

# Why aren't duties rights?

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I do not answer my title's question in this paper. Instead, my aims are first to show that the question is worth asking, secondly to show that its answer will not be trivial, and thirdly to show that it is unclear what the answer is. From these three conclusions it follows that many contemporary Hohfeldian approaches to the conceptual analysis of rights (including those of Sumner, Jones, Kramer, Wenar and myself)<sup>1</sup>, while potentially capable of extensional accuracy, overlook an essential but unidentified feature of rights: the feature which explains why duties are not rights. The paper challenges theorists to investigate what this feature is.

## Hohfeld's technical vocabulary

To grasp my argument, one needs to understand Hohfeld's technical vocabulary. Initially, Hohfeld introduces the first-order Hohfeldian positions: 'claims', 'no-rights', 'duties' and 'privileges'.<sup>2</sup>

- X holds a **claim** that Y perform act A if and only if Y holds a **duty** towards X, to perform act A.
- X holds **no claim** – which Hohfeld reifies as a **no-right** – that Y perform act A if and only if Y holds a **privilege** against X not to perform act A.

The two statements above entail:

- Y holds a **privilege** against X not to perform act A if and only if Y holds **no duty** towards X, to perform act A.

Next, Hohfeld introduces the second-order Hohfeldian positions.<sup>3</sup>

- X holds a **power** if X holds the ability to create or to remove some **claim, duty, privilege** or **no-right** (a claim, duty, privilege or no-right which might be held by X himself or herself, or by someone else).

Like the four first-order positions, the four second-order positions are logically inter-definable:

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<sup>1</sup> See L. Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press, 1987); P. Jones, *Rights* (Basingstoke: Macmillan, 1994); M. Kramer, 'Rights Without Trimmings', in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 1998), pp. 7-111; L. Wenar, 'The Nature of Rights', *Philosophy and Public Affairs*, 33 (2005), pp. 223-252; R. Cruft, 'Rights: Beyond Interest Theory and Will Theory?', *Law and Philosophy*, 23 (2004), pp. 347-397.

<sup>2</sup> See W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Conn.: Yale University Press, 1964 [repr. from *Yale Law Journal* 1913 and 1917]), at pp. 36-50.

<sup>3</sup> *Ibid.*, pp. 50-64.

- X holds a *power* to create some specific claim, duty, privilege or no-right for Y if and only if Y holds a *liability* to have that specific claim, duty, privilege or no-right created for Y by X.
- X holds *no power* – which Hohfeld reifies as a *disability* – to create some specific claim, duty, privilege or no-right for Y if and only if Y holds an *immunity* from having that specific claim, duty, privilege or no-right created for Y by X.

From these two statements, we can infer:

- Y holds an *immunity* from having some specific claim, duty, privilege or no-right created for Y by X if and only if Y holds *no liability* to have that specific claim, duty, privilege or no-right created for Y by X.

There can be second-order positions enabling the manipulation of second-order, as well as first-order positions. For example, my right to give away my house to you might include not only a power to confer on you claims to noninterference with the house, and a power to confer on you privileges to use the house, but also a power to confer *powers* on you. For in giving you the house, I might give you the power to give away the house to some further person. My initial analysis of powers – in terms of which the three other second-order Hohfeldian positions have been defined – should therefore be expanded as follows:

- X holds a *power* if and only if X holds the ability to create or to remove some *claim, duty, privilege* or *no-right* (a claim, duty, privilege or no-right which might be held by X himself or herself, or by someone else), or X holds the ability to create or to remove some *power, liability, disability*, or *immunity* (a power, liability, disability or immunity which might be held by X himself or herself, or by someone else).

Note that the first-order Hohfeldian positions are each defined in terms of their relationship to our pre-theoretical concept of duty (e.g. I hold a claim whenever someone owes me a duty), while the second-order positions are defined in terms of their relationship to our pre-theoretical concepts of both duty and ability (e.g. I hold a power whenever I have the ability to create or remove some duty).<sup>4</sup> In what follows, I will assume familiarity with Hohfeld’s technical terms as outlined above.

### Why my title’s question is worth asking

My title asks why duties are not rights. This question would not be worth asking if one agreed with Hohfeld’s and Kramer’s contention that all and only claims are rights.<sup>5</sup> If this contention were true, then ‘X’s right that Y do A’ would refer to the very same phenomenon as ‘Y’s duty towards X to do A’; the terms ‘right’ and ‘duty’ would be two different ways of referring to the same normative relationship, and the difference in meaning would simply be that ‘right’ focuses on a different ‘end’ of the same normative relationship to which ‘duty’ refers. If this were true, then ‘Why aren’t rights duties?’ would be akin to such trivial questions as ‘Why isn’t North South?’<sup>6</sup>

<sup>4</sup> See Sumner, pp. 18-31.

<sup>5</sup> Hohfeld, pp. 36-38; Kramer, p. 9.

<sup>6</sup> See Thompson’s contention that rights and duties are, for Hohfeld, ‘the same concept, the same “fundamental legal conception”, the only difference being the order in which the terms are taken’ (M. Thompson, ‘What is it to Wrong Someone? A Puzzle about Justice’, in R. Wallace, P. Pettit, S.

But my title's question is not so easily dismissed, because (a) *not all rights are claims*. In addition privileges, powers, immunities and, I have argued, even liabilities can qualify as rights, as can clusters of these positions (e.g. my right to transfer my property is centrally constituted by a power; my right to freedom of religion is constituted by a cluster involving immunities, privileges and claims).<sup>7</sup> Furthermore (b) *not all claims, privileges, powers, immunities and liabilities are rights*. For instance, a claim, privilege, power, immunity or liability for which no duties of apology or recompense would be triggered if it were not properly respected does not qualify as a right (e.g. suppose I have a duty to my parents to work hard at school, but no duty to apologise or recompense my parents if I fail to work hard; my parents' claim here is not a right).<sup>8</sup> And a power, immunity or liability that in no way serves its holder's interests is normally not a right (e.g. suppose you hold an immunity from receiving promises – so any attempts to promise you things or enter into contracts with you are void; suppose also that this immunity in no way serves your interests; in this situation you hold an immunity that is not a right).<sup>9</sup>

For reason (a), the best theories of what we ordinarily mean by 'rights' are what Kramer and Steiner call 'capacious theories', theories that allow that a wide set of Hohfeldian positions (including privileges, powers, immunities etc.) can qualify as rights.<sup>10</sup> And for reason (b), the best theories of what we ordinarily mean by 'rights' will specify that not every claim, privilege, power, immunity, liability and cluster qualifies as a right; what makes a sub-set of the claims, the privileges and the relevant clusters etc. qualify as rights is their relationship to some further concepts such as *recompense* and *interests* or *choice* or *some other functions*.

My own capacious theory is a version of the Interest Theory, as follows:

[I]n most cases where X holds a right, the following is true:

- (1) X holds:
  - (i) a claim; or
  - (ii) a privilege; or
  - (iii) a power; or
  - (iv) an immunity; or
  - (v) a liability; or
  - (vi) some cluster involving several of one or more of positions (i)-(v),
- and
- (2) if the position (or cluster of positions) of type (i)-(vi) were infringed, unenforced or not properly respected, then X would hold a claim to some form of apology or recompense,
- and
- (3) the position (or cluster of positions) of type (i)-(vi) serves X's interests.

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Scheffler and M. Smith (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press 2004), pp. 333-384, at p. 344, note 18; see also p. 370).

<sup>7</sup> Cruft, pp. 355-359.

<sup>8</sup> Ibid., pp. 359-360. Note that privileges, powers, immunities and liabilities cannot be *violated* (unlike claims); for an explanation of how these positions can nonetheless *fail to be properly respected* (thereby triggering duties of recompense), see *ibid.*, pp. 359-360. For further discussion of violation, see subsections 3 and 4 below, plus note 11 below.

<sup>9</sup> Ibid., pp. 362-363. Note that *privileges* seem invariably to serve their holders' interests in some respect (see [CROSS-REF] below), and *claims* always either serve their holders' interests or are tokens of types the vast majority of whose tokens serve their holders' interests in some respect (see *ibid.*, pp. 364-366 and 381-383).

<sup>10</sup> M. Kramer and H. Steiner, 'Rights Revisited: A Reply to Leif Wenar', forthcoming.

[... But] in *some* cases where X holds a right, clause (3) is false. [... These exceptional cases] arise because users of the term ‘a right’ have decided that certain duties, *when conferred by certain specific institutions* (such as property systems, or the institution of promising), will qualify as correlating with rights whether or not these duties serve the interests of the people to whom they are owed, and similarly certain privileges, powers, immunities and liabilities *when conferred by certain specific institutions* (such as property systems, or the institution of promising), will qualify as constituting rights whether or not these powers, immunities or liabilities serve their holders’ interests.<sup>11</sup>

An alternative capacious theory has recently been developed by Wenar. Wenar maintains that X holds a right if and only if (1) X holds a claim, privilege, power, immunity or some molecular structure of these Hohfeldian positions, and (2) this claim, privilege, power, immunity or molecular structure fulfils one or more of the six functions that he identifies as essential to rights: he maintains that rights must ‘mark exemption, or discretion, or authorization, or entitle their holders to protection, provision or performance’.<sup>12</sup>

For both Wenar’s capacious approach and my capacious approach, the following version of my title’s question seems pressing: why do only *certain types* of Hohfeldian position (claims, privileges, powers, immunities, liabilities, and clusters of these) qualify as rights when they serve their holder’s interests or fulfil the relevant Wenarian function? Why can’t duties, disabilities or no-rights qualify as rights when they serve their holders’ interests or fulfil the functions identified by Wenar? My theory implies that a claim, privilege, power, immunity or liability that serves its holder’s interests qualifies as a right.<sup>13</sup> But *duties* can sometimes serve their bearers’ interests. My duty to wear a seatbelt plausibly serves my interests. Why, then, isn’t this duty itself one of my rights? Similarly, I would add that my duty to care for my parents serves my interests, because I have a concern for my parents’ well-being and I benefit from being normatively bound to assist them. Why, then, isn’t this duty one of my rights? Note that it is plausible that I hold rights protecting my ability to fulfil my duty to wear a seatbelt and my duty to care for my parents. These rights include claims that others not interfere with my carrying out my duties. But my title’s question asks why the *duty itself* (as opposed to its protective claims) does not qualify as a right. Given that the duty itself in each case serves my interests, why isn’t it a right? We surely would not call my duty itself (to wear a seatbelt or to care for my parents) ‘a right’. It would be very strange to do this. But why would this be strange, when the duty serves my interests?

Similarly, *disabilities* and *no-rights* can sometimes serve their holders’ interests. For example, my disability from giving myself away as a slave serves my interests, given

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<sup>11</sup> Cruft, pp. 381-382. One critical response to my definition questions whether clause (2) applies to *morally unjustified* rights and to what Kramer calls ‘*purely nominal*’ legal rights (see M. Kramer, ‘Getting Rights Right’, in his (ed.), *Rights, Wrongs and Responsibilities* (Basingstoke: Palgrave, 2001), pp. 28-95, at pp. 74-78; see also his ‘Moral Rights and the Limits of the Ought-Implies-Can Principle: Why Impeccable Precautions are No Excuse’, *Inquiry*, 48 (2005), pp. 305-355, at p. 326). To defend my definition, one could maintain that morally unjustified rights generate morally unjustified duties of recompense, and that purely nominal rights generate purely nominal duties of recompense. Although there is more to be said, I shall not pursue this topic here.

<sup>12</sup> Wenar, p. 246. For a precursor of Wenar’s multi-function view, see J. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987), at pp. 19-26.

<sup>13</sup> For ease of exposition, I here overlook the recompense clause (clause (2) in my capacious definition quoted in the main text). This clause is discussed in subsection 3 below.

that I am the kind of person whose interests would be disserved by my being able to give myself away as a slave. If this disability serves my interests, why would it then seem odd to call it ‘a right’? It surely would seem odd to call this disability itself ‘a right’, but why is this so? Similarly, given that my interests are served by your not punching me, my no-right that you punch me (i.e. your privilege not to punch me) serves my interests. But why, then, would it seem odd to call this no-right ‘a right’? Surely my possessing a Hohfeldian no-right can never in itself qualify as a right, but how can we explain this, given that some of my no-rights do just as much to serve my interests as my claims, privileges, powers, immunities etc. do?

The same question arises for Wenar’s theory. Some *duties* protect their holders (e.g. my duty to make sure I know the Highway Code). Some *disabilities* exempt their holders (e.g. a criminal’s disability from voting and thereby from endowing others with the duties of political office). We would not call these ‘rights’, but why not? Why do only certain Hohfeldian positions qualify as rights, even though other positions (including duties, disabilities and no-rights) often do just as much by way of serving their holders’ interests, or fulfilling Wenar’s favoured functions?

Although I shall not discuss the Will Theory of rights in detail – because I believe it has been convincingly defeated by MacCormick and Kramer<sup>14</sup> – nonetheless we should note that Will Theorists face a similar question to that faced by Wenar and me. This is because Will Theorists standardly maintain that claims qualify as rights *when they are accompanied by powers of waiver-or-enforcement*.<sup>15</sup> But in unusual circumstances I could also hold powers of waiver-or-enforcement over my own *duties* (i.e. powers to waive or enforce the duties I am under). For example, perhaps a certain government official holds the power to relieve herself of her duty to pay taxes; here she holds a power of waiver-or-enforcement over her own duty. Will Theorists would probably allow this official’s *power* to qualify as a right, but they surely would not want to allow this official’s *duty to pay taxes* itself to qualify as a right – but how can they resist this conclusion? On what basis can Will Theorists disallow my duties from qualifying as rights for me when I hold powers of waiver-or-enforcement over these duties, yet allow my claims to qualify as rights for me when I hold powers of waiver-or-enforcement over them? Note, further, that in unusual circumstances people hold something like powers of waiver-or-enforcement over their own disabilities (e.g. a lawmaker sometimes holds a power to ‘waive’ (or, perhaps, to ‘cancel’) one of her disabilities, replacing it with a power), and it is not unusual for people to hold something like powers of waiver-or-enforcement over their own no-rights (e.g. whenever a person holds a power to create a claim for herself, that person thereby also holds a power to ‘cancel’ one of her no-rights, by replacing it with a claim). A Will Theorist needs to explain why such disabilities or no-rights would not themselves qualify as rights, in cases where they are accompanied by something akin to a power of waiver-or-enforcement held by their holders.

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<sup>14</sup> N. MacCormick, ‘Children’s Rights: A Test-Case for Theories of Right’, repr. in his *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982), pp. 154-166; M. Kramer, ‘Rights Without Trimmings’.

<sup>15</sup> See, for example, Sumner, p. 43, or H. Steiner, ‘Working Rights’, in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 1998), pp. 233-301, at pp. 239-237. For a somewhat different approach, see N. Simmonds, ‘Rights at the Cutting Edge’, in Kramer, Simmonds and Steiner, *A Debate Over Rights*, pp. 113-232, at pp. 217-223.

## Why the answer is not trivial

The problem outlined in the previous section asked Interest Theorists, Wenarian multi-function theorists and Will Theorists to explain why duties, disabilities and no-rights cannot themselves qualify as rights even though they can as readily serve their holders' interests, fulfil Wenar's functions, and be accompanied by powers of waiver-or-enforcement, as can claims, privileges, powers, immunities and liabilities. There are two types of explanation that one could offer. A *non-trivial* explanation would argue that claims, privileges, powers, immunities and liabilities share some substantive feature that duties, disabilities and no-rights lack, a feature which makes only the former type of Hohfeldian positions suitable to qualify as rights. This feature need not be simple; it could be some complex disjunction. But the thought is, according to this non-trivial approach, that some such simple or complex feature is distinctive to claims, privileges, powers, immunities and liabilities, and that is why these Hohfeldian positions can qualify as rights when they serve interests or fulfil Wenar's functions, while the other Hohfeldian positions cannot. By contrast, a *trivial* explanation would maintain that there is no special feature held by all and only claims, privileges, powers, immunities and liabilities; instead, the trivial approach maintains that it is in some sense simply a matter of chance that language-users have come to disallow duties, disabilities and no-rights from qualifying as 'rights'. According to this trivial approach, the reason why duties, disabilities and no-rights are not rights is because language-users happen to have refrained from using the term 'rights' to refer to such Hohfeldian positions, even though these positions do not lack any special features that the claims, privileges, powers, immunities and liabilities possess.

The trivial approach could be inspired by Wittgenstein:

Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? – Don't say "There *must* be something common, or they would not be called 'games'" – but *look and see* whether there is anything common to all. – For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. [...] Are they all 'amusing'? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared!<sup>16</sup>

There are many ways of taking this passage. One way takes Wittgenstein as denying that there is any pattern whatsoever underlying our usage of the term 'game', or indeed any other terms. This radical approach would give what I have called 'trivial' explanations of every term in natural language: it would maintain that for every term there is no feature – not even a complex feature reflecting a complex pattern – held by all and only the objects falling under that term. By contrast, my theory and Wenar's theory both assert that there is a complex pattern underlying our usage of 'right': rights are claims, privileges, powers, immunities and (in my view) liabilities, plus clusters of the foregoing, that either serve interests or fulfil Wenar's functions. So our account of rights already assumes the falsity of this first reading of Wittgenstein.

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<sup>16</sup> L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1953), at §66.

A second way of taking Wittgenstein reads him as accepting that there is some pattern underlying our usage of 'game', and reads him as simply arguing that this pattern reflects a complex *disjunctive* feature shared by all and only the games: the feature of being *either amusing or competitive or involving winning-or-losing or involving skill etc.* I shall not discuss this reading here because it does not constitute what I have called a 'trivial' account of games. Rather, this reading maintains that there *is* a special feature shared by all and only the games; it just offers a complex disjunctive account of that feature. I return to this idea in subsection 5 of the next section below.

A third way of taking Wittgenstein fits best with what I have in mind as a trivial answer to my problem. On this reading, Wittgenstein accepts that there is a complex disjunctive feature shared by all games, but denies that it is shared by only games. That is, on this reading Wittgenstein is maintaining that while all games are either competitive or entertaining or amusing etc., other non-game phenomena (including, e.g., market interactions) are also competitive and entertaining, and the norm restricting the term 'games' to certain activities and not others does not reflect some feature possessed by *only* the games. So Wittgenstein is pointing out that market interactions, say, do not qualify as games even though they possess the same disjunctive feature possessed by all games. To take this approach to the question of why duties, disabilities and no-rights cannot qualify as rights when they serve interests or fulfil Wenar's functions is to maintain that there is no feature shared by claims, privileges, powers, immunities and liabilities, and *not* shared by the other Hohfeldian positions, that explains why we restrict the term 'rights' to the former types of Hohfeldian position.

This picture is perhaps accurate as an account of games. It is attractive to regard language-users' exclusion of market interactions from qualifying as games – even though such interactions involve competition between participants, plus a form of winning and losing, plus (arguably) some element of amusement – as an exclusion reflecting no deep difference between games and market interactions, and as an exclusion that it would not be shocking to revise. That is, it is not obvious that market interactions cannot be games, and a case could be made to revise our usage of the term here. Such a revision would not feel radical or bizarre. By contrast, I contend that it would feel radical and bizarre to adopt a similar view of the norm excluding duties, disabilities and no-rights from the concept, 'rights'. Even though duties, disabilities and no-rights share many features with the other Hohfeldian positions, it would seem very strange indeed to countenance expanding the concept 'rights' to include duties, disabilities and no-rights. Such an expansion would be resisted; many would probably argue that while their duties should be protected by rights, we should not go so far as to describe the duties themselves as 'rights'. And it would seem even more bizarre to allow that disabilities or no-rights could qualify as rights. We could not comfortably allow your no-right that I punch you to qualify as itself one of your rights. So to allow that *all* Hohfeldian positions could qualify as rights if they served interests or fulfilled Wenar's functions would be much more radical than to allow market interactions to qualify as games. I think the relevant difference here must be that the proposed expansion of the language of rights would overlook a key substantive feature (a feature that might be simple or disjunctive) that duties, disabilities and no-rights lack, and that the remaining Hohfeldian positions possess,

while the proposed expansion of the language of games would not overlook any such key substantive difference between games and market interactions. If this is correct, then the trivial approach to my title's question cannot be accurate. The exclusion of duties, disabilities and no-rights from being able to qualify as rights is not a brute linguistic quirk, but rather reflects some substantive underlying difference between those Hohfeldian positions that can and those that cannot qualify as rights.<sup>17</sup>

### **What is the answer?**

I have argued that there must be some substantive feature that duties, disabilities and no-rights lack, and claims, privileges, powers, immunities and liabilities possess, that underpins the linguistic convention restricting the application of the term 'rights' to the latter sub-set of Hohfeldian positions. What is this substantive feature? As I mentioned above, it need not be simple – it could be some complex disjunction. Below, I reject four simple answers, and then briefly assess a disjunctive approach.

*1. Do claims, privileges, powers, immunities and liabilities invariably (or typically?) serve their holders' interests, while duties, disabilities and no-rights do not?*

Duties, disabilities and no-rights frequently fail to serve their holders' interests (consider the duty to keep within my overdraft limit, or the disability from placing others under duties to do my bidding – and of course for some people the duty to care for their parents will not serve their interests). By contrast, it might be held that claims, privileges, powers, immunities and liabilities invariably serve their holders' interests. But this is false. Some powers are onerous, such as my power to incur new duties through careless driving (powers to incur duties of apology; duties to repair your wall; duties to compensate you for injury; duties to attend court etc.).<sup>18</sup> Similarly, immunities can sometimes do nothing to serve their holders' interests (consider your immunity from receiving promises (see p. [CROSS-REF] above)). And some claims do nothing to serve their holders' interests (such as my property-based claims that you not interfere with my ugly and worthless garden gnomes).<sup>19</sup> It follows that while duties, disabilities and no-rights do not invariably serve their holders' interests, neither do claims, powers and immunities. So 'invariably serving position-holders' interests' is not the special feature of claims, privileges, powers, immunities and liabilities that explains why these Hohfeldian positions can qualify as rights and others cannot.

Perhaps someone might argue that claims, privileges, powers, immunities and liabilities *typically* – rather than invariably – serve their holders' interests, while duties, disabilities and no-rights do not. But this seems mistaken: a large number of our powers are of the onerous type mentioned above (consider my power to get myself sent to prison for theft, and all the other powers to incur remedial duties by violating legal or moral norms). Given how many powers are onerous, it is not clear

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<sup>17</sup> This is not to deny that there is some indeterminacy in the application of the concept, 'a right' (see Cruft, p. 385). But this indeterminacy does not reflect any fuzziness in the way the term 'rights' maps onto the distinction between, on the one hand, duties, disabilities and no-rights (each of which cannot qualify as rights) and, on the other hand, the Hohfeldian positions that can qualify as rights.

<sup>18</sup> The example is drawn from Kramer, 'Getting Rights Right', at p. 59.

<sup>19</sup> For further discussion, including rejection of the contention that all property rights must serve their holders' interests in some loose sense, see Cruft, pp. 372-375 and footnotes.

that powers typically serve their holders' interests. Furthermore, we can conceive of possible worlds in which duties, disabilities and no-rights typically serve their holders' interests. For example, consider (i) a certain kind of 'ethical egoist world' in which each person's duties require that person to perform actions that serve his or her interests, and without these duties each person would, through weakness of will, fail to pursue his or her interests. Even though duties would typically serve their holders' interests in such a world, I think it is fairly clear that in this scenario we would still refrain from allowing duties to qualify as rights. Alternatively, consider (ii) a 'morally demanding' world, in which people have privileges to help each other and very few privileges to do anything other than help each other. In such a world, a given person P would hold many no-rights serving his or her interests: no-rights to be harmed and no-rights not to be assisted (correlating with privileges, held by others, not to harm P and to assist her). And in such a world P would hold very few useless no-rights, as people would hold very few privileges to perform activities (such as pursuing their own projects) that would not help P. Even though no-rights would typically serve their holders' interests in such a world, I think it is again fairly clear that in this scenario we would still refrain from allowing no-rights themselves to qualify as rights. Similar thought-experiments can be constructed to show that disabilities could not qualify as rights even if they typically served their holders' interests. So 'typically (rather than invariably) serving position-holders' interests' cannot be the special feature of claims, privileges, powers, immunities and liabilities that explains why these Hohfeldian positions can qualify as rights and others cannot.

*2. Perhaps duties, disabilities and no-rights are not justified by what they do for their holders, while claims, privileges, powers etc. are justified by what they do for their holders?*

It might seem that most duties are justified by the moral importance of aspects of the people to whom they are owed, rather than by the moral importance of the duty-bearers. For example, isn't my duty to care for my parents justified ultimately by the moral importance of my parents' well-being? Further, it might seem that most claims are justified by the moral importance of aspects of their holders. This distinction might explain why duties, disabilities and no-rights cannot be rights: their moral justification (unlike the moral justification for claims, powers etc.) is not based on the importance of aspects of their bearers. But this picture is doubtful. Are my duties towards my parents really morally justified ultimately by the importance of their well-being? Mightn't these duties be just as much grounded in the importance of the relationship between my parents and me? And aren't some duties morally justified by what they do for their holders? For example, my moral duty to vote in elections is at least partly grounded in what it does for me. And my duty to wear a seatbelt or a motorcycle helmet is also largely grounded in what it does for me. So 'being justified by what they do for their holders' is not the special feature of claims, privileges, powers, immunities and liabilities that explains why these Hohfeldian positions can qualify as rights and others cannot.

*3. Can the recompense clause help?*

My theory maintains that Hohfeldian positions only qualify as rights when people would owe recompense were they to violate or fail properly to respect the positions in question. Thus my theory maintains that every right is partially constituted by a conditional claim: a claim to recompense, triggered if the other Hohfeldian positions

constituting the right are violated or not properly respected.<sup>20</sup> So, for example, my theory will maintain that a particular claim only qualifies as a right if one would owe recompense to the claim-holder, were one to violate the claim. Similarly, my theory will maintain that a particular power only qualifies as a right if one would owe recompense to the power-holder, were one to fail to respect this power. In subsection 4 below, we will see that powers, privileges and immunities (unlike claims) cannot be violated, but I contend that one can still *fail to respect* a power (or privilege or immunity), even though one cannot *violate* it. One can fail to respect it by, for instance, erroneously denying that a power-holder genuinely holds a power; if the power is a right, then such failure of respect will generate duties of recompense.

Perhaps duties, disabilities and no-rights can never be rights because they can never be accompanied by the appropriate requirements of recompense. But this looks doubtful. Just as my powers can be accompanied by conditional claims to recompense, it is similarly possible for my duty to care for my parents (or for one of my disabilities or no-rights) to be accompanied by a claim to recompense requiring that others apologise if they fail properly to recognise my duty (or disability or no-right). In the case of the duty to care for my parents, this claim might require you to apologise if you erroneously maintained that I held a privilege to abandon my parents. Note that the possible remedial claim outlined here is not to be confused with a remedial claim for apology when others violate my *claim* to be allowed to care for my parents. Instead, the remedial claim outlined here is a claim for apology when others wrongly deny that I am under a *duty* to care for my parents. Some such remedial claim for parental-care duty-holders seems morally justified: you *should* apologise when you erroneously contend that I am under no duties to my parents. And independently of whether it is morally justified, a legal system could institute such a remedial claim. So duties – and, I think, disabilities and no-rights – can be supported by remedial claims in the same way that the Hohfeldian positions that qualify as rights are. Thus ‘being capable of being accompanied by requirements of recompense’ is not the special feature of claims, privileges, powers, immunities and liabilities that explains why these Hohfeldian positions can qualify as rights and others cannot.

#### 4. *Do rights have a distinctive ‘direction’ opposite to that of duties, no-rights, liabilities and disabilities?*

Jones suggests that rights necessarily confer ‘entitlements’ or ‘titles’, and he explains having a title as a ‘directional’ phenomenon:

What is distinctive about legal or moral systems that incorporate rights is that they invest people with titles. [...] When a right is violated, wrong is done, but it is not merely that a rule has been transgressed; it is also that someone has been *wronged*; the wrong is a wrong *to* the right holder. It is failure to do what is *owed to* that right holder.<sup>21</sup>

Perhaps, as Jones suggests, the Hohfeldian positions which can qualify as rights have a ‘direction’ opposite to those which cannot qualify as rights. Rights, unlike non-right Hohfeldian positions, seem in some sense recipient-focused. Violating rights involves wronging their holders in a ‘directed’ way, while the positions that cannot qualify as rights have an opposite ‘direction’. Can this notion of ‘direction’ answer my title’s question?

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<sup>20</sup> Cruft, pp. 359-360. See note 11 above for discussion of the contention that morally unjustified and purely nominal rights are not accompanied by conditional claims to recompense.

<sup>21</sup> Jones, pp. 36-37, italics in original.

Given the way they are defined by Hohfeld, there is obviously a sense in which claims are opposite in ‘direction’ to duties, privileges are opposite in ‘direction’ to no-rights, powers are opposite to liabilities, and immunities are opposite to disabilities.<sup>22</sup> But, in developing this observation in order to explain why duties, disabilities and no-rights cannot be rights, there are two problems. First, my own approach problematically allows both powers *and liabilities* to qualify as rights, even though these positions have opposite ‘directions’. Perhaps I should drop my contention that liabilities are rights. I have argued that my liability to receive gifts is a right,<sup>23</sup> but maybe the right in this example can be explained as a privilege to accept gifts, protected by a claim against interference in my receipt of gifts. I am tempted to stick by my initial contention that the status secured by my bare liability to receive gifts (or to inherit, or to receive promises) is sufficient on its own to qualify as a right. But for now I propose to concede this point. Thus for now I accept the ‘standard’ view that only claims, privileges, powers and immunities can qualify as rights.<sup>24</sup> Given this concession, it might seem promising to argue that the ‘direction’ of these Hohfeldian positions explains why they can qualify as rights, and why duties, disabilities, no-rights and liabilities cannot.

But there is a second problem. While it is clear that claims are opposite in ‘direction’ to duties, and privileges are opposite to no-rights etc., it is not clear that claims, privileges, powers and immunities together all *share* roughly the same sort of ‘direction’, nor is it clear that their opposites – duties, no-rights, liabilities and disabilities – together share the same opposite sort of ‘direction’. For example, it is not obvious that the ‘direction’ of claims is more similar to the ‘direction’ of privileges, of powers and of immunities, than it is to the ‘direction’ of duties, no-rights, liabilities and disabilities. Both my claims and my liabilities seem *recipient-focused*: both are focused on how other people do things with regard to me (claims place others under duties towards me; liabilities allow others to exercise powers over me). Furthermore, while it seems that my claims, powers and immunities *necessarily affect how others should behave towards me* (my claims place others under duties; my powers make others liable to alterations in their first-order Hohfeldian positions; my immunities disable others from altering my first-order Hohfeldian positions), my privileges do not share this feature – instead, my privileges are akin to my duties, no-rights, liabilities and disabilities in that they do not necessarily affect how others should behave towards me (for my privileges simply consist in my not being under duties).

Some might argue that the distinctive shared ‘direction’ of duties, disabilities, no-rights and liabilities is located in the fact that these Hohfeldian positions cannot be violated by other people. A duty can be violated by its own bearer, but it cannot be violated *by people other than the duty-bearer*. Suppose you promise to meet Joe on the other side of town this evening. You thereby place yourself under a duty to Joe. You can violate this duty by failing to turn up. But if I, and many other people, get in your way by holding a demonstration in the centre of town this evening, we do not thereby violate your duty to Joe. We perhaps prevent you performing your duty by impeding your route, but this does not constitute our violating your duty. It might

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<sup>22</sup> My notion of ‘opposite direction’ here should be distinguished from Hohfeld’s differing technical concept of ‘jural opposites’ (Hohfeld, p. 36).

<sup>23</sup> Cruft, pp. 358-359.

<sup>24</sup> Clear versions of the ‘standard view’ are given in Jones, pp. 12-25 and Wenar, pp. 224-237.

well be that we do not owe you any requirement to let you through, in which case our actions do not violate you at all. Alternatively maybe we are ourselves under duties to let you through – maybe you have a special pass that overrides our right to hold demonstrations. But in this situation, if we impede your progress we violate your *claim* to be let through, and we violate *our own* duties towards you. What we don't do is violate *your duty to Joe*. This duty can only be violated by you. In sum, duties cannot be violated by people other than their bearers.<sup>25</sup> And note that disabilities, no-rights and liabilities cannot be violated at all. A disability consists in my not being able to alter someone's first-order Hohfeldian positions. How can such an inability to alter something be violated? At worst, someone can erroneously deny that I hold a disability when actually I do hold such a position. For example, someone can insist that I exercise a non-existent power when I hold a disability to do this. Similarly, no-rights and liabilities cannot be violated. As with disabilities, at worst someone can erroneously deny that I hold a disability or a no-right, when actually I do hold such a position.

We have seen that duties cannot be violated by people other than their bearers, and we have seen that disabilities, no-rights and liabilities cannot be violated at all and hence they also, like duties, cannot be violated by people other than their bearers. Is this the distinctive shared 'direction' of duties, disabilities, no-right and liabilities? This suggestion can seem attractive when we note that, by contrast, claims clearly can be violated by other people: *you* violate *Joe's* claim when you fail to turn up as promised. So perhaps the distinctive shared 'direction' of duties, disabilities, no-rights and liabilities is located in the fact that they, unlike the Hohfeldian positions which can qualify as rights, cannot be violated by others. But the suggestion fails because privileges, powers and immunities cannot be violated; in this respect, privileges, powers and immunities are akin to disabilities, no-rights and liabilities. For example, Thomson writes (using the term 'infringement' as equivalent to my concept, 'violation'):

[T]here is no such thing as infringing a person's right if the right in question is a privilege. I now have a privilege of pinching my nose, and I have that privilege as regards everything in the universe. A privilege is a right; is it possible that some person, say Bloggs, should infringe that right of mine? How is he to do that? Well, suppose Bloggs prevents me from pinching my nose. That would not constitute infringing my privilege of pinching my nose, since for me to have that privilege is nothing more than for me to lack a duty, [...], and the lack of a duty entails no claims, [...], and *a fortiori* entails no claim to noninterference.<sup>26</sup>

So, like disabilities and liabilities, privileges cannot be violated. Similarly, powers and immunities cannot be violated. Someone can erroneously deny that I hold a power (e.g. by claiming that I cannot have altered his or her duties when actually I have done so), or erroneously deny that I hold an immunity (e.g. by claiming to have altered one of my duties when this was not possible), but this is not the same as violation – in the same way, people can erroneously deny that I hold a liability, disability or no-right. Because only claims can genuinely be violated by other people, one cannot successfully appeal to the concept of violation in order to identify a 'direction' shared by claims, privileges, powers and immunities, a 'direction' opposite to that of duties, no-rights, liabilities and disabilities.

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<sup>25</sup> The illustrative example here was inspired by a similar one in H. Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), at p. 84.

<sup>26</sup> J. Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), at p.47.

It is tempting to conclude that there is no feature that constitutes a distinctive shared ‘direction’ for all and only claims, privileges, powers and immunities. Perhaps on further inspection these concerns can be quelled, for example by arguing that it is a brute matter that claims, privileges, powers and immunities share a ‘direction’ that duties, no-rights, liabilities and disabilities lack. But I remain to be convinced.

##### 5. *A disjunctive approach?*

So far I have been looking for some simple feature *F* that is possessed by the Hohfeldian positions that can qualify as rights, and that duties, disabilities and no-rights lack. But perhaps the relevant feature is not as simple as this. Instead, perhaps there is some complex disjunctive feature, *F-or-G-or-H*, that is possessed by all and only claims, privileges, powers, immunities and liabilities – and the linguistic norm excluding duties, disabilities and no-rights from qualifying as rights reflects the fact that they lack this disjunctive feature.

But what could this feature be? Of the features examined in the subsections above, the latter three features were each held by some duties, disabilities and no-rights, in addition to being held by claims, privileges, powers, immunities and liabilities. That is, some duties, disabilities and no-rights are justified by what they do for their holders [subsection 2]; duties, disabilities and no-rights are each capable of being accompanied by requirements of recompense [subsection 3]; and duties, disabilities and no-rights can each be taken to share a ‘direction’ with some of the types of Hohfeldian position that can qualify as rights [subsection 4]. Therefore a disjunctive property including any of these three features could not be a property held only by claims, privileges, powers, immunities and liabilities, because such a property would share the over-inclusiveness of its disjuncts.

By contrast, the two features I examined in subsection 1 above – that is, the features of *either invariably or typically serving the position-holder’s interests* – are not features of duties, disabilities or no-rights in the actual world. Furthermore, I suspect that every privilege invariably serves its holder’s interest in at least some respect, and I have argued elsewhere that every claim must either serve its holder’s interests or be a token of a type of claim the vast majority of whose tokens serve their holders’ interests.<sup>27</sup> So these features – of either invariably or typically serving the position-holder’s interests – might seem promising candidates to constitute disjuncts within a disjunctive property held by all and only rights. However, my thought-experiments about ‘ethical egoist’ and ‘morally demanding’ worlds showed that in possible worlds where the relevant features (of either invariably or typically serving the position-holder’s interests) were held by duties, disabilities and no-rights, we would not therefore be compelled to reclassify these Hohfeldian positions as ‘rights’. Thus a disjunctive property including these features would still risk being over-inclusive.

Perhaps an improved version of this approach would maintain that among the disjuncts within the disjunctive property held by all and only the Hohfeldian positions that can qualify as rights is the feature of being *necessarily* or *essentially* a position that either invariably or typically serves its holder’s interests.<sup>28</sup> This is perhaps a feature held by all privileges and claims, and not by any duties, disabilities or no-

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<sup>27</sup> Cruft, pp. 364-366 and 381-383.

<sup>28</sup> I am grateful to Peter Jones for discussions from which this suggestion emerged.

rights, even in distant possible worlds (for even in possible worlds where duties, disabilities or no-rights invariably or typically served their holders' interests, they would not do so as a matter of necessity, or as essential to their nature). Nonetheless, given that many powers and liabilities are onerous and hence (unlike privileges and claims) they are clearly not essentially positions that invariably or typically serve their holders' interests, we will need to find additional disjuncts if we are to locate a complete disjunctive property that underpins all and only the Hohfeldian positions that can qualify as rights when they serve their holders' interests or fulfil Wenar's functions. This is quite a challenge. Exploring alternative disjuncts is one of the possible ways that we should go next, along with exploring alternative non-disjunctive approaches. Yet both these avenues seem mysterious. I want to conclude by explaining why we should continue investigating this mystery.<sup>29</sup>

## Conclusion

I have not answered my title's question. But I have, I hope, shown that the question is non-trivial, and that it needs an answer if the capacious Hohfeldian analysis of rights is to achieve more than merely extensional accuracy. Of course this is not to reject Hohfeldian analyses of rights; it simply shows that, without supplementation, they cannot fully explain what we mean by 'rights' in our capacious everyday speech. Someone might respond by claiming that while I have shown that it is unclear whether there is a unifying feature underlying our expansive usage of the term 'rights' in everyday speech (even though everyday speech seems to assume that there is a unifying feature of this sort), what this shows is that we should revert to Kramer's and Hohfeld's restrictive proposal, narrowing our usage so that we only refer to claims as rights.<sup>30</sup> This narrow approach, it might be argued, will keep our language of rights more precise, and will avoid a dependence on the insupportable assumption that there is a unifying feature underlying the capacious language of rights.

I am wary of this response. Part of my wariness is pragmatic: it seems to me that the expansion and proliferation of the language of rights is here to stay, and it would be hopeless to attempt to restrict this. Furthermore, such a restriction might lead the academic analysis of rights to overlook important moral developments in the looser, more capacious everyday usage of the language. But part of my wariness is not pragmatic. I think it feels as if there is a unity underlying our capacious everyday usage of rights. This is reflected in our sense that, while it would not be a great stretch to allow market interactions to qualify as games, it would be an enormous stretch to allow duties, disabilities and no-rights to qualify as rights – even though duties, disabilities and no-rights often do a lot to serve their holders' interests and fulfil Wenar's functions.<sup>31</sup> So it seems to me that the capacious analysis of rights, including the restriction of the term to apply only to claims, privileges, powers,

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<sup>29</sup> An alternative disjunctive approach has been suggested to me by Leif Wenar: perhaps it is essential to claims, privileges, powers and immunities that they typically fulfil one or more of Wenar's six functions, while this feature is not essential to duties, disabilities and no-rights. This suggestion merits further exploration – and as with any disjunctive approach, one should also ask why these six seemingly disparate functions have been bound together by the term 'rights'.

<sup>30</sup> See Hohfeld, pp. 36-37; Kramer, 'Rights Without Trimmings'; Kramer & Steiner, 'Rights Revisited: A Reply to Leif Wenar'.

<sup>31</sup> For further discussion of the pitfalls of revisionary analyses of rights, see Cruft, pp. 379-381.

immunities and liabilities, does genuinely reflect some underlying unifying feature. To complete our analysis of rights, we need an account of this distinctive feature – only then will we know why duties, disabilities and no-rights cannot be rights.<sup>32</sup>

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<sup>32</sup> The question raised in this paper first struck me at a workshop on rights at the University of Edinburgh, organised by Antony Hatzistavrou. Early versions of the article were then presented to the Stirling Political Philosophy Group, and to the annual meeting of the Northern Political Theory Association in Glasgow. I am grateful for comments received at these events, and owe special thanks to Antony Duff, Peter Jones, Matthew Kramer, and Leif Wenar.