected by law in order to ensure the safety and freedom of all humans.