

Rethinking moral claim rights

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I | INTRODUCTION

The notion of rights is ubiquitous in philosophical discourse. As Allen Buchanan put it over thirty years ago, ‘Future historians of moral and political philosophy may well label our period the *Age of Rights*’.¹ This notion is not only popular, but also complex. As the legal scholar W. N. Hohfeld famously suggested, rights are susceptible to multiple interpretations: they can be claims, liberties, powers, or immunities.² Despite this variation, the consensus view is that the core instance of a right is a claim right.³

In the moral domain, claim rights designate a binary relation between a right-holder and a duty-bearer, where the former stands in a *distinctive moral position* vis-à-vis the latter.⁴ While there is controversy as to what, precisely, this distinctive moral position amounts to, the idea that claim rights capture it is seldom put into question.

In this article, I challenge this way of thinking. I argue that the language of claim rights is ill suited for the purpose of picking out a distinctive moral position.⁵ I show that the notion of a claim right is susceptible to several disambiguations, just as the

¹Buchanan 1984, p. 61, original emphasis. By ‘rights’ here, Buchanan means claim rights specifically.

²Hohfeld 1913.

³E.g. Thomson 1990; Kramer and Steiner 2007, pp. 296–7; Wenar 2013, p. 202.

⁴See, e.g., Nagel 1995, pp. 89–90; Kamm 2002; Darwall 2012.

⁵Compare Hayward’s (2013, p. 275) claim that there is no satisfactory way of construing the notion of a ‘directed duty’. Hayward argues that disagreement about what directed duties are traces back to differences between Kantian and Humean traditions of thought, and expresses scepticism about the possibility of reconciling the two (p. 280). See also the discussion in Van Duffel (2012). Van Duffel argues that will and interest theories are not genuine rivals, because each of them captures a distinctive kind of right. Specifically, for the former, rights are about ‘the normative control of a sovereign’; for the latter, they involve ‘the protection of an interest by the sovereign’ (p. 118, original emphases).

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notion of a right itself is. From this, I conclude that we should *either* no longer appeal to the concept of a claim right in moral theorizing *or* rethink its purpose.

The article proceeds as follows. In Section II, I set out two desiderata that a plausible definition of moral claim rights should satisfy. The definition should: (a) capture a distinctive moral position and (b) account for paradigmatic instances of claim rights in our ordinary language. In Section III, I show that the two most prominent accounts of claim rights fail to meet desideratum (b). Of course, the fact that prominent accounts are unsatisfactory does not mean that no satisfactory account could be developed. To support this stronger claim, in Section IV, I offer a systematization of our language of claim rights. I suggest that the greatest common denominator of such language is the idea of empowerment, and show that paradigmatic statements about claim rights track either the justification for certain forms of empowerment (*justification rights statements*) or empowerment itself and the particular status it confers on individuals (*status rights statements*).

As I explain in Section V, this twofold connection between claim rights and empowerment reveals that, for structural reasons, our desiderata cannot be jointly satisfied. No notion of claim rights can *both* capture justification as well as status rights statements *and* pick out a distinctive moral position. In Section VI, I consider three possible implications of this conclusion. One is that we should abandon the notion of claim rights in moral theorizing. Another, less drastic possibility is that, in light of its disjunctive structure, the notion of claim rights should be given a different purpose. A third possibility, for those not persuaded by my arguments, is to treat my discussion as setting out a challenge that any satisfactory account of moral claim rights should meet. Section VII concludes.

Before I start, let me make some clarifications. My discussion focuses on claim rights in moral theorizing specifically, where the notion is assumed to capture a distinctive moral position. As I shall explain towards the end of the article, the ambiguities that make the notion of claim rights ill suited for this purpose in moral theorizing also render it a powerful tool of political advocacy. I remain silent about the suitability of claim rights for the technical purposes of *legal reasoning*. Since those are, plausibly, different from the purposes of moral philosophy, the concerns raised in this article need not extend to the legal domain.

Finally, a note on my terminology. In what follows, I shall treat ‘claim rights,’ ‘directed duties’ (the violation of which wrongs particular others), and ‘duties owed to others,’ as equivalent. This terminological choice is in line with standard use in the literature.⁶

II | DESIDERATA FOR A GOOD DEFINITION OF CLAIM RIGHTS

An evaluation of claim rights presupposes an account of the work we want this notion to do in moral theorizing. If no plausible definition that does that job can be found, we will have reason to doubt the usefulness of the concept, *at least with respect to the originally intended purpose*.

⁶The use is standard, but there are exceptions; for attempts to separate these notions, see, e.g., Cornell 2015; May 2015.

For an analogy, consider a society with a conceptual scheme different from ours, in which there are only two types of cutlery: forks and spives. Forks are defined in the familiar way, as tools for picking up solid food. The concept of a spife is disjunctive: it points either to tools for scooping liquid food or to tools for cutting solid food. We want these concepts to help us effectively select different ‘tools for eating’. As it happens, *two* kinds of objects fit into the category ‘spives’: what we (in our world) call spoons and knives. In this parallel society, when asking for a spife, one may have in mind either what we call a spoon or what we call a knife. Without further specification, one may therefore end up getting something one did not want. The category ‘spife’, it seems, is a recipe for confusion: it does not help us select our tools efficiently. Instead of having one concept—‘tools to either scoop liquid food or cut solid food’—it would be much better to have two: ‘spoons’ for liquid food and ‘knives’ for solid food. This would be a reason to abandon the concept of a spife, at least for the purpose of selecting specific pieces of cutlery. If, *mutatis mutandis*, the concept of claim rights were similarly unable to do the work we want it to do in moral theorizing, we would have reason to abandon it, at least for that purpose.

So, what work do we want claim rights to do in moral theorizing? Claim rights, as I have noted in the Introduction, are meant to designate a *distinctive moral position* that some (that is, right-holders) hold vis-à-vis others (that is, duty-bearers). Claim-rights relations are ‘bipolar’, in the sense of always involving two relata: a duty-bearer on the one hand, and a claim-right-holder on the other.⁷ Each pole within the relation is marked by distinctive attributes. One pole bears duties: she is bound by certain oughts. The other pole possesses correlative rights. This, in turn, puts her in a special moral position vis-à-vis the corresponding duties, which are owed to her and the violation of which wrongs her. To be a claim-right-holder, then, is ‘more’ than being the mere beneficiary of someone’s duty. A good definition of claim rights must elucidate what this ‘more’ precisely amounts to: what it means to have a claim (or, equivalently, to be owed a duty and be wronged by its violation).

In addition, a good definition of claim rights should account for paradigmatic rights statements. This is a familiar desideratum. As Leif Wenar puts it, rights theorists ‘take extensional fit with ordinary language as a primary standard of success’.⁸ And as Matthew Kramer confirms, ‘nobody has ever denied that ordinary understandings are an important anchor for one’s theorizing about rights and rights-holding’.⁹ This is not to say that a successful definition of claim rights must fit every conceivable instance of ordinary-language rights statements. Ordinary language is messy, and a good account of claim rights for the purposes of moral theory may well require a more disciplined use of this term than we find in day-to-day discourse.¹⁰ But if our definition failed to encompass paradigmatic rights talk, we would have to ask ourselves whether what we

⁷Darwall 2012. See also the work of Thompson (2004), to which Darwall refers. The first use of the expression ‘bipolar’ in this context has been attributed to Ernest Weinrib (1995).

⁸Wenar 2013, p. 203. See also Rainbolt 2006, p. 112.

⁹Kramer 2017, p. 51.

¹⁰*Ibid.*

are capturing really is the special moral position intuitively associated with the language of claim rights, and not something altogether different.

Emphasis on ordinary language invites the objection that the idea of a claim right is a term of art, introduced by Hohfeld to disambiguate different meanings of ‘right’ in the law. In ordinary language, we talk about rights simpliciter, not about any Hohfeldian incident in particular. So, how are we to isolate ordinary-language instances of the notion of ‘a right’ that pick out claim rights specifically?¹¹

This doesn’t pose an insurmountable obstacle to our inquiry, for two reasons. First, while many of our ordinary-language rights statements implicate bundles of Hohfeldian incidents, claim rights often lie at their heart.¹² For example, whenever we insist that individuals have rights to a variety of objects—shelter, life, free speech, property, and so on—we typically imply, among other things, that they are *owed* secure access to them.¹³ When such access is denied, we can infer that some agents are failing to discharge the corresponding duties, hence that some claim rights are being violated.

Second, to test whether any rights assertion is meant to involve claim rights, we can ask whether violations of the asserted right would *wrong the right-holder in particular*, as opposed to being wrong simpliciter. If our intuitive answers are affirmative, then we’ll know that ‘right’, in the statement under consideration, is intended to mean ‘claim right’.

If all of the above is correct, then, a plausible definition of claim rights—one that does the job we want it to do in moral theorizing—should meet the following desiderata:

a) Distinctive moral position. The definition vindicates the view that to be a right-holder (i.e., the addressee of a directed duty who may be wronged by its violation) is to stand in a distinctive moral position vis-à-vis duty-bearers.¹⁴

b) Consistency with paradigmatic claim-rights statements. The definition fits our core ordinary-language statements about rights; it neither over-generates rights nor under-generates them relative to those statements.

¹¹I thank Jakob Huber and J. P. Messina for pressing me on this.

¹²See Thomson 1990, pp. 55–6; Wellman 1995; and Kramer and Steiner 2007, p. 297.

¹³Cf. Pogge 2008. It may be objected that some of the rights I have listed—e.g., to shelter, free speech—cannot be claim rights because secure access to them is not owed by anyone in particular, but by the state or society writ large. While I agree that there cannot be claim rights without corresponding duty-bearers, and that such duty-bearers must be agents, I resist the suggestion that the agents in question must be individuals. Collective or corporate agents, of which the state is a prime example, may also bear duties correlative to claim rights, including duties to provide secure access to a variety of goods (food, shelter, free speech) to their citizens. In addition, the suggestion that group agents can bear duties should be fairly intuitive—for instance, it seems perfectly appropriate to say that, in February 2022, Russia violated its duty of non-aggression vis-à-vis Ukraine. For an account and defence of group agency, see List and Pettit 2011.

¹⁴The notion of a distinctive moral position is deliberately left open, since providing a more precise account of what the relevant position amounts to would skew the desideratum in favour of one or the other definition of claim rights. In order to be plausible (and not beg the question against one or the other theory) the desideratum has to be sufficiently neutral. The fact that, as we shall see in the next section, both interest and will theory succeed in meeting it confirms that the desideratum is formulated in suitably neutral terms.

As will become apparent, meeting both desiderata proves challenging. In fact, if I am right, it is impossible.

III | TESTING EXISTING DEFINITIONS OF CLAIM RIGHTS

Philosophical discussion about claim rights is dominated by the dispute between will and interest theories.¹⁵ In what follows, I briefly examine how these theories fare in relation to our two desiderata. Doing so will require going over some familiar ground. Although this exercise may seem a little tedious, it provides necessary background for my argument in later sections.

Let us start with the will theory, prominently defended by H. L. A. Hart and Hillel Steiner among others.¹⁶ For the will theorist, to have a moral claim right is to possess *the moral power to control another's duty* (that is, to demand/enforce its performance, waive it, and seek compensation for its violation). This definition captures an important aspect of the phenomenology of claim-rights possession. After all, if your duty is owed to me, its performance is in some sense 'mine', and when something is mine, I have normative control over it. The will theory not only has independent appeal, but also meets desideratum (a). It assigns claim-right-holders a distinctive moral position, namely the power to control others' duties. But what about desideratum (b)? Here, as critics have famously pointed out, the theory encounters some difficulties, in that it under-generates rights.¹⁷

On the will theory, a capacity for choice—hence for normative control over others' duties—is a necessary condition for rights possession. Consequently, the theory cannot account for the rights of entities—such as children, people with severe mental disabilities, and non-human animals—who lack such a capacity.¹⁸ What is more, the theory has no room for so-called inalienable rights. Since, for the will theorist, to have a right *just is* to have the power to control a duty, including the power to waive

¹⁵Of course, several alternatives to these classic theories have been proposed, such as the kind-desire theory (Wenar 2013); the demand theory (e.g., Feinberg 1970; Skorupski 2010, pp. 307–13; Gilbert 2018); and the hybrid theory (Sreenivasan 2005). None of them, however, enjoys a level of influence comparable to that of the will and interest theories, and they have all been criticized, in my view, quite effectively: see, e.g., Kramer and Steiner 2007; Frydrych 2018. For this reason, I focus on the classic views. Furthermore, if my argument is right, it will show that the difficulties affecting the will and interest theories are bound to extend to other theories of claim rights as well.

¹⁶Hart 1955, 1982; Steiner 1998.

¹⁷For detailed discussion, see Bowen 2020; Sreenivasan 2005, pp. 259–60.

¹⁸See, e.g., MacCormick 1982, p. 156. Of course, the will theorist can respond that these entities are still objects of moral concern and the recipients of duties of care. Alternatively, the will theorist might insist that even if severely mentally disabled individuals, children, and non-human animals cannot themselves have the power to control others' duties, fiduciaries can possess and exercise that power in their interest/on their behalf. While the role of a fiduciary is, of course, a crucial one in both law and morality, invoking it does not allow the will theorist to avoid the current objection, at least not without significantly modifying her definition of what it is to have a right. According to the will theorist, a right-holder is whoever has control over someone else's duty. And, in cases where a fiduciary is involved, it is the fiduciary who possesses such control and not, e.g., non-human animals, children, or differently able people. To be sure, what justifies the fiduciary's possession of such control are the interests of these other entities. But, for the will theorist, right-holders are those who possess the relevant control, not those whose interests justify the existence and 'location' of said control (cf. Sreenivasan 2005). The latter type of consideration (about justification) brings us closer to the interest theory, more on which later.

it, inalienable rights—that is, rights that cannot be waived—are a conceptual impossibility.¹⁹ In sum, the will theory satisfies desideratum (a), but struggles with desideratum (b). Let me now turn to its main competitor.

According to the interest theory, prominently defended by Joseph Raz among others, to have a right is to *possess an interest weighty enough to justify another's duty*.²⁰ The interest theory, too, has much intuitive appeal. It is natural to suggest that a duty is owed to me when my interest is key to explaining its existence. Many rights—to life, to bodily integrity, to food, and so on—appear to fit the interest-theory rationale. Furthermore, ‘being the holder of an interest that justifies a duty’ can be aptly described as a distinctive moral position. Whoever possesses it stands in a special normative relation with respect to the duty-bearer. The interest theory thus satisfies desideratum (a). But, like the will theory, it struggles to meet desideratum (b).

First, since there are several duties justified by others' interests that do not appear to give rise to rights, the theory over-generates rights.²¹ Consider my duty to assist an elderly lady who is struggling to cross the street. If I am uniquely positioned to help her, and can do so at very little personal cost, I ought to do it. Yet, most people would deny that the lady has a *claim right* to be helped by me in the same way as, say, my baker has a claim right that I pay for the bread rolls I bought from him this morning. My duty looks like a matter of beneficence, and although the beneficiary in this case is clear, this doesn't seem sufficient to generate a right.²²

Second, as others before me have also noted, since there are cases where someone's right to X cannot plausibly be justified by appeal to their interest in X, the theory under-generates rights. For illustration, consider my property right over a cheap ornament gifted to me by a cousin. I have very little interest in possessing the ornament. Finding it rather ugly, I put it at the bottom of a closet some years ago and have since forgotten about it. Under any plausible construal of the situation, my interest in possessing the ornament is not weighty enough to place others under strong obligations not to steal it.²³

One may respond that the relevant interest is not in possessing the ornament, but in being the one who decides what to do with it: it is a broader interest in freedom. But, as Raz himself admits, there are conceivable cases in which ‘I do not mind and have no reason to mind your taking it without permission’.²⁴ That is, no freedom-interest

¹⁹For discussion, see Steiner 2013.

²⁰Raz 1986. Matthew Kramer has also defended a prominent version of the interest theory, according to which a necessary condition for X to hold a claim right is that a corresponding duty protects an aspect of X's situation that is, on balance, in the interest of an entity like X. However, Kramer is explicit that his account is primarily meant to capture legal rather than moral rights. I focus on Raz's version of the interest-based approach, since its emphasis on justification is particularly suited for the purposes of moral theorizing. For a statement of Kramer's view, see Kramer 2010.

²¹Buchanan 1984, p. 73.

²²For a similar line of argument against the interest theory, see Kamm 2002.

²³Cruft 2013, p. 208.

²⁴Raz 1992, p. 133.

is involved. In such cases, it seems, an interest theorist must conclude that I have no right.

Raz's way out of this difficulty involves suggesting that, while I may have little interest in owning this particular object, I, together with everyone else in society, have an interest in there being a well-functioning system of property. That system is justified not by appeal to the interests of particular individuals, but by everyone's interests: by the common good. Such common-good cases are ones where the right-holder's interest and the public's interests are 'harmoniously interwoven': that is, 'benefiting him is a way of benefiting them, and ... by benefiting them the right-holder's interest is served'.²⁵ In such cases, the weight of my individual interest is 'augmented' by that of others, thereby justifying my (property) rights.

While this response may allow the interest theory to avoid the under-generation charge, it does so at the cost of making it unable to satisfy desideratum (a).²⁶ For, if what explains others' duties not to steal my property are not *my* interests, but my interests *as well as* everyone else's (namely, the common good), from the perspective of the interest theory, I can no longer be said to stand in a *distinctive* moral position in relation to those duties. When it comes to generating those duties, my interests are no more important than everyone else's. This strikes me as a significant price to pay, greater than just accepting the costs of under-generation.²⁷

In sum, the will and interest theories—in their original formulations—both satisfy desideratum (a), each pointing to a distinctive moral position. They also each have difficulties satisfying desideratum (b). My aim in highlighting these difficulties has not been to induce a change of heart in these theories' advocates. Objections to the will and interest theories have been around for a while, and yet the literature continues to be broadly divided between these two camps, with theorists on each side either 'biting bullets' or providing ever more subtle responses to the objections raised.²⁸ But I do hope that a fair-minded reader can grant me this: neither the will nor the interest theory provides a fully convincing account of claim rights, judged by our two desiderata. In fact, as others before me have pointed out, the debate appears to have reached a stand-off.²⁹ Explaining why this is so, and why the difficulties plaguing the will and interest theories are bound to extend to alternative theories as well, will be my task in the next section.

²⁵Ibid., p. 134.

²⁶Cf. Sreenivasan 2005, pp. 265–7. For further critical discussion of this line of response, from which I have learnt, see Kamm 2002; Wenar 2005, p. 242; Cruft 2013, pp. 207–8; and Brownlee 2020, pp. 19–21.

²⁷For further analysis, see the in-depth discussion of property in Penner (1997, 2020).

²⁸For a comprehensive overview, see Wenar 2008.

²⁹Sumner 1987, p. 51; Sreenivasan 2005; Wenar 2008, p. 267.

IV | SYSTEMATIZING OUR LANGUAGE OF RIGHTS: THE ROLE OF EMPOWERMENT

Diagnosing the difficulties with will and interest theories requires us to systematize the conceptual domain of claim-rights talk. A good systematization of this domain must be responsive to the following three considerations. First, there has to be something that unites claim-rights talk, otherwise we would simply be unable to discuss claim rights without always talking past each other. Second, will and interest theories must be ‘on the right track’, otherwise their enduring influence would be inexplicable. Third, the conceptual domain of claim-rights talk must be sufficiently heterogeneous to explain these theories’ inability to capture some core rights statements.

My suggestion—which, as I will show, accounts for all three considerations—is that moral claim-rights language, in all its core uses, is linked to the idea of *empowerment relative to others’ duties*. This is the ‘greatest common denominator’ of claim-rights talk. The relevant empowerment may vary depending on the case at hand, and consists in different forms of control over others’ duties—such as the power to demand and enforce them, to waive them, and to seek compensation for their violation.

Crucially, our language of claim rights implicates empowerment in two distinct ways. On the one hand, we can talk about claim rights while focusing on the *justification for empowerment*: the moral reasons (typically, interests) there are to empower individuals. From this justificatory perspective, a statement such as ‘A has a moral claim right to X’ is shorthand for ‘A’s interests justify certain forms of empowerment—either for A herself or for other agents—relative to others’ duties to X’.³⁰ On the other hand, we can talk about claim rights while focusing on the morally justified *forms of empowerment* that are present in any given circumstance: an empowered *status* individuals enjoy. From this status perspective, a statement such as ‘A has a moral claim right to X’ is shorthand for ‘A is empowered relative to others’ duties to X’.

In sum, any moral claim-right statement is susceptible to two interpretations: it could be either a *justification* or a *status statement*. For instance, take the statement ‘women have moral claim rights not to be battered by their husbands’. This can be given the following two readings:

Justification statement. Women’s interests in bodily integrity justify women’s power to, for example, demand that their husbands not batter them, enforce their husbands’ duties not to batter them, seek compensation in case of violations, and (possibly) waive those duties.³¹

³⁰Compare Sreenivasan’s (2005, p. 271) ‘hybrid theory’, according to which ‘Y has a claim-right against X that X ϕ just in case: Y’s measure ... of control over a duty of X’s to ϕ matches (by design) the measure of control that advances Y’s interests on balance’.

³¹I say ‘possibly’, since there is substantive controversy over whether the right to bodily integrity can be alienated.

Status statement. Women have the morally justified power to, for example, demand that their husbands not batter them, enforce their husbands' duties not to batter them, seek compensation in case of violations, and (possibly) waive those duties.³²

Many statements about claim rights are equally susceptible to both interpretations. Which one is most appropriate will depend on the speaker and context at hand. For instance, rights advocates may often be understood as making justification statements, pointing to the reasons why certain forms of empowerment ought to be granted to a certain class of individuals: for example, LGBT groups, the differently able, ethnic minorities, and so forth. Others may instead point to existing forms of empowerment, reminding their interlocutors that certain agents already enjoy them.

The fact that, for most statements about claim rights, status and justification interpretations are jointly satisfied allows us to talk meaningfully about claim rights, and gives us the sense that claim-rights language points to a unique phenomenon. This, however, is not so. First, and somewhat trivially, the forms of empowerment associated with claim-rights language need not always co-occur. For instance, there may be cases in which waiver powers are inappropriate (for example, the right not to be tortured) or where powers to request compensation would not be justified (for example, when rights violations are too trivial). While all claim rights involve empowerment, then, they do not all involve the *same* forms of empowerment.

Second, and more importantly, there are some paradigmatic instances of claim rights which can only be made sense of from either a status or a justification perspective. These are statements where the 'locus of justification' and the 'locus of status (empowerment)' diverge. In such instances of divergence, ordinary language sometimes locates rights in the individuals whose interests justify empowerment, and other times in the agents who possess an empowered status. The former cases are captured by justification-rights statements, but not by status-rights statements. For the latter, the reverse is the case. Such statements reveal that, in fact, beneath our language of claim rights, lie two distinct—though related—phenomena: the justification of empowerment and empowerment itself.

To see this, consider the assertion 'children have moral claim rights to education'. This can be easily interpreted as a justification-right statement, meaning that children's interests in education justify *adults'* powers to see to it that those who bear duties to provide children with education fulfill them. But this statement lacks an equally natural interpretation from a status perspective. The view that children

³²Further, the empowerment referred to in claim-rights statements could be *either* 'non-institutional', namely empowerment agents possess as a moral matter, independently of any social facts, *or* 'institutional', namely morally justified empowerment conferred upon agents by socio-legal rules; cf. Feinberg 2003. This distinction allows us to accommodate the views of *both* those who believe that there exist 'natural', institution-independent moral claim rights *and* those who do not, instead believing that all rights, including moral ones, have an institutional dimension.

themselves should be empowered in relation to others' duties is hard to sustain. Children, as we have seen, cannot plausibly have the power to control others' duties. Their interests may justify that power, but the power lies elsewhere—with parents, guardians, or the state. From a status perspective, therefore, we cannot say that children have a right to education.

For another example, return to the assertion 'I have a moral claim right to the ornament gifted to me by my cousin'. From a status perspective, this can be easily interpreted as meaning that I am empowered to, for example, demand that others not take the ornament, seek compensation in case of theft, and so on. But when we try to read this assertion as a justification-right statement, we encounter difficulties. It is just not true that my interest in possessing and controlling that ornament explains why I am (or should be) empowered in relation to it. Justification-rights statements are ill suited to capturing rights whose existence is justified not by the interests of what ordinary language identifies as the right-holder, but by broader considerations, typically the interests of society as a whole in the existence of certain power-conferring practices: for example, a well-functioning property system.³³

To sum up, claim-rights talk is underpinned by a common reference to empowerment relative to others' duties, and our language of rights invokes such empowerment in two ways, captured by the distinction between status- and justification-rights statements. Many statements about claim rights are susceptible to both status and justification interpretations, giving us the impression that a unique phenomenon lies beneath them. But this impression is, in fact, illusory.

V | WHY OUR TWO DESIDERATA CANNOT BE SIMULTANEOUSLY MET

My systematization of the language of claim rights is, I believe, clarifying in several respects. Apart from highlighting what assertions of claim rights have in common, it (1) helps us diagnose the failures of the will and interest theories, (2) makes sense of these theories' enduring influence, and (3) explains why it is impossible for any definition of claim rights to satisfy both of our desiderata. In what follows, I elaborate on these points.

While the interest theory accounts for the core concerns behind justification-rights statements, the will theory largely articulates those captured by status-rights statements. This, I believe, explains their lasting popularity: each theory responds to an important dimension of our rights language. At the same time, each theory is deficient in several respects, and my empowerment-based taxonomy helps us see why.

Consider the interest theory first. Its focus on the justification of duties—as opposed to the justification of *empowerment* relative to those duties—is responsible

³³Cruft 2013, p. 208.

for its over-generation of rights: for declaring that rights exist even in cases of mere beneficence. Moreover, insofar as it identifies rights with justifications for duties, rather than with empowerment relative to duties, the theory is systematically unable to account for rights statements we can *only* make sense of from a status perspective (for example, my property right over the ugly ornament).

Turning to the will theory, while this is better placed to make sense of status statements, it runs into difficulties for two reasons. First, as we have seen, the forms of empowerment associated with claim rights are heterogeneous and need not always be co-instantiated (as, for example, in the case of inalienable rights). By assuming that such forms of empowerment always co-occur, the will theory under-generates rights. Second, by not referring to the interest-based justifications for empowerment, the theory is systematically unable to capture those claim-rights statements we can only make sense of from a justification perspective (for example, children's rights).

As anticipated, my analysis not only helps us diagnose the difficulties with prominent theories of rights, but also reveals that such difficulties are bound to extend to any attempt to define claim rights in line with the two desiderata introduced at the start of this article. The point can be made most effectively by recalling that justification- and status-rights statements locate rights, as a moral category, in different places.

Justification statements locate them in the individuals whose interests justify empowerment, and it is an open question as to which form of empowerment is most appropriate in any given case. Status statements, by contrast, locate claim rights in the individuals who possess certain justified forms of empowerment. The fact that the individuals whose interests justify empowerment and the individuals who are empowered need not always coincide (think of children's rights and property rights), coupled with the fact that empowerment can take several different forms that need not always be co-instantiated, makes it impossible to develop a definition of claim rights that *both* captures all core instances of ordinary-language use *and* singles out a distinctive moral position.³⁴ If we want to capture all core ordinary-language statements, we need a disjunctive definition of claim rights. Such a disjunctive definition, in turn, does not point to a distinctive moral position, but rather to a family thereof, just as the broader notion of 'a right' is disjunctive, and points to four possible normative relations.³⁵

³⁴Cf. the related discussion in Cornell (2015).

³⁵Leif Wenar has similarly argued that will and interest theories go wrong in assuming that rights (in general) have a single function, when in fact they have multiple; Wenar 2008, pp. 269–70. Note, however, that, unlike Wenar, I am here focusing on claim rights specifically, where the single-function assumption would seem even stronger (since rights in general have already been disambiguated in line with Hohfeld's taxonomy). In fact, Wenar himself seems to think that claim rights can be given a non-disjunctive, single-function definition, according to which claim rights are enforceable strict duties that beings belonging to a particular kind (e.g., parent, human, journalist) desire to be fulfilled; Wenar 2013, p. 219. In this context, I limit myself to noting that Wenar's definition arguably does not satisfy our first desideratum, since belonging to a class of entities who desire certain duties to be fulfilled is *not* a distinctive moral position in relation to those duties, at least to the extent that there is no deontic or justificatory relation between those desires and the relevant duties.

VI | IMPLICATIONS

I have argued that, for structural reasons, no extensionally adequate definition of a claim right can enable this notion to do the job we want it to do in moral theorizing. There is no distinct moral position that the notion of a claim right captures, but a family thereof. The idea of a claim right is not much more specific, then, than the broader notion of a right, of which it is meant to be a disambiguation.

What follows from this? I consider three possibilities and offer some arguments in relation to each. My aim is not to defend one in particular, but to show that, regardless of one's instincts, the present discussion should prompt us to rethink the direction taken by much of the contemporary conceptual debate about claim rights.

VI.1 | Abandoning the language of claim rights

The first possibility is to *abandon the language of claim rights* in moral theorizing. The thought is simple: if that language is meant to pick out a distinctive moral position, but cannot do the job, then it would be better to cut it out of our moral vocabulary. Instead of using the category of claim rights as if it pointed to a unique phenomenon, we could simply refer to the specific phenomenon we have in mind: empowerment-justifying interests or particular forms of empowerment themselves.

In other words, we should not ask questions such as 'Does A have a moral claim right against B?', but should instead directly rely on one of the following possible disambiguations: Does A have the moral power to demand and enforce the performance of B's duty? Does A have the moral power to waive B's duty? Do A's interests justify this or that form of empowerment relative to B's duty? and so forth. Incidentally, this solution parallels the conclusion reached in the imaginary society in which, instead of talking about spoons and knives, people use the concept of a spife. There, employing separate concepts for spoons and knives seemed like the right way forward. Why should things be any different in the case of claim rights?

A natural reaction to these concerns is to suggest that confusion could be avoided by being explicit about the definition of a right one is relying on. The problem, it might be argued, is not with the notion of a claim right, but with users of the notion being unclear about what they mean by it.

While I agree that this way of proceeding would mitigate the confusion, it is not obvious that it offers any advantages over the option of just avoiding claim-rights language. Holding on to the language of claim rights is still likely to mislead readers. Rights language is so charged that, despite definitions, readers will still project their own understanding of claim rights on to whatever matter is being discussed.

Furthermore, the suggested strategy—to be more explicit about one's definition of a right—seems motivated by continued attachment to a word ('claim right') even when this is decoupled from what was supposed to motivate such attachment in the first place: the idea that a claim right designates a distinctive moral position. As it turns out, this notion points to a family of possible attributes ('empowerment'), as

well as to interest-based justifications for conferring them on individuals. Focusing *directly* on those attributes or justifications is more intellectually transparent. All we lose is a word, but the substantive ethical contents remain the same. Compare this again with the earlier example of a 'spife'. Would it really make much sense to speak in the following way? 'Can you pass me a spife, by which I mean the tool for cutting solid food?' Surely, it is more parsimonious to ask directly for the relevant tool. The same goes for claim rights, or so one could argue.

These reflections lead me to the second possible upshot of my discussion. This does not involve abandoning the language of claim rights in moral theorizing, but, rather, repurposing it.

VI.II | Repurposing the language of claim rights

I have argued that the notion of a claim right encompasses a variety of phenomena that have something in common: empowerment. Might there not be a useful purpose for a concept of this kind? To go back to our analogy, *both* the specific concepts of knives, forks, and spoons *and* the more abstract concept of cutlery are useful. Cutlery doesn't pick out any specific tool for eating, but a family of such tools. Perhaps claim rights can perform a similar role in moral theorizing.

Accepting this solution involves treating claim rights as falling under the rubric of what Wittgenstein called 'family resemblance' concepts. These are concepts characterized by 'a complicated network of similarities overlapping and criss-crossing', which cannot be defined via a set of necessary and sufficient conditions.³⁶ From a family-resemblance perspective, all instances of claim rights could be said to be unified by their connection to 'empowerment relative to others' duties': this is the family they belong to.

Furthermore, we could distinguish between 'core' members of the family and more 'distant' members, depending on how many of the 'empowerment features' associated with the notion of a claim right any particular instance exhibits. For example, a person's right to physical integrity and to food would count as core instances of claim rights, since, in these cases, the loci of justification and empowerment coincide. *My* interest in physical integrity justifies *my* powers with respect to others' duties not to injure me. Similarly, *my* interest in nutrition explains *my* powers with respect to others' duties to provide me with food, and so forth. By contrast, cases in which the locus of justification and that of empowerment come apart would count as more peripheral instances of claim rights. The rights of children and non-human animals would fall into this category, as would the rights of property owners, if these are justified by appeal to interests other than their own.

The family-resemblance proposal delivers a coherent concept of claim rights, yet one that explicitly acknowledges the multifarious and graded nature of this

³⁶ Wittgenstein [1953] 2009, sec. 66.

notion. Whether the proposal should be accepted depends on whether it could be put to good use in moral theorizing. If there are contexts in which referring to the family as a whole is explanatorily useful for moral theory, then the proposal will be vindicated.

A further option—it could be suggested—is to consider whether, of the multifaceted aspects of the concept of a claim right, one might be dominant.³⁷ In that case, we should simply reserve rights language for that aspect, and find a different label for the more minor uses. To go back to this article's analogy, if in a society the concept of 'a spife' were used 80 per cent of the time to denote tools for cutting, it may be best to just agree that spives are what we call knives and use the notion of a spoon for what is left out.

The difficulty with this otherwise promising suggestion is that it is not clear whether there really exists a 'dominant aspect': that is, whether our claim-rights language is predominantly concerned with what I have called justification or status rights. Both appear equally central to our rights talk, such that privileging one over the other without appeal to some independent theoretical rationale (more on which in Section VI.C) would be arbitrary. Indeed, as I have argued, the centrality of both aspects probably explains the enduring influence of will and interest theories.³⁸ I am therefore not convinced that this further option is available in the case at hand.

Having said all this, let me note that my concerns about the multifarious nature of claim rights for the purposes of moral theorizing do not extend to the realm of politics. That multifarious nature may be a liability for moral theory, but it is an asset for political advocacy. In fact, politically, the language of rights has been very efficacious.³⁹ It suffices to think of the successful forms of rights activism the world has witnessed over the past fifty years or so: activism in pursuit of labour rights, LGBT rights, animal rights, disability rights, and so on. The versatility of rights language might explain part of this success.

In the political realm, rights language can be used justificatorily, as a means of drawing society's attention to the justifications for empowering people to protect their interests. Justification-rights statements can be employed as devices for contesting the status quo.⁴⁰ They can spark debate over the introduction of forms of empowerment for entities who currently lack them. And the open-endedness of such statements is a reflection of the fact that they are often a plea for change, where the details of the relevant change may be up for negotiation.

³⁷I thank an anonymous referee for advancing this suggestion.

³⁸Note that the family-resemblance suggestion, focusing on empowerment, already excludes 'duty-grounding interests' from the range of objects that might be classified as rights. This is, of course, a departure from the interest theory, but it isn't obvious that it is also a departure from our ordinary language of rights. As I have previously argued, linguistically speaking, interests which ground duties are not always equated to rights. Others' interests in being assisted or in not suffering may well explain why I have duties to assist them, but it is not clear that it also automatically gives them rights/entitlements to assistance.

³⁹E.g. Risse-Kappen et al. 1999.

⁴⁰For helpful discussion, see Aitchison 2018.

Status-rights statements are equally unproblematic, from a political point of view. From a status perspective, for instance, to say ‘you have a right to medical treatment’ is to point to the ways you are morally (and, ideally, socially) empowered to demand such treatment. The breadth of the conceptual terrain covered by claim rights seems to make them powerful instruments in political argument. The difficulties with claim rights that I have highlighted in the context of moral theorizing, then, need not make us sceptical about this notion in the context of political advocacy.

Contrary to what I have just suggested, it might be objected that the flexibility of rights language is a double-edged sword. While many causes can be advanced using rights language, the dominance of such language might also distort political discourse. It might hinder advocacy in support of causes that cannot be easily framed in terms of rights, such as the need for greater mercy in the penal system, the protection of species diversity, and support for the arts.⁴¹

This is a valid point, though one that takes issue not so much with the flexibility of rights language as with its dominance. After all, the very fact that some causes cannot be easily expressed in rights language shows that such flexibility has limits. The trouble is that rights are often used as ‘conversation stoppers’ or, as Ronald Dworkin famously put it, as ‘trumps’ that take priority over other concerns.⁴² So, as soon as rights-based concerns are pitted against concerns phrased in other language (the language of needs, virtue, the good, human flourishing, and so on), the deck is automatically stacked in favour of the rights-based issues.

If my argument in this article is correct, it shows that the use of rights language as a trump card or conversation stopper is unwarranted. Any use of rights language, while referring to empowerment relative to others’ duties, needs to be disambiguated. Are we talking about justifications for empowerment or empowerment itself? If we are talking about justifications, which ones are they? If we are talking about empowerment itself, what particular types of empowerment are involved? And once it becomes clear that reference to rights, while pointing to empowerment, requires disambiguation, rights language can no longer serve as a conversation stopper but becomes a conversation-opener. Using rights language thus doesn’t bestow an automatic advantage in the context of political argument.

But a lingering worry may remain. To put it concisely, this is that, if the notion of a claim right, as an ‘ill-formed’ concept, might not serve the purposes of moral philosophy, why should we expect it to make a contribution to well-formed political discourse? What could possibly explain this disanalogy?⁴³

The answer lies in acknowledging that the concept of a claim right is not ‘ill formed’ simpliciter. Instead, it is a concept which, I have argued, cannot fulfil the function it has often been expected to play in moral theorizing: that of picking out

⁴¹I thank an anonymous referee for raising this objection.

⁴²Dworkin 1977.

⁴³I thank an anonymous referee for raising this objection.

a distinctive moral position. This, however, does not prevent the concept from fulfilling *other functions* in moral theorizing (for example, family resemblance) and in political discourse (for example, tools for advocacy and conversation openers).

VI.III | Treating my discussion as a challenge

A final option is to treat my discussion as a challenge that any defence of the view that claim rights pick out a distinctive moral position should address. Meeting the challenge could be done in either of two ways. First, it could be done by showing that, contrary to what I have suggested, both of my desiderata can be simultaneously met. For the reasons articulated in this article, I am rather sceptical about this option. Still, in the moral domain ‘impossibility results’ are hard to prove. While I take myself to have offered some fairly persuasive reasons for concluding that the conceptual domain of claim-rights talk does not allow for the joint satisfaction of desiderata (a) and (b), I must reckon with the possibility of counter-arguments. The article can be taken as an invitation to provide those counter-arguments.

Second, the challenge could be met by offering a robust enough explanation for why some core rights statements should, in fact, be discounted; why ordinary language is, after all, mistaken. I am not too hopeful about this strategy either, at least as a way of resolving the debate about claim rights. My suspicion is that this strategy would rather *dissolve* the debate: that is, show that it is not a genuine debate after all.

Take again the controversy between will and interest theories: they each point to a distinctive moral position and they each fail to account for some core rights statements. How are we to decide which one best characterizes claim rights, hence which rights statements we should discount? It seems that our answer will inevitably depend on our broader theoretical purposes, beyond the neutral desideratum of ‘picking out a distinctive moral position.’ In this vein, Leif Wenar, for instance, has suggested that the ‘will versus interest theory’ debate is a proxy for substantive disputes between supporters of Kantian deontology and welfarists.⁴⁴ Irrespective of whether Wenar is right about these hidden motives, there seems to be no neutral, purpose-independent criterion that can tell us if rights amount to the power to control others’ duties or to the interests that justify those duties. But in the absence of such a criterion, as Tim Hayward has argued, there can be no genuine ‘competition’ between will and interest theories—or any other theory of rights for that matter.⁴⁵ By analogy, there is no point in asking which of a hammer and a whisk is better: if your purpose is to put a nail in the wall, it’s a hammer; if your purpose is to beat some egg white, it’s a whisk. The same goes, *mutatis mutandis*, for claim rights.

In sum, I am sceptical that the challenge I have set out can be met. If I am wrong, however, I hope the article will still be of value in setting out that challenge.

⁴⁴Wenar 2008, p. 271.

⁴⁵Hayward 2013, p. 266.

VII | CONCLUSION

The language of rights, and especially of claim rights, is pervasive in moral theorizing. If there is one thing non-utilitarian moral philosophers seem to agree on, at least in the western world, it is that human beings have a certain set of rights. Reference to their status as claim-right holders is meant to signal something special about their humanity and position vis-à-vis one another. I have argued, however, that when we inquire more deeply into what exactly this position might amount to, the idea that the notion of a claim right aptly captures it evaporates. The greatest common denominator of claim-rights talk is empowerment. Moral claim rights are ill suited to capture a distinctive moral position. So long as this is what we want them to do in moral theorizing, we should conclude that they are not fit for purpose. Whether this means that the language of claim rights should be abandoned or repurposed is a matter I have left open. I hope, however, to have offered reasons for rethinking the nature of claim rights as a moral concept.

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