Canadian Journal of Law & Jurisprudence XXX No.1 February 2017, 125-157
© *Canadian Journal of Law & Jurisprudence* 2017 doi: 10.1017/cjlj.2017.6

Rights Modelling

David Frydrych

§ I Introduction

This paper has four aims. First it explains and distinguishes between two different kinds of philosophical accounts of the 'formal' features of rights: models and theories. *Models* explain whether there are different conceptually basic types of 'a right' and how rights and other kinds of normative positions (e.g., duties, liabilities etc.) relate to one another.[1] *Theories* explain what singular, ultimate purpose all rights serve: some value, goal, activity, or state of affairs that all rights supposedly protect or promote. Second, the paper argues that Monistic rights models (ones positing only a single basic type of right) are under-inclusive. They wrongly exclude and cannot explain relevant data, i.e., ordinary and legal linguistic practices. In doing so, the paper does not defend a particular Pluralistic model; demonstrate how many different basic types of rights there are; or advance particular conceptions of those basic normative positions. It merely aims to show that Monistic models are under-motivated and flawed. The third aim is to show that certain Pluralistic models are over-inclusive in terms of what they count as 'rights'. Fourth, the paper begins to touch upon, but does not provide, criteria for determining what counts as 'a right' in the first place. Two candidate factors will be addressed.

§ II Models vs. Theories of Rights

Philosophers (and some lawyers) have long been aware that there are different senses of the term 'a right' abounding in legal, moral, and political practices and discourse. In an effort to make sense of this diversity, they have developed two different kinds of accounts of the 'formal' features of rights: models and theories. A *model* provides a typology of conceptually basic or fundamental rights and shows if and how they can be combined into larger constructs, 'complexes'. ('Basic' and 'fundamental' here mean being relatively simple conceptually, rather than marking a judgement about which rights are morally or politically essential for persons, justice, a political order, etc.). It is not within a model's purview to explain whether rights ought to exist, or if they all serve some singular, ultimate purpose (the latter is the purview of *theories*, which will be explained below). Most lawyers and the general public have nevertheless ignored

1. The philosophical literature often refers to rights and related concepts as 'normative positions'. This suggests peoples' and institutions' identities and/or statuses within a normative system or domain (a legal system, a corporation, etc.). It is also a slightly controversial term, as some philosophers deny that some such positions (e.g., liberties and powers) constitute 'norms' on the grounds that they do not guide or regulate behaviour. See, e.g., Carl Wellman, *Real Rights* (Oxford: Oxford University Press, 1995) at 8 [Wellman (1995)].

such philosophical distinctions and elucidations, and continue to speak as if 'a right' was a univocal term.

There are several models of rights. The Appendix provides a sample list and elucidates certain ones' features. The most prominent are those of Wesley Newcomb Hohfeld, Immanuel Kant, HLA Hart, and Joseph Raz. Some models also admit of their own set of scholarly interpretations and suggested modifications (i.e., there can be different iterations of a model).

Rights models can be divided into Monistic and Pluralistic varieties. Pluralistic models identify different basic types of normative positions as 'rights' and hold that each is irreducible to the other types.[2] The most famous proponent of rights diversity is Hohfeld. His model, the 'schema of jural relations', contains eight normative positions. The schema is usually taken to register four distinct senses of 'a right', which refer to four distinct concepts: claims, liberties, powers, and immunities.[3] Each of these four correlates with one (only one, and always the same one) of what I shall call, for want of a better term, four 'ligations': a duty, 'no-right', liability, and disability.[4] Despite deeming 'a claim' to be the *stricto sensu* case of 'a right', Hohfeld holds that all of his basic normative positions are indefinable.[5] Instead, each is to be comprehended through it relationships with

---

2. A popular idea in analytic philosophy is that concepts are (often) complex and decomposable into more basic ones. This paper takes no stance on whether this is true of most concepts. It simply employs the phrase "conceptually basic" as a useful term of art and a description of certain concepts in rights models. Again, some models explain many legal and moral rights in terms of 'complexes': composites of the model's more basic concepts, e.g., a claim + a power + a liberty, etc.

3. Wesley Newcomb Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 [Hohfeld, *FLC #1*]; Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions As Applied In Judicial Reasoning" (1917) 26:8 Yale LJ 710 [Hohfeld, *FLC #2*]. Hohfeld used the term 'privilege' rather than 'liberty', but it has become commonplace (for better or ill) to use 'liberty' instead.

4. The term 'ligation' comes from Albert Kocourek, "Wanted: Phrase for Legal Capabilities and Restraints" (1923) 9 ABA J 25 at 26. Years before Hohfeld, John Salmond posited four basic kinds of rights and four correlative positions for each. The general term for the four kinds of rights, popularised and modified by Hohfeld, is also 'rights'. Moreover, complexes (aggregations of the different kinds into one larger unified construct) are also called 'rights'. While Salmond noted the lack of a generic term for the other four correlative positions (duty, liability, etc.) he failed to coin one. John Salmond, *Jurisprudence, or The Theory of the Law*, 1st ed (London: Stevens & Haynes, 1902) at 195 [Salmond]. While there is no common term, 'ligation' is the least bad option. Kocourek was a Sanction Theorist, holding that all rights must be enforceable, and thus all of their correlative positions must be subject to sanctions for non-conformity. My usage of 'ligation' excises that element: not all ligations are obligations, let alone ones subject to sanction for non-conformity. Pavlos Eleftheriadis calls those four 'legal negations'. Pavlos Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008) at 123. However, this seems to miss the positions' affirmative qualities, e.g., the requirement to act in a duty, to have one's position changed in a liability, etc. The same problem applies to Pierre Schlag's distinction between 'entitlements' and 'disablements'. Pierre Schlag, "How to Do Things with Hohfeld" (2015) 78 Law & Contemp Probs 185 at 188. Other scholars divide Hohfeld's eight terms into four 'advantages' and four 'burdens', but Hohfeld himself shows why many liabilities are desirable and even sometimes advantageous. See Hohfeld, *FLC #1, supra* note 3 at 54 n 90. The same might be said for the other three kinds of ligations.

5. Hohfeld, *FLC #1*, *supra* note 3 at 36. In fact, Hohfeld did define his terms.

> A right is one's affirmative claim against another, and a privilege [liberty] is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation. *Ibid* at 55.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

its specific correlative and 'opposite' (logical contradictory) position, all within a scheme of two matrices that are presented in the Appendix.

By contrast, Monistic models hold that there is only one basic kind of right. Almost all modern Monists deem that one right to be a normative position that correlates with a duty.[6] For Monists, it is inappropriate to count other basic normative positions, such as liberties, powers, or immunities, as 'rights'. To clarify, Monists of course agree that those others constitute bona fide normative positions in law, morality, etc. They simply deny that liberties, powers, etc., count as 'rights'. There are, moreover, monistic *interpretations* of pluralistic models,

---

Section iii touches upon the confusion generated by Hohfeld's contradictory remarks about his concept of 'a claim'; particularly whether, as shall be explained there, it is an 'active' or 'passive' kind of normative position.

There is also a long philosophical history of those who attribute a 'strict sense' of the word 'right' or phrase 'a right'. Grotius, for example, did so in the seventeenth century for his notion of a right as a kind of normative power. Hugo Grotius, I *De Jure Belli ac Pacis* (1625) at 1.5. English and German nineteenth century pluralist modellers in turn distinguished amongst the different basic normative positions they adjudged to be 'rights' (e.g., a claim, a liberty, a power, etc.) by deeming one to be the strict sense thereof. See Roscoe Pound, 'Rights' in *Jurisprudence*, vol 4 (Minnesota: West, 1959) [Pound (1959)]; Salmond, *supra* note 4 at 219-36. Perhaps some did so based on *per genus et differentiam* definitions, treating their candidate strict senses of 'a right' as the basis for understanding the rest.

6. Modellers, both pluralistic and monistic, present various conceptions of (the kind of) a right that is correlative to a duty ('RCTD'). See the Appendix for further explication. The differences amongst these conceptions, though, are not as great as sometimes made out to be. Space does not allow for a full explication of all their similarities and differences, but here are some poignant ones. First, despite my 'RCTD' label, some modellers deny that rights always have correlatives on the grounds that a right is conceptually, and even sometimes temporally, prior to duties. (These modellers nonetheless believe that duties can always be affixed to such rights.) See, e.g., Henry Terry, *Some Leading Principles of Anglo-American Law Expounded with a View Towards its Arrangement and Codification* (Philadelphia: T & J W Johnson & Co, 1884) at 93; Neil MacCormick, "Rights in Legislation" in Peter Hacker & Joseph Raz, eds, *Law, Morality and Society: Essays in Honour of HLA Hart*, (Oxford: Clarendon Press, 1977) [MacCormick (1977)]. Second, some characterise rights as reasons rather than as normative positions. E.g., Joseph Raz, 'The Nature of Rights' in *The Morality of Freedom* (Oxford University Press, 1986) [Raz (1986)]. Third and fourth, it is debated whether Hohfeld's schema is able to account for *prima facie* rights (and duties) and the qualities of 'force' or 'weight'. Michael Steven Green and blog commentators, 'Why No Deontic Logic?' (Prawfsblawg 12 October 2007), online: http://prawfsblawg.blogs.com/prawfsblawg/2007/10/why-no-deontic-.html. Fifth, some scholars argue that rights are not claims, but are rather (sometimes) defended by claims. See, e.g., Anthony Honoré, "Rights of Exclusion and Immunities against Divesting" (1960) 34 Tulane L Rev 453 at 456-57 [Honoré (1960)]. Matthew Kramer successfully shows that Hohfeld's schema is compatible with the first four views. Matthew Kramer, "Rights Without Trimmings" in Matthew Kramer, ed, *A Debate Over Rights: Philosophical Enquiries* (Oxford: Oxford University Press, 1998) at 23-29, 36-49 [Kramer (1998)].

Unlike Hohfeld's conceptually basic 'claim', HLA Hart's 'right-correlative-to-an-obligation' is actually a complex. It is a composite of liberties and powers: the capacity to enforce or waive a correlative legal duty, which includes legal permissions to undertake either option. HLA Hart, 'Legal Rights' in *Essays on Bentham*: *Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) at 180-91 [Hart (1982)]. Joseph Raz's conception of a right is similar to a Hohfeldian claim insofar as it marks its holder as the intended beneficiary of a correlative duty-bearer's action or forbearance, but differs insofar as (a) the right is a reason, predicated upon some interest or other of the holder, which has the qualities of force or weight, and (b) it is *justificatorily* prior to the duty (my right is the reason for your duty). Raz (1986); Joseph Raz, 'Legal Rights' in *Ethics in the Public Domain*, revised ed, (Oxford: Oxford University Press, 1994 [Raz (1994)].

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

whereby one position is deemed to be 'a right' while the rest are re-characterised as something else. Wayne Sumner provides a helpful typology of how rights models differ from one another.

> Here we can broadly distinguish two hypotheses. [**I]** One is that rights are simple, thus that every right consists of just one position. [**II]** The other is that rights are complex, thus that every right consists of some bundle of different positions. [**III]** These two hypotheses do not exhaust the possibilities; some rights might be simple while others are complex. Further, we can easily distinguish between monistic and pluralistic versions of each hypothesis. [**Ia]** A monistic version of the first hypothesis would hold that every right consists in the same normative position, while [**Ib]** a pluralistic version would allow different rights to consist of different positions (though only one in each case). Likewise, [**IIa]** a monistic version of the second hypothesis would hold that every right consists of the same bundle of positions, while [**IIb]** a pluralistic version would allow different rights to consist of different bundles.[7]

Let us address various interpretations of Hohfeld's model in order to flesh out Sumner's typology. (Presenting some intra-Hohfeldian disagreements also helps give a sense of how diverse scholarly views about a given model can be.) Matthew Kramer holds that only one of Hohfeld's basic kinds, a claim, is properly labelled 'a right'. Liberties, powers, and immunities are not rights, even though ordinary and legal parlance often reflects such meanings. Talking about rights as entitlements *to do* things, he especially thinks, is erroneous and unhelpful.[8] Kramer thus represents view **Ia**: a monistic view (only singular claims are rights) where rights are simple (rights are not combinations of different Hohfeldian positions).

Carl Wellman represents a second Hohfeldian view, **IIb**. He believes rights can only be modelled in terms of 'complexes': aggregations of different Hohfeldian basic kinds, not singular instances thereof.[9] In other words, for Wellman, Hohfeldian claims, liberties, powers, and immunities are really only ever features or components of rights, not basic rights themselves—and not all of Hohfeld's kinds must obtain within a given complex.

George Rainbolt's view represents an option Sumner neglects: a pluralistic model allowing for rights to be *either* simples or complexes containing various Hohfeldian kinds. Rainbolt believes that, while Hohfeld's four basic kinds can serve as components of a right complex, some of them additionally suffice to count as an actual right.[10] For example, a liberty can serve as part of a complex, such as the right (liberty) to enter your own land, which is but one part of your

---

7. Wayne Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press, 1987) at 32-33 [numbering added].

8. Kramer (1998), *supra* note 6 at 13-14; Matthew Kramer & Hillel Steiner, "Theories of Rights: Is There a Third Way?" (2007) 27 Oxford J Leg Stud 281 at 295-99 [Kramer & Steiner (2007)].

9. See, e.g., Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (New Jersey: Rowman & Littlefield, 1985) [Wellman (1985)] at 59-60, 80, 92; Wellman, (1995), *supra* note 1 at 7-8.

10. Specifically, Rainbolt believes that Hohfeldian claims and immunities are rights, while powers and liberties are not. However, he also thinks there are many kinds of rights complexes, including power-rights and liberty-rights, but only so long as a claim or immunity serves as a component. George Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006) at xi-xii, 30-39 [Rainbolt (2006)].

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

property bundle; and a liberty can also be a right on its own, e.g., the right to pick up abandoned money off the street.

Be it monistic or pluralistic, no model is concerned exclusively with rights. Each contains other related or associated basic kinds of normative positions such as duties, liabilities, etc. Generally, models aim to explain the relationships between: (I) the various basic kinds of rights (if indeed the model posits more than one); (II) between rights and other kinds of normative positions (e.g., between a right and a correlative duty); and (III) between those other related kinds of positions (e.g., between a duty and a liability). What makes them 'rights' models, then? Are they not models of normative positions? Hohfeld's, for instance, is called the 'schema of jural relations'. Yes, but rights are given a central role in almost every such model.

Additionally, some models are presented as being system or domain specific (i.e., of *legal* rights exclusively, or of *institutional* rights, or of *moral* ones, etc.). Certain modellers profess only to explain the structure of legal rights, say, without addressing moral or other kinds of rights. This can leave the nature of the relationships between legal, moral, institutional, and other rights open. Other modellers, though, take an explicit stance on that matter. They divide over whether rights are functional or modal kinds. Modalists think there are no significant differences amongst legal, social, and moral rights. For them, legal and moral rights do not do anything differently from one another. The only difference is that they are housed in different domains.[11] Functionalists, by contrast, posit that legal, moral, social, etc., rights differ in structure. They usually assume or argue that legal rights differ in structure and usage from moral or social ones, e.g., they tend to hold that legal rights are always enforceable, while moral rights are not.[12] Though functionalists need not go so far, some additionally believe that, because of these differences, legal, moral, and institutional rights are mere homonyms.

There are reasons to doubt the appropriateness of stipulating domain limitations when providing a model of rights. One is that this might lead to a distorted picture.[13] Second, any such stipulations themselves rely on an underlying commonality in order to mark supposed functional differences. Modellers rely upon the same basic components in order to even express the claimed functional differences (between legal and moral rights, say). Take, for example, a Functionalist version of Hohfeld's schema, which professes to apply only to legal rights and be inapplicable to moral ones. A typical reason why functionalist modellers hold that legal rights differ from moral ones is because they think the former are enforceable complexes (composites, say, of Hohfeldian claims and powers) while the latter are not. Regardless of whether that is true, we already need to know what each basic concept means in order to *establish* that supposed functional difference. You must know what Hohfeldian claims and powers are, in order to

11. See, e.g., Joseph Raz, *The Authority of Law,* 2nd ed (Oxford: Oxford University Press, 2011) at 158-59 [Raz 2011]; Raz (1994), *supra* note 6 at 255-57.

12. E.g., Jeremy Waldron, "A Right to Do Wrong" (1981) 92 Ethics 21 at 23.

13. For example, Raz is concerned by (what he takes to be) a dubious inclination to seek moral and social analogues to legal rights enforcement mechanisms, which may not obtain—even for certain legal rights too. Raz (1994), *supra* note 6 at 255-57.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

understand what it is to have a claim with an associated power (the latter being the mechanism by which to enforce the complex), as opposed to a claim without one, in order to establish the supposed functional difference between legal and moral rights *for that functionalist model*. Hence, despite any professed limited application or range, the model actually relies upon a conceptually more basic toolkit for all normative domains.

In contrast to a model, a rights *theory* aims to explain what ultimate purpose all rights serve, their raison d'être. Rights are said to advance, protect, justify, promote, or serve some ultimate value or activity. Why their *ultimate* purpose? It could be said that both models and theories explain rights' purposes. One could say that the purpose of a power is to modify normative relationships, the purpose of a liberty is to entitle to someone to act, the purpose of an immunity is to prevent changes to one's normative positions, etc. If more than one of those positions count as kinds of rights, then what is their common purpose? If they are all rights then what is it that they all do *qua* rights?[14]

Despite recent scholarly efforts to generate alternatives, there are only two candidates: the Interest and Will Theories of rights. Interest Theories hold that rights advance, serve, or protect someone's interests or wellbeing. Will Theories posit that rights effectuate or protect peoples' abilities to make choices or to vindicate their wills. Theories also aim to do other seemingly crucial work: provide competing fundamental criteria for determining which features of a model actually count as 'rights' and which do not (i.e., which should be considered as simply being different sorts of normative positions altogether).

There are, or could be, normative and analytical versions of each model and theory of rights. Normative—in the sense of being morally or politically evaluative—versions concern what rights' structural components *ought* to be (models), or what their raison d'être *should* be (theories). Their analytical analogues aim to explain rights' conceptual features (models), or their ultimate purpose (theories), without engaging in, or relying upon, moral or political evaluations of rights' goodness or worth. It is possible to endorse both analytical and normative versions of a given model or theory. For example, you might think that a Hohfeldian conception of a liberty is correct both on analytical grounds (e.g., because you think it best tracks ordinary and legal usage) and the optimal one for moral or political reasons.

---

14. Although the 'model-theory' characterisation is novel, noting that there are two different sorts of philosophical explanations of rights is not. Instead of 'models' and 'theories', Leif Wenar divides them in terms of 'forms' and 'functions'. Leif Wenar, "Rights", online: Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/rights/ accessed 1 January 2016 [Wenar (2015)]. That distinction is unhelpful because both terms work equally well in either category. For example, one could say it is the function of a power to change parties' normative positions, while it is the function of all rights to protect right-holders' interests. Alon Harel distinguishes two kinds of accounts as governing the 'nature' and 'role' of rights respectively. Alon Harel, "Theories of Rights" in Martin P Golding & William Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Singapore: Blackwell, 2007) at 192. This too is unhelpful because either category can be labelled 'role': we could say that each Hohfeldian position serves a distinct role, while the Interest Theory posits that a right's role is to protect some aspect of a right-holder's well-being.

What is the relationship between models and theories? Some models are not based on *theoretical* criteria for determining what counts as 'rights'. For example, Hohfeld's model is often said to be neutral between the Interest and Will Theories.[15] Thus, proponents of either theory are free to employ it in order to explain and advance their respective theoretical views.[16]

Let us style those models constructed without relying on theories 'theory-independent' ones. By contrast, some theorists construct their own models instead of relying on existing ones. As their designs are influenced by 'theoretical' commitments, these will be styled 'theory-driven' models. (There are also theory-based interpretations of, and modifications made to, 'theory-independent' models. A theorist might start with a theory-independent model like Hohfeld's and then alter some of its components in order for it to better conform with his or her theoretical views, producing a theory-driven iteration of the model.)[17]

Many philosophical accounts of rights are composed of both a theory and model. While it is possible to construct theory-independent models, all theorists either rely upon or create a model. Further, while any scholar's model and theory are conceivably severable, it is possible that there will be information loss were this to be done. Specifically, the motivations behind positing a model's propositions (rather than understanding the propositions themselves) may be indiscernible without appreciating that its designer was heavily influenced by a given theory of rights.

Modellers (and model interpreters/modifiers) disagree about what makes something 'a right'. Some rely on a theory to defend their typologies ('theory-driven' ones). Others do not ('theory-independent' ones, like Hohfeld's). Either way, rights scholars (modellers and theorists) lack both shared criteria and shared paradigms by/in which to assess each other's identifications. (A big question is whether modellers must employ 'theoretical' criteria in order to determine what counts as 'a right'. Are they indispensible starting points for any sound model?)

§ III Under-Inclusive and Over-Inclusive Models

§ III.1 Under-inclusivity: Monistic Modelling

This section aims to show that the reasons offered by Monists for restricting rights to one concept are mistaken and that their methodological priorities are

---

15. See, e.g., Kramer (1998), *supra* note 6 at 61. *A Debate Over Rights* is the most extensive treatment to date of rights theories. Unfortunately, there is no extensive treatment of the various models. The best option for some introductory treatments are: Nigel Simmonds, *Central Issues in Jurisprudence*, 4th ed (London: Sweet & Maxwell, 2013); Wenar (2015), *supra* note 14; Rainbolt, *supra* note 10.

16. Hohfeld himself probably had no theory of this kind in mind when constructing his schema. See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 202-03, 465 n 32; Kramer (1998), *supra* note 6 at 61 n 23, 62.

17. To clarify, not all modifications made to models are based on 'theoretical' considerations. For example, the intra-Hohfeldian disagreement about whether to use the label 'liberty' or 'privilege' for Hohfeld's basic position, or whether these mark two different concepts, does not rest on theoretical bases.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

skewed. The purpose here is not to defend either Hohfeldian or competing conceptions of the various normative positions.[18] It is merely to defend the idea that there is more than one basic concept of 'a right'. Particularly, a right correlative to a duty—a 'RCTD'—is not the only one.

One might be tempted to call this effort mere 'intuition pumping'. If one's intuitions suggest otherwise, we are probably at an impasse. But Monistic modellers themselves do *not* oppose rights pluralism based either on mere intuitions or their understandings of ordinary or technical linguistic practices. Instead, their monism is predicated upon various methodological assumptions or preferences, which will be elucidated below. Thus, instead of a mere clash of intuitions, there is real room here for debate about how many basic kinds of rights there are based on what all parties construe the pertinent underlying data to be.

Tony Honoré: Rights are not Claims, Powers, or Liberties

Tony Honoré levies a series of arguments against Hohfeld's schema.[19] One of them offers a reason against identifying claims, liberties, or powers as rights and for thinking there is but one basic kind of right. 'Ordinary legal usage certainly does treat a right as something different from a claim, power, liberty, etc. or even some aggregate of these'.[20] Rights are instead, he thinks, 'protected' by certain claims. The right is what unifies the various claims (it antedates some of them, and often outlives some of them too) and 'give rise' to certain liberties.[21] So, for example, if *A* has a right to £100 from *B*, *B* might transfer that debt to *C* (who now owes £100 to *A*). *A*'s right was protected by a claim against *B*, but post-transfer, the right survives and can be protected by a new claim to the money held against *C*.

Through no great fault of his own, Honoré has been misled by Hohfeld's confusing and self-contradictory remarks about the meaning of a *Hohfeldian* claim. For there are good reasons to think that a Hohfeldian claim is a technical term, one noting a 'passive' normative position.[22] In other words, you do not make claims with Hohfeldian claims. They simply mark one as the intended, inert recipient of another party's (a duty-bearer's) required action or forbearance. Nevertheless, even if one were to adopt the 'active' interpretation, Honoré has not shown why claims—let alone liberties or powers—fail to amount to different kinds of rights, be they non-*stricto sensu* cases or otherwise.

---

18. Much ink has been spilled trying to show errors in the Hohfeldian conceptions of a liberty, a power, etc. Even granting that such arguments evidence certain conceptual difficulties for Hohfeldians, they do not *ipso facto* count as good arguments for the view that any and all conceptions of a liberty, a power, etc., do not or cannot constitute distinct kinds of 'rights'.

19. Honoré (1960), *supra* note 6 at 456.

20. *Ibid.*

21. *Ibid* at 457.

22. The difference between 'active' and 'passive' kinds of rights is whether the position entitles its holder to act (an active right), or whether someone else owes the position-holder some action, forbearance from action, or is incompetent to act (a passive right). See, e.g., Salmond, *supra* note 4 at 225.

Joseph Raz: 'Rights to do' are Really Just Rights Against Interference

Joseph Raz characterises his account of rights (model-theory combination) as a 'partisan' account of the moral, political, and legal *philosophical discourse*, not an analysis of legal practice or ordinary usage.[23] For Raz, a right is a weighty interest that, perhaps in combination with other interests, suffices to ground duties in other parties.[24] Despite offering an 'analytic definition' of a right, Raz nevertheless claims it is not designed to handle 'a right to do' locution. Even so, he briefly mentions the ideas of 'liberty-rights' and rights exercise. Nonetheless, reconciling his various remarks on rights suggests he does not really think that there really are rights to do (e.g., liberty-rights) after all. Such cases are instead explainable as follows. The real right is the reason for other parties' non-interference (it is a RCTD), while the liberty to act (which is not a right) is merely the right-against-interference's referent.

> The issue of so-called liberty rights is a complex one…. The absence of duty does not amount to a right. A person who says to another 'I have a right to do it' is not saying that he has no duty not to or that it is not wrong to do it. He is claiming that the other has a duty not to interfere'… [a] right to *x* is not the same as to have no duty to *x* or not to *x*.[25]

Raz's point is not merely directed against a certain conception of liberties. For example, some people attack the *Hohfeldian* conception of liberties for marking

---

23. '[A] philosophical definition of 'a right', like those of coercion, authority, and many other terms, is not an explanation of the ordinary meaning a term. It follows the usage of writers on law, politics and morality who typically use the term to refer to a subclass of all the cases to which it can be applied with linguistic propriety. Philosophical definitions of rights attempt to capture the way the term is used in legal, political and moral writing and discourse. (I refer of course to what philosophers commonly do, whether they know it or not. I do not wish to deny that some understand their enterprise in other ways.) They both explain the existing tradition of moral and political debate and declare the author's intention of carrying on the debate within the boundaries of that tradition. At the same time they further that debate by singling out certain features, as traditionally understood, for special attention, on the grounds that they are the features which best explain the role of rights in moral, political, and legal discourse. It follows that while a philosophical definition may well be based on a particular moral or political theory (the theory dictates which features of rights, traditionally understood, best explain their role in political, legal and moral discourse), it should not make that theory the only one which recognizes rights. To do so is to try to win by verbal legislation'. Raz (1986), *supra* note 6 in the article-cum-book-chapter 'The Nature of Rights' at 165-66 (certain internal citations embedded into the quote).

Raz remarks cannot be squared with his presentation of the structure of legal officials' reasoning processes using rights in that chapter's companion paper 'Legal Rights', reprinted in Raz (1994), *supra* note 6. Regardless, Raz does not adhere to his own stated methodology. Those two book chapters, his most important writings on rights, are devoid of citations to moral, political, and legal philosophical works about rights (let alone citations to standard legal texts). Even if he had complied, though, why should moral and political philosophical conceptions of rights predominate over examples of rights found in legal practice? What is the point of modelling rights and theorising about them if not to help explain real world legal, moral, and institutional practices, and lay linguistic usages and practices? Why do those data/explananda not take priority over, say, a possibly obscure and possibly misguided moral philosopher from 1850?

24. Raz (1986), *supra* note 6 at 166; Raz (1994), *supra* note 6 at 254.

25. Raz (1994), *supra* note 6 at 275. *Cf* Raz (1986), *supra* note 6 at 167; Kramer (1998), *supra* note 6 at 13-14.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

either (a) the mere absence of a duty or (b) an unenforceable position. For such critics, a genuine liberty must instead either be an express permission (as opposed to the mere absence of a duty), or it must (also) always be protected by another position like a Hohfeldian claim or power.[26] This is not Raz's (only) point. His is rather that the right in question is the entitlement to another's non-interference, and that a related, express permission to act or not is not 'a right'.

Pace Raz, there is a long-standing practice in moral, political, and legal philosophical discourse (let alone regular legal discourse and practice) of treating what philosophers and various legal sources (at least a certain subset of) 'liberties' as rights. As this conception of 'a right' abounds in the philosophical literature it cannot be passed over in silence or assumed away. Further, Raz's reduction of 'a right to do *X*' to simply a right against interference by other parties in one's action (excising the entitlement to act oneself) simply begs the question. Why is the relevant liberty to act, which Raz deems to be the right's referent, itself not also a right? Imagine that Bob the law student wants to park his bicycle in front of his university's law building. A staff member approaches Bob, telling him that the bike racks are for the faculty members' exclusive usage. Bob, the budding lawyer, knows better about the relevant regulations. 'I have a right to park here', he says in reply. Bob does not just mean by this that he has a right against the staff member's interference with his parking there. Bob's primary intention is to convey the fact that he is indeed entitled or allowed to undertake the action of parking his bicycle there, let alone that it can be done without interference. For it could otherwise be that he is not entitled to park there at all, free of interference or otherwise.

Neil MacCormick: Rights Must Be Rightful

Neil MacCormick thinks powers ought not to count as rights because their exercise can be valid but wrongful. He therefore seems to suggest that, to be 'a right', even a legal one, a normative position must entail actions that the law (or some other normative system) deems rightful, as opposed to action the law proscribes and affixes civil or criminal liabilities for undertaking.

> For example, *A* having validly contracted to sell a piece of land to *B*, proceeds to convey the same piece of land to *C* under a subsequent contract of sale, *C* acting in good faith and with no notice of *B*'s prior right. Here *A* acts wrongfully towards *B*; but the conveyance, albeit not rightfully executed, is valid and effectual in *C*'s favour. There can be other cases in the sale of goods where a person has a power to transfer property in goods without having the right to sell them, eg, on account of having acquired them by fraud, and thus under voidable title. This sufficiently indicates that powers are not themselves rights, although one can only have a right to exercise a given power provided one has that power, and provided that the exercise

26. For example, R Robinson, Sam Coval & Joseph Smith, "The Logic of Rights" (1983) 33 UTLJ 267 at 269: 'No person can be said to have a right to do that which he can always be prevented from doing or forced to do. The mere negation of a duty to do and not to do is a necessary, but not a sufficient, condition of a right to do. The other person must also have a duty not to interference with you in doing it'.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

in question is not on some ground a wrongful one.[27]

MacCormick's argument is distinct from a seemingly similar view, held by Joseph Raz and Carl Wellman, that certain legally valid but wrongful actions ought not even count as 'powers', let alone as 'rights'.[28] Again, the crux of MacCormick's argument seems to be that, because it involves or entails an action that is not 'rightful', the normative position in question cannot count as 'a right'.

Yet the agent in question, although perhaps criminally and civilly liable to the wronged parties, was able to create legally valid contracts and exchanges. For a Hohfeldian at least, this meets the criterion of being 'a power': being able to intentionally change the parties' normative positions. Further, hardcore Hohfeldians are committed to the strict Bilateral Thesis: the idea that all legal relations, such that as between claims and duties, powers and liabilities, etc., only ever obtain between two parties. The hardcore Hohfeldian could therefore hold that *A* (the seller) has a right vis-à-vis *C* (the second purchaser) to make a contract offer despite also bearing a duty to *B* (the first purchaser) not to make such an offer to *C*. The *A-B and A-C* legal relations are distinct. In other words, the hardcore Hohfeldian would posit that we might say *both* that (I) *A* has a right *vis-à-vis C*, *and*, at the same time, (II) *vis-à-vis B*, *A* has no such right (because he or she is duty bound not to act) *vis-à-vis C*.

That seems a bit odd, though. There are two simpler answers. One is that the connection between 'a right' and 'rightfulness' is not always true of legal rights or other legal positions. There can be trivial rights, immoral rights, rights predicated upon governmental corruption, favouritism, etc. Second, even if one treats powers as a type of a right, not all tokens of the type must count as 'rights'. This is a common strategy in the rights literature.[29] If sound, it means that MacCormick's argument does not go far enough in showing that *all* powers should be disqualified from counting as rights. (The demand to show that all tokens of the type are disqualified also hoists MacCormick with his own petard, as it were, for his own argument/bald assertion delimits *rights to exercise* a power to situations wherein uses of the power are not wrongful.)

Kenneth Campbell: Rights Must Be Entitlements or Permissions

For Kenneth Campbell powers and immunities are not rights. This, he claims, is because powers are capacities, not entitlements or permissions.[30] Campbell also

---

27. Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2008) at 127 [MacCormick (2008)].

28. See Raz (1994), *supra* note 6 at 267; Wellman (1985), *supra* note 9 at 44-46, 50, 68-69, 80.

29. See Eleftheriadis, *supra* note 4 at 7. On only tokens of Hohfeldian claims counting as rights see, e.g., Rowan Cruft, "Rights: Beyond Interest and Will Theory" (2004) 23 Law & Phil 347 at 356; Leif Wenar, "The Nature of Rights" (2005) 33 Philosophy and Public Affairs 223 at 243-46 [Wenar (2005)]. On only token powers counting as rights, see, e.g., Kramer (1998), *supra* note 6 at 103; Finnis, *supra* note 16 at 226-27. On only token immunities counting as rights, see, e.g., Hart (1982), *supra* note 6 at 191.

30. Kenneth Campbell, Book Review of *Real Rights* and *The Proliferation of Rights* by Carl Wellman (2001) 110:439 Mind 881 at 884 [Campbell (2001)]. *Cf* Kenneth Campbell, "The

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

argues that certain powers can be used to do bad things, e.g., a thief undertaking a dishonest transfer in market overt, thereby committing conversion of goods. Campbell thinks this involves a power. He simply denies that that power counts as a right or that the thief has a *legal right* to act upon such power. 'To be sure, the lawmaker generally confers a right to exercise a power at the same time as granting the power itself. But the two are quite distinct and are related only pragmatically, not conceptually'.[31]

Unlike MacCormick, then, Campbell provides a reason for thinking that all tokens of the type (powers) ought not count as rights: they are capacities, not entitlements or permissions. For as some powers are used to accomplish illegal-yet-legally-valid ends, the power-holder has the capacity to do that which he or she is not entitled to do. The thief is not entitled to sell the stolen goods because he bears a duty not to do so (and could be criminally and civilly liable if he does).

There is a centuries-old debate about the relationship of enforcement powers to the concept of a right. One stance, taken by Guido Calabresi and Douglas Melamed, is that there is a conceptual distinction to be had, if not also a historical-temporal one, between the creation of a right and its modes of attempted remedy or vindication.[32] These can be thought of in terms of two stages (be they historical, conceptual, or both). Stage I: create a right. Stage II: design modes of protecting it (e.g., powers to sue). However, it is hard to believe that the legal officials who first created the Market Overt doctrine could even deign to conceive of the matter in terms of bestowing a right to use this power (if indeed lawmakers even thought about such matters in terms of 'rights' and 'powers'). Campbell's is a conceptual point: the initial position (here, the power to contract) is conceptually distinct from the modes of its protection or utilisation (here, the liberties to use those powers). On the contrary, I think the dishonest transfer case is one where there is no distinct conceptual space for officials to design this power's modes of protection or utilisation.

More importantly, Campbell's reliance on a Capacity-Entitlement distinction fails to show why all tokens of the type should be disqualified from counting as rights. Granted that a power is a capacity, he has not shown: that capacities cannot also be entitlements; why capacities are not rights; and why all rights must be entitlements. Lawyers would be happy to say that we are generally 'entitled' to gift our property to others, or that we are 'entitled' to buy a house, or sell it. We are also entitled to enter contracts so long as they are for legal purposes and we are legally competent consenting persons. Campbell would have to provide reasons for thinking that *all* powers (not just some) are not both entitlements and

---

Variety of Rights" in Rex Martin & Gerhard Sprenger, eds, *Challenges to Law at the End of the 20th Century: Rights: Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy* (IVR), Bologna, June 16-21, (Stuttgart: F Steiner Verlag, 1995) at 22. Campbell is probably not a Monist, but just a more restricted pluralist, as he seems to think that both liberties and RCTDs are 'rights'. It is also unclear whether Campbell thinks that an immunity is a marker of another party's incapacity, or something else, and in what sense he thinks that an immunity itself could be 'a capacity'.

31. Campbell (2001), *supra* note 30 at 884.

32. Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089 at 1090-91.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

capacities. To do so, it would help if he told us what makes something an entitlement in the first place.

Matthew Kramer & Hillel Steiner

Matthew Kramer and Hillel Steiner present the most sophisticated case for delimiting rights to one basic kind, a Hohfeldian claim. They co-authored a paper in order to rebut the works of Gopal Sreenivasan and Leif Wenar, who claim to present alternatives to the Interest and Will Theories of rights.[33] Kramer and Steiner argue that the others have simply presented versions of the Interest Theory. In so doing, Kramer and Steiner also outline some of their own views about rights, particularly in response to Wenar. To understand their monistic position, though, we must briefly address Wenar's pluralistic view.

Another Hohfeldian, Wenar believes that certain tokens of all of Hohfeld's four basic types (claims, powers, liberties, immunities) count as rights. This is in part because everyday discourse about rights includes what Hohfeldians call powers and liberties. For Wenar, the test of a philosophical account (a model & theory combination) is how well it captures our ordinary understanding of what rights there are.[34] An account that narrowed down the number of kinds of rights would therefore be incorrect as measured against common understanding.[35]

Kramer and Steiner disagree. They provide several arguments aiming to show why the term 'a right' should be restricted to Hohfeldian claims and why we should not abide by Wenar's proposed test.[36] Mostly paraphrased, these are they:

(I) There is not one ordinary understanding of what rights are. There are instead multiple ordinary understandings, which conflict with one another in a number of respects. Hohfeld himself notes that even professional jurists employ the language in confusedly inconsistent ways.[37]

(II) Wenar acknowledges this systematic ambiguity of ordinary usage, but attempts to defuse it via assurances that ordinary rights-talk can be entirely rigorous and error-free, provided speakers understand how assertions of rights map onto the Hohfeldian incidents. Yet Wenar's assurances are uninformative and carry a patently unsatisfied proviso.[38]

(III) Moreover, his proviso can be countered with an alternative one: that ordinary rights talk can be error free so long as speakers restrict the term "rights" to Hohfeldian claims.[39]

---

33. Kramer & Steiner (2007), *supra* note 8. *Cf* Gopal Sreenivasan, "A Hybrid Theory of Claim-Rights" (2005) 25 Oxford J Leg Stud 257; Wenar (2005), *supra* note 29.
34. Wenar (2005), *supra* note 29 at 238.
35. *Ibid* at 243.
36. This seems to diverge from Steiner's earlier views about rights being claims *or* immunities. See, e.g., Hillel Steiner, *An Essay on Rights* (Oxford: Oxford University Press, 1994) at 61 n 9.
37. Kramer & Steiner (2007), *supra* note 8 at 295.
38. *Ibid* at 295-96.
39. *Ibid* at 296.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

(IV) When Hohfeldians frown on the looseness of the terminology of 'rights' in quotidian discourse, they are distancing themselves from the ways in which lay people and professional jurists *do* discuss various legal entitlements.[40]

(V) The indiscriminate use of the term 'right' to cover each of the Hohfeldian entitlements (i.e., claims, powers, liberties, and immunities) is strongly conducive to muddled thinking and argumentation.[41]

(VI) Hohfeldians are not seeking to lay down terminological prescriptions for everyday communications and contexts. Any such prescriptions would be futile and misconceived. Rather, Hohfeldians have striven to devise an intricately precise vocabulary from which philosophical disputes about the basic nature of rights can be conducted rigorously and perspicuously.

Ordinary usage is an essential point of departure of the development of that specialized philosophical parlance… but it is only an initial point of reference. Some regimentation/purification is inevitable if the requisite degree of precision for philosophical disputation is to be attained.[42]

(VII) The foremost reason for limiting rights to claim-rights (ones accompanied by protective immunities, at any rate) is grounded in the presuppositions of ordinary usage. As Hohfeld's investigations tended to reveal, an assumption ordinarily underlying the invocation of the term 'right' is that the holder of an entitlement denoted by that term is owed a duty with some specified content by somebody else. An assumption to that effect will be fully apt when the entitlement under consideration is a claim-right—since every claim-right is correlative to a duty—but will otherwise be prone to be false.[43]

(VIII) A chief factor behind the tendency of ordinary speakers and professional jurists to refer to Hohfeldian powers and liberties as 'rights' is that nearly all such entitlements in any civilized society are accompanied by claim-rights against many forms of interference with the exercise thereof. No liberty or power would ordinarily be designated as a 'right' if it were wholly unaccompanied by claim-rights against interference with the exercise of it. By contrast, a claim-right does not need such supplementation to be ordinarily classifiable as a right. It is itself an instance of legal protection against interference or uncooperativeness, and it is itself thus correctly regarded as a right by ordinary speakers and Hohfeldian theorists alike. When powers and liberties consort with claims that protect the power-holders' and liberty-holders' abilities 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

40. *Ibid.*
41. *Ibid.*
42. *Ibid.*
43. *Ibid* at 296-97.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

> claims are unique in performing that particular function, the singling out of them as right is hardly an arbitrary stipulation.[44]

Kramer and Steiner agree with Wenar that, in their everyday discourse, people would call (what Hohfeldians style) powers and liberties 'rights'.[45] I, in turn, agree with Kramer and Steiner that Hohfeld's schema of jural relations is a *corrective* to ordinary usage,[46] the latter of which is ambiguous. Hence, one cannot lean too heavily on provisos about ordinary usage per their second argument. That is where I part company with Kramer and Steiner though.

The problem of muddled thinking articulates a worry, but not one so weighty as to warrant restricting term usage to any one basic kind of right. Hohfeld's schema provides distinct terms to help philosophers and jurists alike avoid ambiguous thinking and argumentation. Further, Hohfeld's adoption of the term 'claim' is itself a form of philosophical correction and clarification, not something that ordinary folk (as opposed, perhaps, to lawyers) would always recognise as being identical to 'a right' easily.

It is not enough to note that Kramer and Steiner harbour divergent methodological aims from Wenar and myself. There is also something mistaken about their stated aims and priorities. Instead of coming up with an account of rights that *balances* (i) an effort to best track the data of ordinary and technical (e.g., legal) usage and (ii) meet the stated desiderata of a precise vocabulary that helps avoid muddled thinking in philosophical discussions of rights, Kramer and Steiner simply concern themselves with the latter. Even if their preferred interpretation of Hohfeld's model (which treats a claim as the exclusive kind of right) achieved that end, it should be deemed woefully under-inclusive and a distortion. Whatever one thinks of the merits of desiring a philosophical model that is tidier and simpler than the real-world concepts (in part because it reduces the number of relevant concepts or their features), Kramer and Steiner's is so much so as to be unrepresentative of that which they wish to model.

Their approach may even defeat the very purpose of having a model of rights altogether *as they themselves construe it*: to help understand the 'nature' of rights. Hohfeld was trying to make sense of rights discourse. One does not make sense of it by denying that much of it is about rights at all, especially when the *explananda* strongly suggests otherwise. Again, Kramer and Steiner even admit

---

44. *Ibid* at 297-98. The following portions of the argument were omitted for brevity's sake. 'To be sure, a claim must be accompanied by immunities against most types of divestiture if it is to count as a genuine right at all…. However, the lesson to be drawn here is not so much that concomitant immunities against divestiture are necessary for a claim's status as a genuine *right*; instead, the presence of such immunities is necessary for a claim's status as a genuine *entitlement or legal position* of any sort' (*ibid* at 297). Kramer contrasts 'genuine' entitlements with merely 'nominal' ones, which are nevertheless also real positions within a legal system, but it is hard to square these remarks with Kramer's earlier view about claims being 'nominal' if unprotected by powers. Kramer (1998), *supra* note 6 at 8-9, 34, 46, 63-65, 100, 106; Matthew Kramer, "On the Nature of Legal Rights" (2000) 59 Cambridge LJ 473 at 476-77, 481-82. Perhaps he abandoned it, though. Further, there are good reasons to think this argument reflects Kramer's view and not Steiner's as it is hard to reconcile with latter's Will Theory of rights.

45. Kramer & Steiner (2007), *supra* note 8 at 295.

46. See also Kramer (1998), *supra* note 6 at 22-23.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

that ordinary usage is 'an essential point of departure for the development of [a] specialized philosophical parlance' about rights,[47] and the ordinary users would consider cases of what Hohfeldians call liberties and powers to be 'rights'.

Further, how can we have philosophical disputes about the 'nature' of rights if we only use one *philosophically constructed*, corrective concept, e.g., a Hohfeldian claim? If concepts do indeed have natures (discernible internal structures), and what we want is the nature of rights, why think Hohfeldian claims are going to get us to an adequate understanding thereof? All we will get is the 'nature' of Hohfeldian claims. Is it by approximation or abduction, then, to the nature of 'real-world' rights (or, at least, real-world RCTDs)? If it is, then that approximation is quite off the mark for discounting other concepts that can count as 'rights'.

Additionally, Hohfeld was adamant that his schema was meant to give practical guidance to lawyers and judges, and was not strictly meant for employment in philosophical debate.[48] If philosophical modelling of rights is not aimed to explain real world practices in a way that aims to clarify the concept(s) or practice(s) to the practitioners, and is simply for philosophers for the sake of philosophising, then something has gone awry.

Kramer and Steiner assume a Right-Entitlement distinction, whereby four of Hohfeld's kinds (claims, liberties, powers, and immunities) are entitlements, but not all count as rights. What would they say to someone who believes that all entitlements are rights? The closest they come to a possible response is in their seventh argument: a presupposition of ordinary usage that there is a relationship between rights to duties. Yet Hohfeld's investigations do *not* reveal that most people assume duties are tethered to rights. He just baldly states it as an assumption. He also fails to explain or justify why claims ought to constitute the *stricto sensu* case, save to say that it is *because* they correlate with duties.[49] This is, of course, no answer at all. For why should that correlation make claims the strict sense? His "investigations" in the *Fundamental Legal Conceptions* articles do not show that that assumption is actually held by most people. It might be true, but neither Hohfeld nor Kramer and Steiner even begins to provide evidence for it.

Kramer and Steiner's last argument presumes, rather than demonstrates, why liberties and powers are ordinarily counted as rights (because they are accompanied by claims against interference with their exercise). Counterexamples abound. One was already mentioned in the argument against Raz above vis-à-vis parking a bicycle at a law faculty. Second, Kramer holds that a 'right of action' (i.e., a secondary and tertiary right in ordinary parlance) is really just a Hohfeldian power.[50] Whether or not that constitutes 'proper' Hohfeldian

47. Kramer & Steiner (2007), *supra* note 8 at 296.
48. Hohfeld, *FLC #1*, *supra* note 3 at 20.
49. *Ibid* at 31: '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 then proceeds to cite three cases as evidence. *Ibid* at 31-32.
50. Kramer (1998), *supra* note 6 at 34 n 14.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

parlance, it is implausible that, transposing those remarks about rights of action to this new argument, most regular people and lawyers would construe a right of action to be 'a right' simply because of some direct or indirect protection against non-interference afforded to it by another party's correlative duty (if there is one). (Here, the relevant duty against non-interference would have to be against the secondary/'remedial' right of action itself, not the underlying (primary) right).[51] A right of action would rather seem to count as a right because its holder is entitled to commence legal proceedings, say, against the holder of a primary duty. Lest one think that the concept of 'entitlement' is doing all the work here, the idea can be reiterated without it. Imagine *A* owes *B* money for goods delivered according to a contract. *A* refuses to pay, so *B* commences a lawsuit. Is *B*'s right of action 'a right' to lawyers and ordinary folk because *B* can legally commence institutional proceedings, or is it a right (if at all) because the capacity to do so is protected by *A* or some other party's being duty-bound to refrain from interference with the commencement process? It is possible, but I find it extremely doubtful that most ordinary folks, let alone lawyers, would choose the latter answer.

Kramer and Steiner also beg the question that most people would consider a 'naked' claim (i.e., one unprotected or supported by liberties or power to exercise or enforce it) to be a right.[52] Granted these are in part empirical questions, I nevertheless think that most people believe rights *are* claimable. Whenever I confront people with the idea of a wholly unclaimable or unenforceable right people deem it to be no right at all. Even those scholars who believe that such cases exist tend to mark them off as being either exceptional, or as constituting 'imperfect', 'vitiated', 'nominal', or 'degenerate' cases of rights.[53] Lay people and scholars may be mistaken about the matter (while those select scholars who note the existence of 'naked' RCTDs, on the other hand, may be correct). Even so, Kramer and Steiner's *own* view being based on an appeal to ordinary linguistic usage for the basic unique function of eliciting the application of the term 'a right' is open to empirical challenge, if it is not just false.

Further, Kramer and Steiner overemphasise the direct or indirect security afforded to an entitlement by duties and immunities as a criterion for rights status.

---

51. The Primary-Secondary-Tertiary right distinction is commonplace in legal and philosophical discourse. *Primary* rights are substantive entitlements, e.g., a right to free speech or to purchase some land. *Secondary* rights usually authorise their holders to initiate dispute resolution mechanisms (litigation, arbitration, mediation, etc.) when primary rights seem to have been, or are threatened to be, violated (or they authorise holders to waive such processes). However, they can also sometimes be employed outside of such contexts, e.g., as entitling one to undertake self-help remedies. *Tertiary* rights are used to enforce or waive the binding prescriptions or remedies provided by third party dispute resolution mechanisms like courts.

52. In explicating Jeremy Bentham's account of liberties, HLA Hart notes the former's Vested/Naked liberties distinction. 'Vested' liberties are those that, however weakly, are directly or indirectly protected by at least some legal RCTDs. For example, one has the liberties to eat or not eat, to stand or sit down, to go inside one's house or out. These are "liberty-rights" because they are protected, e.g., it is an offence for others to use violence to prevent one for so acting. 'Naked' liberties, by contrast, are not protected by RCTDs. Hart (1982), *supra* note 6 at 172.

53. See, e.g., Salmond, *supra* note 4 at 122-23, 129; Raz (1994), *supra* note 6 at 256-57; Rex Martin, *A System of Rights* (Oxford: Clarendon Press, 1993) at 82-83; Kramer (1998) and (2000), *supra* my footnote 44.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

(This is ironic given Kramer's Interest Theory-based opposition to the Will Theory idea that 'a right' is a complex containing a Hohfeldian claim combined with at least one Hohfeldian enforcement power.) There are cases of liberties (entitlements to act) that were previously forbidden. As examples, the Charter of the Forest granted certain English people rights to hunt and gather; the English Parliament granted itself freedom of speech, etc. It is not that people were insecure in their entitlements or capacities to do such things before; they were not allowed to do (duty-bound not to do) them at all![54]

Kramer and Steiner could offer the following rebuttal. In terms of conceptual resources, it makes sense to focus on Hohfeldian claims. 'Liberties' and 'powers' are established terms, which we can contradistinguish from rights. Change the label (from 'claim') to just 'a right' and abandon the predicate '*stricto sensu*' if you like, a claim nevertheless serves a distinct job from the other Hohfeldian positions. ('Immunities' might also be a bad label, but it serves a different role from the other three, and not one we would intuitively consider to be the paradigmatic usage of legal rights.)

In response, a Hohfeldian claim is a technical term, one with which ordinary speakers may not be familiar (if not also professional jurists). It is also a poor label, since it is ambiguous between 'active' and 'passive' conceptions. More importantly, the possible rebuttal takes the philosophical literature for granted as having a greater foothold in ordinary and technical (e.g., legal) discourse than it does. In 1915 Roscoe Pound lauded the addition of the concept of power as a distinct label from a right correlative to a duty as a great *jurisprudential* contribution.[55] Has it caught on en masse with judges and lawyers? Have they ceased to use the language of 'a right' to buy or sell property, and restricted their vocabulary to that of 'powers'? No. *Should they*, on the idea that a different technical term is available? Howsoever one chooses to answer that question, it will not change the fact that most if not all of the agents in question (and other ordinary folk) do continue to think and talk of such normative positions in terms of rights. And it is that fact that a philosophical account of rights must take seriously.

§ III.2 Over-Inclusivity: Ligation-Rights

The last section showed why certain philosophers provide under-inclusive rights models based on unwarranted assumptions or methodological commitments. This section shows the opposite: other philosophers present over-inclusive models by treating some or all ligations as 'rights'. Their general argument is as follows. Ligations are indispensable for structuring our social, legal, moral, and political relations. We need duties and liabilities in order to even have contracts,

54. For a different set of responses to Kramer & Steiner's arguments, see Leif Wenar, "The Analysis of Rights" in Matthew Kramer et al, eds, *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (Oxford: Oxford University Press, 2008) 251-74.

55. Roscoe Pound, "Legal Rights" (1915) 26 Int J Ethics 92 at 95 ('Rights in this sense, or powers, as we are now coming to call them….') [Pound (1915)].

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

property, etc. It is thus *desirable* and *advantageous* to be able to be a duty-bearer in many cases, for example. Therefore, it seems fit to deem (at least some) ligations to be basic kinds of rights: duty-rights, liability-rights, etc.

The idea is not completely far-fetched. Ligations are often thought to serve as part of either rights complexes, or, at least, as part of complex legal relations. For example, Tony Honoré's model of ownership (i.e., property bundle of sticks) includes ligations as some of its eleven incidents.[56] The idea of a ligation-right goes farther, though, by making the ligation the defining feature of the right complex.

For example, Carl Wellman reports that HLA Hart suggested to him the idea of a Hohfeldian liability-right. Hart's examples were the legal right to inherit property and a right to be given something.[57] Yet Hart's own *theory* of private law rights requires that they afford their holders some modicum of control in terms of self-enforcement capacities.[58] Liabilities, however, cannot be self-controlled in these fashions. Hart's *model* of a private law right, moreover, construes rights as powers, or, more accurately, as liberty-powers.[59] How, then, could liabilities count as rights per Hart's own criteria?

Wellman might claim to be able to bypass Hart's difficulty. On Wellman's model, a right is always a complex containing various Hohfeldian tokens.[60] Complexes, he thinks, have 'core' and 'peripheral'/'ancillary' components.[61] For example, if *A* and *B* enter a contract for widgets, *A*'s right against *B* is a complex containing a Hohfeldian claim correlating to *B*'s duty to pay that forms the core, with enforcement powers (and perhaps other positions) constituting ancillary positions for that claim. Moreover, on Wellman's *theory* of rights all rights afford their holders 'dominion' in a potential conflict with other parties, even if the right cannot be personally controlled/enforced.[62]

Scholars have shown that Wellman's suggested tools for determining what constitutes a complex's core are wanting.[63] Even so, one could try to show how certain normative positions are dependent upon others within a complex. To give an example of the problem of identifying 'cores' of complexes, there is a famous

---

56. Anthony Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961). His eleven standard incidents are: 1, a right to possess; 2, a right to use; 3, a right to manage; 4, a right to the income of the thing; 5, a right to the capital; 6, a right to security; 7, an incident of transmissibility; 8, an incident of absence of term; 9, a duty [to prevent] harm; 10, a liability to execution; 11, an incident of residuarity.

57. Wellman (1985), *supra* note 9 at 86.

58. Hart (1982), *supra* note 6 at 183-85.

59. *Ibid.*

60. Wellman (1985), *supra* note 9 at 92.

61. *Ibid* at 81-94.

62. *Ibid* at 54, 95.

63. For example, Campbell (2001), *supra* note 30; Rainbolt, *supra* note 10 at 105-09, 242. They also show why Wellman's concept of 'dominion' is underdeveloped. Wellman suggests there are two aspects for identifying the core. Aspect 1: look at the language of legal rights and interpret its meaning (plain meaning, legislative intent, etc.). Aspect 2: look at the matter through the lens of an actual or hypothetical confrontation between two parties under the law. Identify and define the way in which the law might favour a party alleging some right in the face of the contending party. Wellman (1985), *supra* note 9 at 89-90. There are also two stipulated limiting conditions: 1, the core must be a legal advantage. 2, it must be the sort of legal advantage whereby *X* can have 'dominion'. *Ibid* at 85.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

American case about the rights of African Americans to sit on juries.[64] A state law barring them from jury selection was said to violate the Fourteenth Amendment. Is the right to sit on a jury *primarily* about (that which makes it 'a right') the Hohfeldian liability, i.e., changing one's status from non-participant to that of a candidate juror in a particular jury pool; the duty to attend the court and participate in the jury pool and *qua* juror if selected; a liberty to serve; the power to effectuate one's status as a (potential) juror once selected if people try to interfere with one's serving; or something else?

Wellman's example of a liability-right is the right to be married. Certain people are, of course, legally eligible to marry. Wellman identifies this eligibility with a Hohfeldian liability (susceptibility to having one's legal relations changed), which in turn forms the core of the right to marry.

> [T]he eligible couple have legal dominion concerning its enjoyment. Thus, they acquire this legal liability to be married only if they first freely consent to be married to each other; no minister or magistrate has the legal power to marry reluctant couples dragged in off the streets, or even out of the bedrooms. And presumably the couple retain the legal power to withdraw their consent at any time during the marriage ceremony before the declaration has been completed. And individuals have the legal power to take legal action… to establish their liability to be married or their lack of it.[65]

Whatever one thinks of Wellman's theoretical 'Dominion' criterion for identifying something as 'a right', his example of a right complex with a liability at its core fails to meet it. It instead suggests that the work of establishing dominion is accomplished by the complex's liberties, powers, and immunities. Further, a liability does the opposite of establishing a right-holder's dominion over others: it merely marks its bearer's susceptibility to another party's capacity to change the liability-bearer's normative position(s). In other words, if Wellman's Dominion theory of rights relies either on the would-be marrying parties' effectuating choices regarding consent, or their power to establish their status as marriageable, then dominion cannot be explained in terms of a liability. On the other hand, if the right to marry has a Hohfeldian liability as its core *because* of the dominion that a liability purportedly affords, then Wellman's answer is either circular or incomplete. Moreover, he believes that the 'core' defines the entire right complex. To be sure, eligibility is a *sine qua non* for being able to marry. Even so, there is a difference between having a legal status and *the right to* (gaining and/or maintaining) that status. Nor must those rights/positions form part of a complex. Perhaps only Hegelians, for example, would say that there is a right to being liable to being sentenced for one's crimes. But even they might dispute that a Hohfeldian liability forms the core of that right.

To return to Wellman's marriage case, for example, an oft-neglected feature of Hohfeldian and other conceptions of powers is that they change *both* the power-holders and other parties' normative positions. A third party (a government

64. *Strauder v West Virginia*, 100 US 303 (1880).
65. Wellman (1985), *supra* note 9 at 89.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

official, a religious figure, etc.) is usually required in order to marry people. Yet the marrying couple must be competent and eligible to trigger that process. As Wellman notes, (at least in many modern societies) one cannot be compelled to marry. Thus, one must make oneself susceptible to a legal official's marriage ceremony. This requires the power to make oneself liable, which correlates with the official's liability to having a duty created in him or herself to use his or her legal power to marry the couple. There is no marriage without eligibility. But the eligibility is itself partially established through a *sui generis* change in one's own position: by applying to the state, say, to get a marriage certificate, a ceremony, etc. Thus, it seems that the power to get married is even more basic to 'a right *to* marry' than the liability (if eligibility is indeed to be identified exclusively with that type of Hohfeldian position) to be married by an official.

George Rainbolt, another ligation-right proponent, believes that all four types of Hohfeldian ligations can form the core of rights complexes so long as each includes a claim and/or an immunity.[66] Rainbolt's *theory* of a right is that it justifiably affixes a normative constraint upon others.[67] Of Hohfeld's four basic kinds, however, only a claim or an immunity can normatively constrain another party. Hence any right complex must contain a token instance of at least one of those two basic positions.[68]

How could any ligation-right complex be squared with Rainbolt's own criteria, though? How could a duty or liability really constitute kinds of rights if, according to Rainbolt, what makes the complex 'a right' is either a constitutive claim or immunity, which does the requisite constraining? The ligation-right idea cannot be squared with Rainbolt's *model* of rights (rights are claims, immunities, or complexes containing them), and *theory* of rights (rights impose normative constraints upon other parties). His rejection, moreover, of the notion of complexes having a core for being difficult to identify is belied by his own belief that a claim and/or immunity must form that core.

Rainbolt also seems to misidentify what counts as the core of such complexes. Take his example of the so-called duty-right to vote.[69] In certain countries, such as Australia, there is a duty to vote. That duty qualifies or shapes the right to vote (eliminating the freedom not to participate). Still, *pace* Rainbolt, that duty is not itself a right, let alone the core of one. If anything, the core of the right to vote is either the legal capacity to vote, or the holder's authorisation/permission to undertake the relevant actions that constitute voting. As another example, if there

66. Rainbolt (2006), *supra* note 10 at 34-39.
67. *Ibid* at xi, xiii, 118.
68. *Ibid* at 25, 30. The constraining can be seen via the correlative positions. A duty binds its bearer to act and thus restricts his or her options for action, while a Hohfeldian disability marks one as incompetent to change parties' relations. But there is a difference between being obligated (not) to act in certain ways and being disempowered to so act. One may act despite being normatively disempowered to do so. The act may be 'wrongful', but it is not constraining. For example, a legislature may pass laws that are ultra vires their constitutional competencies; a person may create a will that is not witnessed by the relevant number of parties. The effect is either that the procedures are legally ineffectual, or that they have changed parties' statuses (citizens, beneficiaries, etc.) in legally-illegal ways. Either way, *pace* Rainbolt, disabilities are not normative constraints per se and hence immunities do not normative constrain.
69. *Ibid* at 35.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

is a 'right to make contracts' (and thus to be eligible to bear contractual duties) it does not follow that *A*'s contractual duty to pay *B* is a right, or forms part of a right complex.

The idea of a ligation-right is dubious. We have rights as persons to enter into social, legal, and political relations (contracts, citizenship, etc.). These may correlate with other people's duties not to deprive us of our personhood, e.g., to enslave us, to denigrate our social status or reputation, etc. It may be a good thing to have the duties that come with citizenship and contracts, but that alone does not make them rights. Nonetheless, the idea of a ligation-right cannot be squared with any of its advocates' *own* criteria for what counts as 'a right'. This is not to deny that ligations cannot form parts of either right complexes or other larger legal constructs (such as property). It is simply to note that neither are these, in themselves, basic kinds of rights, and nor do they constitute the 'core' of right complexes in which they may form parts.

§ IV Some Brief Remarks on Two Candidate Criteria for Rights

The paper has indirectly addressed some candidate factors that might fit within philosophical criteria for what counts as 'a right'. Some of these include the ideas of rights as being: entitlements; advantages; norms; capacities; the bases for imposing normative constraints on others; etc. Rights are also sometimes said to possess the qualities of weight, (peremptory) force, or trumping power. The Interest and Will Theories posit criteria for determining what rights are. Their competing criteria include the ideas of: rights being powers; generators of spheres of liberty for the right-holder; protecting/advancing the holder's or class of agents' interests or wellbeing; etc.

Let us briefly address two 'non-theoretical' candidate considerations. First, it has long been suggested that rights are advantages bestowed upon their holders.[70] Not only is the sense in which rights are advantages debated, though, these days it is usually also coupled with a caveat that they are only *normally*, *standardly*, or *typically* advantageous to either the holder, or to the class of persons to which the right-holder belongs.[71] This is because having a right can actually prove to be disadvantageous in some situations, e.g., having the right to inherit a money-pit. On the other hand, as discussed above, some scholars run amok with the idea of rights as advantages (despite advancing the caveat themselves),[72] treating any normative position that bestows some sort of advantage upon its holder as 'a right'—including ligations.

It nevertheless seems reasonable to think that rights typically are advantageous normative positions. It is unclear what good that observation or intuition

70. See, e.g., Salmond, *supra* note 4 at 190-91; Hohfeld, *FLC #1*, *supra* note 3 at 38; Hohfeld, *FLC #2*, *supra* note 3 at 717; Hart (1982), *supra* note 6 at 191 (we only call immunities 'rights' when they protect against adverse changes, not advantageous ones).

71. MacCormick (1977), *supra* note 6 at 202; Sumner, *supra* note 7 at 32; Kramer & Steiner (2007), *supra* note 8 at 290.

72. For example, Wellman (1985), *supra* note 9 at 25-27.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

does towards helping craft identificatory criteria, at least for an analytic definition, however. By itself, the concept of an advantage does not seem to work as a sufficient criterion. For not all normative (legal, moral, social, etc.) advantages are rights. The nineteenth century scholar Rudolph von Jhering presents the following example. A domestic manufacturer, through political or financial pressure, or corruption, gains the government's favour. He convinces it to pass a law imposing tariffs on certain foreign goods that compete with his own. The domestic manufacturer has an interest in the new law being enforced (indeed, it was grounded in his interests), which also directly benefits him—and intentionally so, in a sense. The tariff harms his foreign competitors and bestows upon him an advantage. According to von Jhering, the law bestows upon the manufacturer an advantage, but not necessarily 'a right'.[73]

A second candidate consideration is of rights as entitlements. As partially demonstrated above, rights scholars generally do not explain what 'an entitlement' is. They disagree about what counts as types of entitlements (such as Campbell's denial that powers and immunities are examples), and about the relationship of rights to entitlements (are all entitlements rights, or only some, and on what bases?). Some hold that entitlements are the key to understanding rights: rights are best explained positively as entitlements to do, have, enjoy, or have done, and not negatively as something against others, or as something one ought to have.[74] Others think the notion of an entitlement is too 'thin' or too 'imprecise' to serve as the fundamental criterion for rights,[75] or that it provides no deeper explanation of rights *qua* explanans.[76] Until a better account of entitlements is worked out, its candidacy *qua* potential criterion for determining what counts as 'a right' must not be assumed.

§ V Conclusion

Philosophers and others have long been aware of different senses of 'a right' abounding in ordinary, legal, philosophical, and political discourses. They try to make sense of this diversity by constructing different kinds of accounts, models and theories, which explain the structure of these different senses and to explain their (supposed) underlying unity. Modellers can be divided into Monists and Pluralists. Pluralists think the term 'a right' refers to distinct concepts and that it is apt to style each of these basic kinds of normative positions as 'a right'. By

73. Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol 3, 6th ed (Leipzig: Breitkopf und Härtel, 1924) at 351-53, cited in Hart (1982), *supra* note 6 at 180.

74. For example, Henry McCloskey, "Rights—Some Conceptual Issues" (1976) 54:2 Australasian J of Philosophy 99.

75. For example, Lars Lindahl, "Stig Kanger's Theory of Rights" in Ghita Holmström-Hintikka et al, eds, *Collected Papers of Stig Kanger with Essays on His Life and Work*, vol 2 (Dordrecht: Kluwer Academic, 2001) at 162-63.

76. 'Entitlement analyses hold that rights are entitlements; duties, powers, and so far are various ways of protecting entitlements. A difficulty with such views is becoming clear what an entitlement is as distinct from its various protections'. Michael Bayles, *Hart's Legal Philosophy: An Examination* (Dordrecht: Kluwer Academic, 1992) at 141-42.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

contrast, Monists either believe that there really is only one basic kind of right, or at least that the term 'a right' ought to be reserved for just one concept.

This paper aimed to undermine the motivations for monistic models. It criticised Monists on their own terms; particularly, their assumptions and methodological commitments, and showed that their delimitation efforts are unmotivated and unsound. However, a more positive defence of Pluralistic modelling is also feasible. It seems perfectly reasonable to believe that the phrase 'a right to do' (e.g., a right to speak) reflects one or more additional basic kinds of rights, and that in law, the abilities to buy and sell property, and to solicit people for contracts, constitute 'central cases' of rights. Such rights cannot simply be identified with RCTDs—at least if the latter are understood as 'passive' rights. Monistic models are therefore explanatorily inadequate for excluding these central cases.

While Monists provide under-inclusive models, other scholars are over-inclusive as to what counts as 'a right'. These modellers treat duties, liabilities, and the like ('ligations', for want of a better generic term) as rights too. The paper showed that these other scholars could not square the idea of 'ligation-rights' with their *own* stated methodological commitments about models and theories of rights.

§ VI Appendix: A Sample List of Rights Models

These are only partial presentations of each model, focusing mostly on its constitutive normative positions.

Jeremy Bentham (1782)[77]

A Right: when the law imposes on one party an *extra-regarding* duty to provide a service to a second party[78] where the law intends for that latter party to benefit (where the act has been calculated, by the lawmaker who designs the duty, to benefit the right-holder).[79]

Type I: *Negative* services

Type II: *Positive* services.[80]

---

77. Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed by Philip Schofield (Oxford: Clarendon Press, 2010) [Bentham (2010)]. This preliminary presentation mostly follows HLA Hart (1982), *supra* note 6 (particularly the chapters 'Legal Duty and Obligation, 'Legal Rights', and 'Legal Powers'), but see also Lars Lindahl, *Position and Change: A Study in Law and Logic* (Dordrecht: D Reidel, 1977) at 198-203. Even so, more work must be done to elaborate Bentham's model.

78. Bentham (2010), *supra* note 77 at 79-80. Take away the notion of punishment and you deprive the words duty, right, power, etc., of all meaning. *Ibid* at 145.

79. *Ibid* at 300. 'The notion of command leads to that of duty: that of duty to that of right: and that of right to that of power' (*ibid* at 317). 'If it be any other part [who will benefit from the compelled action], then is it a duty owing to some other party: and then that other party has at any rate a right: a right to have this duty performed: perhaps also a *power*: a power to compel the performance of such duty' (*ibid* at 317). 'Right is either naked or armed with power' (*ibid* at 317 n 1). 'Wherein consists the exercise of such a right? In the demanding of the services only, or in the demanding and receiving them accordingly?' (*ibid* at 300 n 2).

80. *Ibid* at 80, 301. Both are '*enforced* services'. Hart (1982), *supra* note 6 at 168.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

Liberty: the mere absence of duty. A right of exemption from dominion.[81]
Power:[82]
Type I: Power of ***Contrectation***: a normative capacity to physically handle objects (including humans *qua* bodies). 'The right of performing acts of an intransitive nature, the work of law'.[83]
Type II: Power of ***Imperation***: a normative capacity to control a rational being's active faculties.[84]

Immanuel Kant (1797)[85]
Rechtsanspruch: coercive power vis-à-vis another person's duty.

Alois von Brinz (1857)[86]
Rechte: a legal permission, a legal ability, or a combination thereof.[87]
Dürfen (*licere*): legal permission. (***Befugnis*** is also identified with *licere*.)[88]
Können (*posse*, *potestas*): legal ability/capacity.[89]
Brinz also mentions ***Anspruch*** (a claim) as *rechte*, and as a basis of a *klagrecht* (right/cause of action).[90]

---

81. Bentham, *supra* note 77 at 150 (in the footnote that commences on 148), 75-76
82. Every power is a right, but not every right is a power (*ibid*). Powers can be 'corroborated' (i.e., protected by some other normative position, e.g., by a correlative duty), or 'uncorroborated' (i.e., not so protected). *Ibid* at 314.
83. *Ibid* at 79 n "a", 149 n. Aka 'autocheiristic' power. *Ibid* at 103 n 1.
84. *Ibid* at 42 n "b". Hart on Bentham's imperation power: 'a power to procure persons to act in conformity with a command or prohibition by providing motives influencing their will, and it does so in either of two main ways: by threatening punishment if the act is not done or by offering reward if it is done'. Hart 1982, *supra* note 6 at 200-01. Hart is probably correct to identify Bentham's contrectation and imperation powers as being what usually are called 'liberties' or 'permissions'. Hart 1982, *supra* note 6 at 197, 200.
85. '[I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.' Immanuel Kant, *Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 6:231, page 25. 'Right and authorization to use coercion therefore mean one and the same thing' (*ibid* at 6:232, page 26). Kant calls this the 'strict' or 'narrow' sense of a right, but notes that people also think of a right in a 'wider' sense, of which there are two true or alleged' kinds: *equity* (right without coercion) and *right of necessity* (coercion without a right). *Ibid* at 6:232-6:235, pages 25-28.
86. Alois von Brinz, *Lehrbuch der Pandekten,* 1rst ed (Erlangen: Andreas Deichert, 1857).
87. *Ibid* at 49-50 (§ 23).
88. *Ibid.*
89. *Ibid.*
90. Brinz, *supra* note 86 at 52 (§ 24). Compare JS Mill: 'When we call anything a person's right, we mean that he has a *valid claim* on society to protect him in the possession of it, either by the force of law, or by that of education and opinion'. John Stuart Mill, *Utilitarianism* (London: Parker, Son, and Bourn, 1863) at 78 [emphasis added].
German jurists in the second half of the nineteenth century debated the relationships amongst: (i) *recht*, *anspruch*, and a right/cause of action (sometimes distinguished by the terms *klag* or *klagrecht*) and (ii) 'the' German concept of a cause of action to the Roman *actio*. See, e.g., Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (Düsseldorf: Julius Buddeus, 1867) at 81, 89-93 (§ 37 n 1, §§ 43-44).

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

William Markby (1871)[91]

Three senses of 'a right' (of which the first is intimated to be the most appropriate):

Right: the correlative of a duty, which is invariably enforceable.[92]

Faculty/Power: [undefined]. Two types: 'of doing' and 'of not doing'.[93]

Liberty: freedom from all kinds of duty.[94]

Immunity and Privilege: [both undefined].[95]

Duty: the necessity that persons (to whom a legal command is addressed) are under to obey (that law).[96]

Type I: *Relative*: correlates with a right.

Type II: *Absolute*: does not correlate with a right.[97]

Ernst Bierling (1877-83)[98]

Rechtsanspruch (legal claim): In its narrower meaning, it is an imperatival address to a correlative duty-bearer. However, the concept of a liberty to demand [*Forderndürfen*] is insufficient to explain the concept of *anspruch*; for one may possess the latter without having to make such a demand, and without even being aware that one is a right-holder. The *anspruch*-holder is rather in the special 'constant condition of (a) tacit demand(ing)' [*konstanten zustande stillschweigenden Forderns*] of the duty-bearer. That condition in turn enables the holder to (performatively) make a demand.[99]

Befugniss*:*

Type I: ***Rechtliche Dürfen***: (unrestrained legal liberty): 'simple legal permission'… the content of which is, in essence, purely negative [i.e.,] not being legally forbidden'.[100]

Type II: ***Rechtliche Können***: (legal power): 'legal ability, i.e., the ability, following some provision of positive law, to produce certain legal effects by "acts-in-the-law"'.[101]

---

91. William Markby, *Elements of Law: Considered with Reference to Principles of General Jurisprudence* (Oxford: Clarendon Press, 1871) at 49-57.

92. *Ibid* at 50.

93. *Ibid*.

94. *Ibid* at 51.

95. *Ibid* at 57.

96. *Ibid* at 49.

97. *Ibid* at 50. For the Absolute-Relative duties distinction, see Austin, *infra* note 138 at 5.

98. Ernst Bierling, *Zur Kritik der Juristischen Grundbegriffe*, vol 2 (Gotha: Friedrich Andreas Berthes, 1877-83) at 32-73.

99. *Ibid* at 39-40, 40 n (§ 141). Bierling holds that, of the three concepts expressed in ordinary language by the term 'a right'—*Rechtsanspruch*, *Dürfen,* and *Können*—only the first warrants the 'scientific title' of a 'subjective right'. *Ibid* at 74 (§ 160).

100. *Ibid* at 50 (§ 147), as translated in Lindhal, *supra* note 77 at 196.

101. *Ibid* (and *ibid*). Roscoe Pound translates Bierling here as: "capacity in pursuance of certain provisions of the positive law, to produce determinate legal consequences through legal transactions". Pound (1915), *supra* note 55 at 111.

Cf August Thon, who notes four distinct senses of '*subjektiven rechts*'—***Normenschutz*** (normative protection), ***Anspruch***, ***Befugniss***, and ***Genuss***. August Thon, *Rechtsnorm und Subjektives Recht: Untersuchungen zur Allgemeinen Rechtslehre* (Weimar: Hermann Bohlau, 1878) at ch 5-7. Thon also holds that, of these four concepts, only *anspruch* truly deserves the title of 'a subjective right'. *Ibid* at v-vi. *Cf* Wilhelm Schuppe, *Der Begriff des subjektiven Rechts* (Breslau: Wilhelm Koebner, 1887).

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

Henry Terry (1884)[102]

Jural Correspondents	Correspondent Right	Permissive Right	Protected Right	Facultative Right
	Duty	None	Duty	None

Correspondent: the condition of being owed a duty to act or forbear.[103]

Protected: the condition of being owed a duty to either create a state of affairs, or to preserve the status quo. The duty is enforceable at the right-holder's option.[104]

Permissive: the condition of not being under a duty.[105]

Facultative: powers or capabilities to dispose of rights of other kinds.[106]

Type I: *Powers*: privately exercisable without the aid of a court.

Type II: *Charges*: only executable or enforceable via a judicial proceeding.[107]

Duty: Three types: Peremptory Duty; Duty of choice; Duty of Intent[108]

John Salmond (1902)[109]

Jural Correlatives	Right	Liberty	Power	Immunity
	Duty	Liability	Liability	Disability
Jural Absences	Right	Liberty	Power	Immunity
	Liability	Duty	Disability	Liability

A Right (*stricto sensu*):[110] an interest recognised and protected by a rule of right/legal justice (for *legal* rights, or by the rule of natural justice for *moral* rights) for which a corresponding duty is imposed on one or more other parties.[111]

A Liberty: the benefits one derives from the absence of legal duties imposed on oneself.[112] The law allows to one's will a sphere of unrestrained activity.[113]

---

102. Terry, *supra* note 6, in the chapter 'Duties and Rights in General'.

103. *Ibid* at 87. '[T]he violation of a mere correspondent right does not give a cause of action; for that a violation of a *protected* right is necessary' (*ibid* at 99, emphasis added).

104. *Ibid* at 97.

105. *Ibid* at 90. Permissive right vs. legal power: One may be under a duty not to do an act without being made legally incapable of doing it. *Ibid*.

106. *Ibid* at 100.

107. *Ibid* at 101.

108. *Ibid* at 85-87.

109. 'Legal Rights' and 'The Kinds of Legal Rights' in Salmond, *supra* note 4. *Cf* Anthony Dickey, "Hohfeld's Debt to Salmond" (1971) 10 UWA L Rev 59.

110. Salmond, *supra* note 4 at 231, 234.

111. *Ibid* at 219, 220, 221, 223. The power to enforce via instituting legal proceedings is not essential to the conception of a legal right. (Unenforceable legal rights are 'imperfect' cases, though.) *Ibid* at 223. Nevertheless, 'there can be no right unless there is someone from whom it is claimed…' (*ibid* at 224). 'I enjoy my rights through the control exercised by it over the acts of others on my behalf' (*ibid* at 235). On a right being an interest, see Rudolph von Jhering and Bierling. For Pound's nuanced criticism of that notion, see *infra* note 126.

112. *Ibid* at 231.

113. *Ibid* at 236.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

A Power: when the law actively assists me in making my will effective as against others.[114] A power is usually, but not necessarily, combined with a liberty to exercise it. Hence its exercise may be effectual and yet wrongful.[115]

An Immunity: the benefit derived from the absence of power in other persons.[116]

A Duty: an obligatory act.[117] A duty is the absence of a liberty.[118]

A Disability: the absence of a power.[119]

A Liability: either the absence of a right or an immunity. It is the correlative either of a liberty or a power vested in some one else.[120]

William Galbraith Miller (1903)

Various senses of 'a right':

> 'It is a claim [with a correlative duty?]; a power; a faculty; a liberty [with a correlative duty?]; an authority; a privilege; a prerogative; and a capacity to act or to possess: dominion, empire, power, authority, immunity, status, or some interest put forward actively if necessary in the form of a case or action at law, and recognized by the state in accordance with right, law, and justice.[121]

Hohfeld's Schema of Jural Relations (1913)[122]

Table of Jural Correlatives	Claim	Privilege*	Power	Immunity
	Duty	No-Right	Liability	Disability
Table of Jural Opposites	Claim	Privilege	Power	Immunity
	No-Right	Duty	Disability	Liability

Five Types of Rights: claims, liberties, powers, immunities, and complexes

A Claim/Right (*stricto sensu*): one's affirmative claim against another.

A Privilege [liberty]: one's freedom from the right or claim of another.

A Power: one's affirmative "control" over a given legal relation as against another.

An Immunity: one's freedom from the legal power or "control" of another as regards some legal relation.[123]

---

114. *Ibid*.
115. *Ibid* at 234 n 1.
116. *Ibid* at 235. '1. Rights (*stricto sensu*)—what others *must* do for me. 2. Liberties—what I *may* do for myself. 3. Powers—what I *can* do as against others. 4. Immunities—what others *can not* do as against me' (*ibid* at 238).
117. *Ibid* at 218.
118. *Ibid* at 236.
119. *Ibid*.
120. *Ibid*.
121. William Galbraith Miller, *The Data of Jurisprudence* (Edinburgh: W Green & Sons, 1903) at 131. *Cf ibid* at 50-51.
122. See Hohfeld, *FLC #1*, *supra* note 3 at 30.
123. *Ibid* at 55. Despite his definitions, the reader is advised to note Hohfeld's inconsistent usage of his conceptions. For example, are liberties and immunities *freedoms from* others' claims or powers, or do they instead mark the other parties' *lack of* claims or powers? So to with a claim: does one *claim* with a Hohfeldian claim, or is it a passive position?

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

Right Complexes:

E.g.1, Power + liberty

E.g.2, Claim + claim + power + power + liberty

E.g.3, Claim + liberty + power + immunity

Types of Ligations: duties, no-rights, liabilities, disabilities (and complexes thereof?)

Some Hohfeldians' Suggested Modifications:

*Hohfeld himself preferred the term 'privilege', but this is standardly replaced with 'liberty' in the literature. The differences between a liberty and privilege, say critics, are the mere absence of a duty versus an express permission to act. Hohfeld says that these amount to the same thing.[124]

–Not every one of the four types is a right: only one (e.g., a claim) or some are.

–Not ever token of a type counts as a right, e.g., not all powers are rights.

–Some or all ligations (duties, liabilities, etc.) can also be rights.

–It is disputed whether claims and/or immunities are 'active' or 'passive' positions.

Roscoe Pound (1915, 1959)[125]

Juristic Conceptions	Right	Liberty	Power	Privilege	No Correlative
	Duty	No Correlative	No Correlative	No Correlative	Liability

A legal right (in the 'narrow or strict sense') is a capacity to assert a legally recognized and delimited interest before legal officials (courts, etc.).[126]

Liberty vs. Privilege: liberty is any action that is not prohibited, while privilege is a special exemption from an ordinary legal rule.[127]

'A right' also refers to a complex conception, or rather a bundle of (the more basic) conceptions.[128]

All of these juristic conceptions of 'a right' contain a capacity for asserting them before courts and administrative agencies.[129]

Hohfeld's no-rights, liabilities, immunities, and disabilities are not genuine legal positions and lack jural significance.[130]

---

124. Hohfeld, *FLC #1*, *supra* note 3 at 42 n 59.

125. See Pound (1915), *supra* note 55; Pound (1959), *supra* note 5, especially at 70-71, 75.

126. Pound (1915), *supra* note 55 at 93; Pound (1959), *supra* note 5 at 70. Why not define the *stricto sensu* case as 'a claim'? 'If we define [it] in terms of claim, we put in the foreground the idea of interest, whereas we are defining something conferred by law to make the interest effective (*ibid* at 70).

127. Pound (1959), *supra* note 5 at 81.

128. Pound (1915), *supra* note 55 at 101; Pound (1959), *supra* note 5 at 58.

129. Pound (1959), *supra* note 5 at 71.

130. Pound (1915), *supra* note 55 at 97-98, 100; Pound (1959), *supra* note 5 at 78-81.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

HLA Hart (1982)[131]

Legal Liberty-right: norms to act, which are protected indirectly by obligations of non-interference.

Two varieties: unilateral and bilateral

Liberty-rights vs. liberties: former are 'vested' (protected directly or indirectly by someone else's duty) or 'naked' (unprotected directly or indirectly by a duty).[132]

Bilateral liberties: entitlement to act AND not to act.

To be a liberty-*right* the position must be protected, directly or indirectly, by duties not to interfere.

Unilateral liberties: entitled either to act OR not to act (not both).

To be a liberty-*right* it must be protected, directly or indirectly, by duties not to interfere.

'Naked' (unprotected) unilateral and bilateral liberties do not count as 'rights'.[133]

Legal Right-Correlative-To-An-Obligation

Most private law tokens of the type: a special case of legal power whereby the holder is at liberty to waive, extinguish, to enforce, or leave unenforced another's obligation.[134]

There are other legal and moral tokens of the type that are not liberty-powers. They are instead simply entitlements to a correlative duty-bearer's action or forbearance.

Legal Power: 'the act which there is a bilateral liberty to do is an act-in-the-law, just in the sense that it is specifically recognized by the law as having legal effects in *varying* the legal position of various parties and as an appropriate means for varying it'.[135] Powers can also be used to 'preserve' parties' positions.[136]

Legal Immunity: legal positions that prevent *adverse* changes to its holder's other legal positions. However, immunities that prevent *advantageous* changes do not count as rights.[137]

Legal Duty: 'Far better adapted to the legal case is a different, non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have a categorical reason to do but, as the etymology of 'duty' and indeed 'ought' suggests, such statements refer to actions which are due from or owed by the subjects having the duty, in the sense that they may be properly demanded or *exacted* from them. On this footing, to say that an individual has a legal obligation to act in a certain way is to say that such action may be properly demanded

---

131. See Hart (1982), *supra* note 6.
132. *Ibid* at 173-74.
133. *Ibid*.
134. *Ibid* at 188.
135. *Ibid.* Being 'enabled by the law either to do actions physically affecting other persons or things, or to bring about changes in the legal positions of others or of themselves, or of both themselves and others' (*ibid* at 194).
136. *Ibid* at 184.
137. *Ibid* at 191.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

or extracted from him according to legal rules or principles regulating such demands for action'.[138]

Hart on *Private Law* rights-correlative-to-obligations

Private Law Rights-correlative-to-obligations are bilateral liberties, which are actually pairs of powers by which to enforce or waive duties in three stages. The *fullest* measure of control comprises three distinguishable 'elements', i.e., sets of powers (There are 'lesser' measures of control too, as not all rights possess all of the following elements):

Element I: the right holder may:
- Ia: waive OR
- Ib: extinguish the duty OR
- Ic: leave it in existence

Element II: after (II) breach OR (II′) threatened breach of a duty he may:
- IIa: leave it 'unenforced' OR
- IIb: may 'enforce' it by suing for compensation, OR
- IIc: in certain cases, sue for an injunction OR
- IId: in certain cases, sue for a mandatory order

Element III: AND he may:
- IIIa: waive OR
- IIIb: extinguish the obligation to pay compensation to which the breach gives rise
- [IIIc: **Hillel Steiner's addition**: seek to enforce the obligation to pay][139]

Neil MacCormick (1977, 2008)[140]

–Rights are 'logically', and sometimes also temporally, prior to duties.[141]

–While liberties, powers, and immunities by which to protect passive rights (to another's duty) are not always available;[142] passive rights without associated enforcement powers are for that reason 'imperfect'.[143]

Conjunction of active and passive rights:

[1] A right-holder with 'full active capacity' [e.g., a rational adult] has the choice to demand or forgo demanding observance by another or others of one's passive rights.

[2] When rights have been infringed, it is normally a matter of free choice whether to demand a remedy from the infringer or to let the matter pass.

---

138. *Ibid* at 159-60. *Cf ibid* at 266. *Cf* John Austin: 'Right;—the capacity or power of exacting from another or others acts or forbearances;—is nearest to a true definition'. John Austin, 'Lecture XVI' in *The Province of Jurisprudence Determined*, vol 2, 2nd ed (London: J Murray, 1863) at 63. Compare also JS Mill: 'It is part of the notion of duty in every one of its forms that a person may rightfully be compelled to fulfil it. Duty is a thing which may be *exacted* from a person, as one exacts a debt. Unless we think it can be exacted from him, we do not call it his duty'. Mill, *supra* note 90 at 71.

139. Hart (1982), *supra* note 6 at 183-84; Hillel Steiner, "Working Rights" in Matthew Kramer, ed, *A Debate Over Rights* (Oxford: Oxford University Press, 1998) at 240, 240 n 14.

140. See MacCormick (1977), *supra* note 6; MacCormick (2008), *supra* note 27.

141. MacCormick (1977), *supra* note 6 at 200-01.

142. *Ibid* at 205; MacCormick (2008), *supra* note 27 at 129.

143. MacCormick (2008), *supra* note 27 at 129.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

[3] If the demand is made and rejected, or ignored, one has the right and power to take legal action before a court, calling for it to impose a suitable legal remedy.[144]

Joseph Raz's Model of Normative Positions

A Right: reasons that are the sufficient but not necessary grounds of (justify imposing) duties, other positions, and even other rights. Rights are: *justificationally* prior to duties; *existentially* correlative with duties; and *logically* posterior to duties.[145] Rights are typically but not necessarily exercisable (or enforceable) via liberties and powers and protected by immunities, none of which is a right.[146]

Liberty:

Exclusionary permissions: an entitlement to perform an act even though there are conclusive reasons for one not to perform it, provided one he is entitled not to act for those reasons, to exclude them from one's considerations.[147]

Weak permissions: no norms regulating certain behavior.[148]

'*Liberty-rights*': a spurious category, Raz suggests.[149]

Power:

Directed powers: powers restricted by duties. The duties specify conditions for the power's use[150]

Immunity: A reason for not being subject to another party's power.[151]

Duty: first-order reasons to act or forbear coupled with second-order, exclusionary reasons to exclude from consideration certain reasons for not conforming with the first-order reason to act/forbear.[152]

Duties correlating with rights[153]

Absolute (Non-correlating duties), e.g., self-regarding ones[154]

Liability

---

144. *Ibid* at 129.

145. Raz (1986), *supra* note 6 at 180-81, 196; Raz (1994), *supra* note 6 at 33, 35-36.

146. On rights as reasons, see, e.g., Raz (1986), *supra* note 6 at 169, 181; Raz (1994), *supra* note 6 at 46. On rights as sufficient but not necessary grounds, see, e.g., Raz (1986), *supra* note 6 at 181,183-84, 188, 192, 193, 202; Raz (1994), *supra* note 6 at 31. On rights grounding other normative positions (duties, liberties, etc.), see, e.g., Raz (1986), *supra* note 6 at 167-68, 170-71; Raz (1994), *supra* note 6 at 31, 46, 268. On the existential, justification, and logical relations between rights and duties, see Raz (1986), *supra* note 6 at 170-71, 180-81, 196; Raz (1994), *supra* note 6 at 33, 35-6. On rights being contingently protected by other positions, see Raz (1986), *supra* note 6 at 181; Raz (1994), *supra* note 6 at 256-58, 266-67. On there being but one basic kind of right, see, e.g., Joseph Raz, *Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed (Oxford: Oxford University Press, 1980) at 179-81; Raz (1986), *supra* note 6 at 176 (rights are nothing but the grounds of duties), 180, 188.

147. Joseph Raz, *Practical Reason and Norms*, 2nd ed (Oxford: Oxford University Press, 1999) at 89-91; Raz (2011), *supra* note 11 at 117 n 4.

148. Raz (2011), *supra* note 11 at 117 n 4.

149. Raz (1994), *supra* note 6 at 275.

150. *Ibid* at 241.

151. Raz (1986), *supra* note 6 (1986) at 168 n 1.

152. Raz (1994), *supra* note 6 at 40.

153. Raz (1986), *supra* note 6 at 170-71, 196.

154. *Ibid* at 210-13; Raz (1994), *supra* note 6 at 32-40.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press

The *Purported* Order of Justification for legal rights & other legal positions

Interest → Right → Duty

1, Weighty interest + 2, a weighty moral right, grounds a (legal) duty

Interest → Duty

(i.e., rights are not the exclusive grounds of duties).

Interest → Right → Liberty

Interest → Right → Power (e.g., enforcement powers to protect the right)

Interest → Right → Immunity (e.g., to protect the right from nullification)

Interest → Right → Another Right

The *Actual* Order

An interest + a *moral* right + a conceivable class of duty-bearers *and* a discernible agent who can actually bear the duty. If all four co-obtain, then a *legal* right and a legal duty can be generated concurrently.

https://doi.org/10.1017/cjlj.2017.6 Published online by Cambridge University Press