

# Human rights as rights

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This essay makes three suggestions: first, that it is attractive to conceive individualistic justification as one of the hallmarks – maybe even the one hallmark – of human rights; secondly, that combining this conception of human rights with standard worries about socioeconomic rights can tempt one to take the phrase “human rights” to refer to any individualistically justified weighty normative consideration (including considerations that are not rights); and thirdly, that reflections on the individuation of rights and rights’ dynamic quality give us some reason to resist this temptation – though this reason is interestingly inconclusive.

## Human rights as individualistically justified

In recent work, Joseph Raz has adopted a “political” conception according to which a central, defining function of human rights is to set limits to state sovereignty, limits that require states to “account for their compliance with human rights to international tribunals where the jurisdictional conditions are in place, and to responsibly acting people and organisations outside the state”.<sup>1</sup> Part of Raz’s motivation for this “political” conception is, I venture, a dissatisfaction with the rival view that takes “human rights” to be a secular way of referring to what would once have been called “natural rights”: those important moral rights that people hold simply in virtue of being human. Of course, this “natural rights” conception might – like Raz’s “political” conception – make human rights matters of international concern, but this will be a derivative rather than an essential feature of them qua human rights.

Raz writes that human rights are “thought to combine exceptional importance and universality. Even though various writers have offered explanations of the first element, that of importance, none seems to

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1 Raz 2010, 42. Compare the different “political” conceptions of human rights in Beitz 2009; Cohen 2006; Dworkin 2011, ch. 15; Pogge 2002; Rawls 1999.

me successful” (Raz 2010, 39). A successful explanation here would make a special kind of importance the distinctive feature of human rights, thereby bypassing the need to distinguish them by their (purported) special political role. The explanations of human rights’ importance on offer tend to make them distinctive as protectors of particular important substantive values – personhood, needs, freedoms (Griffin 2008; Miller 2007, ch. 7; Wiggins 1987, ch. 1; Sen 2004). I share Raz’s concern about these accounts. It seems doubtful that anything can be both narrow enough to qualify as a genuinely distinct substantive value (‘the’ value that human rights protect) yet still broad enough to encompass all the things we want to call human rights.<sup>2</sup>

But Raz fails to notice that his own account of rights in general is better taken as a theory of the narrower category, human rights, a theory that gives human rights a special kind of importance which renders unnecessary a further political account of human rights’ distinctiveness. Raz’s celebrated general account of rights is as follows:

“X has a right” if and only if X can have rights and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty (Raz 1986, 166).

According to this account, all rights are individualistically justified, where this means that any given right is justified by what it does for its holder, considered independently of whether it serves or diserves people other than its holder. To put this more precisely, a person P’s right R is individualistically justified if and only if:

1. Some genuine feature F of P is of sufficient non-instrumental importance to constitute a powerful (i. e. hard to defeat) ground for P’s holding a right that will protect, serve or in some other way ensure respect for F – and R is such a right.
2. This ground is undefeated and hence R is justified.<sup>3</sup>

On Raz’s account, the relevant individualistic right-justifying feature F will always be some interest of the individual right-holder, an interest sufficient on its own to justify a duty. Alternative individualistic approaches make each right justified by how it serves its holder’s autono-

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2 For a pluralist approach which allows that various values can ground human rights when they are appropriately “important”, see Tasioulas 2002.

3 This draws on my Cruft 2006, 154–158.

my or needs, or by how it embodies its holder's self-ownership or status.<sup>4</sup>

Individualistic approaches are too narrow to work as general accounts of rights. They fail to explain the many cases in which a right's existence depends on something other than the importance of some aspect of the right-holder. Trivial property rights (e.g. my property rights over my pen) are a good counter-example: such rights are clearly morally justified, but they are surely not justified simply by what they do for their individual holders, whether this is conceived in terms of interests, autonomy or status. I have argued elsewhere that most of an individual's justified property rights are justified because the property system of which they are a part serves the common good (Cruft 2006). Individualistic accounts exclude this plausible possibility. This is just one type of counterexample, but a survey of our morally justified rights suggests that many are justified on non-individualistic grounds, including the importance of the development of knowledge for its own sake (e.g. a scientist's right to pursue research whose results could threaten cherished religious beliefs), the common good (e.g. the system of rights created by traffic regulations), the value of beauty (e.g. your right that I not interrupt your musical performance).

Raz thinks he can accommodate these counter-examples. He considers a journalist's right to withhold the names of her sources. Raz suggests that this right cannot be justified solely by how it serves the interests of its holder (an individual journalist), but must instead be justified in part by how it serves the common good. To accommodate this example, Raz allows that a person can qualify as a right-holder even when that person's interests only justify duties because serving these interests in this way also serves other people's interests. Thus Raz maintains that the journalist has a right not to reveal her sources because (as required by his theory) the journalist's interests justify a duty. Yet he maintains that the journalist's interests only justify this duty because serving them also serves the common good.<sup>5</sup> While Raz presents this as a way to interpret his theory it is actually an admission of defeat

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4 The following theorists are all plausibly read as offering individualistic accounts of rights, although they differ over the particular feature of the individual (e.g. freedom, interests, needs) that grounds rights, and how exactly the grounding works: Hart 1955; Kamm 2007, sect. II; Miller 2007, ch. 7; Nagel 2002, ch. 3; Pogge 2002; Sreenivasan 2010.

5 Raz 1986, 179. See also Raz 1994, 49–55.

for, as Kamm notes, “[i]f the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is not sufficient to give rise to the duty of non-interference with his speech”.<sup>6</sup>

In my view, the individualistic account is most attractive when applied to those basic rights a person has simply in virtue of being human. For example, my right not to be dismembered is plausibly individualistically justified. It is natural to regard my bodily integrity as a feature of me that is of sufficient non-instrumental importance on its own – independently of whether this serves people other than me – to constitute a powerful ground for rights protecting it, including a right not to be dismembered. The other basic rights that protect our most important features are similarly plausibly individualistically justified. Why not, then, take individualistic justification as the hallmark of human rights? This would furnish us with a conception of human rights within the “natural rights” tradition, but one that defines them by the distinctively individualistic structure of their justification, rather than by some distinctive value (personhood, needs, freedom) that they all purportedly serve. On this account, a right will qualify as a human right whenever it is justified simply by what it “does for” its holder considered independently of whether it serves or disservices others. This “doing something for” the holder might involve serving the holder’s interests, or protecting her needs, or securing her freedom, or reflecting her status, etc. So long as the

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6 Kamm 2002, 485. For Raz’s commitment to the *sufficiency* of the right-holder’s interests for grounding a duty, see Raz’s original definition of rights at Raz 1986, 166 and also *ibid.*, 183–184. As well as the response to the journalist case considered in the main text, Raz also offers a second response, aimed at counter-examples in which a person lacks any interest in having a right (as opposed to cases like the journalist, in which the right-holder might have some interest in their right, but not an interest sufficient on its own to constitute a powerful ground for duties). Of someone whose property is “more trouble than it is worth”, Raz says “[t]heir rights serve their interests as persons with [certain general characteristics], but they may be against their interests overall” (*ibid.*, 180). But in what sense do I have *any* interest in my property qua property-owner, if all things considered I would be better off without my property? And if we allow that people can have such ‘kind’- or ‘role’-based interests, why should we see them as possessing any justificatory force in the grounding of duties? And even if we allow this, won’t such force be derived from the justification for the existence of the relevant general kind (i. e. property owner), a justification that will surely refer, in non-individualistic fashion, to more than simply the importance of serving or respecting one member of this kind?

right's justification is individualistic, it will be a human right whatever the particular values at work in the justification.

The individualistic approach to human rights is very attractive: as well as avoiding the difficulty of finding some single substantive value that all human rights serve, it gives center stage to the common concern that non-individualistic theories of human rights are inadequate. For example, according to welfarist consequentialism, if the long run collective interest would be best promoted by denying human rights to certain people, then there would be no justification for the existence of human rights for the relevant people. Concern about this counter-intuitive implication is, in part, what motivates John Rawls's famous claim that "[u]tilitarianism does not take seriously the distinction between persons" (Rawls 1971, 27). If human rights are individualistically justified then they offer the special protection grounded in respect for each separate person that Rawls identifies as necessary – while other rights need not, and might be justified on consequentialist or other non-individualistic grounds.

Defining human rights by their individualistic justificatory structure seems a promising route for those who want to avoid adopting a "political" conception of such rights. But two problems might seem pressing. First, can the individualistic approach make sense of human rights that protect social goods – such as the rights to political participation or to freedom of speech?<sup>7</sup> In my view, such rights can be explained as individualistically justified: for example, the individual's interest in being able to have a say in how their community is run seems sufficiently important on its own to constitute a powerful ground for a right to political participation for the relevant individual, independently of whether this would serve anyone other than this individual. Of course, the right-justifying interest's existence depends on the social nature of our world, but that does not undermine the fact that it justifies a right in an individualistic way: given its very great importance to its possessor, it constitutes a powerful right-justifying ground independently of whether this would serve anyone else.<sup>8</sup>

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7 As in his handling of the journalist's right not to reveal her sources, Raz is willing to depart from strict individualism in accounting for traditional civil rights such as the right of free speech; he allows that my possession of this right might be justified in part by what it does for people other than me (Raz 1986, 179–180).

8 Note that the thoughts in this paragraph can be re-run without using the concept of interests. Note also that related criticisms will charge the individualistic

A second problem is of more concern: the individualistic approach seems over-inclusive, for it seems to encompass a person's right to spousal fidelity, their right not to be murdered and many other rights that are very important, but whose classification as "human rights" is doubtful. For my spouse's being faithful to me is sufficiently important on its own, in terms of what it does for me, to justify a right held by me. And my not being murdered is similarly clearly sufficiently important to ground an individualistic justification in this way.

Here I think the theorist faces a difficult choice. Many writers – including Gewirth, Sen, Tasioulas and Wellman – are willing to allow that human rights encompass a range of very important rights including "personal" ones such as the right to a say in key family decisions, or the right not to be lied to by one's friends.<sup>9</sup> If this seems too inclusive, then we could add that human rights are distinguished not only as individualistically justified, but also as rights that are "everybody's business" – not in the sense that they must entail duties for everyone, for the human right to free speech, for example, seems primarily to entail duties for governments and organizations, and not for "ordinary individuals".<sup>10</sup> Rather, the suggestion is that human rights are distinguished as those rights respect for which can be legitimately demanded on the right-holder's behalf by anyone anywhere.<sup>11</sup>

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approach with (i) being unable to accommodate group rights as human rights, and (ii) being unable to guarantee the universality of human rights. While many significant theorists doubt that group rights can be genuine human rights (e.g. Griffin 2008, ch. 15; Wellman 2011, 66–69), my individualistic approach does not exclude this possibility. It allows that a group right could be individualistically justified (and hence qualify as a human right) when some feature of the group considered on its own is sufficiently important to constitute a powerful ground for the group's holding a right. Similarly, the individualistic approach will imply that human rights are universally held if the features of each person sufficient on their own to justify rights are universal features. The antecedent here is endorsed by those like Tasioulas who espouse individualistic accounts of human rights via commitment to Raz's account of rights in general (see Tasioulas 2002, at p. 87, for defence of the idea that human rights are universally held, but not across time).

9 The first example is drawn from Sen 1999, 229, the second from Gewirth 1982, 56; see also Wellman 2011, 36–39 and Tasioulas's contribution to this volume, ●.

10 For the view that human rights must entail duties for all others, see, e.g., Wellman 2011, 26.

11 I am tempted by John Skorupski's suggestion that "to demand" in this context means to make a request backed by a permissibly enforceable threat – where this

This might still seem too inclusive because many of the most important individual moral rights that are standardly protected by the criminal law (such as my rights not to be murdered or assaulted) are both individualistically justified and demandable by anyone on the right-holder's behalf – but the conventions of international law, and many thinkers working on human rights, deny that such ordinary individual criminal law rights are human rights.<sup>12</sup> To narrow the concept further one could add that human rights are not only (i) individualistically justified and (ii) demandable by anyone anywhere but also (iii) rights whose violation can trigger legitimate international intervention. This would be to add a strong Rawlsian version of the “political” conception of human rights to my proposed individualistic justificatory one.<sup>13</sup>

In my view, linguistic usage underdetermines the choice between the three ways of conceiving human rights sketched above. Quite frequently one encounters the term “human rights” used to refer to any very important rights – and this importance, I think, is best accounted for in terms of individualistic justification. But one also encounters the thesis that human rights cannot be too “private” in the way Gewirth, Sen, Tasioulas and Wellman allow; instead, a particular human rights violation must be everyone's business. And the recent growth of “political” conceptions of human rights reflects a very significant strand in current human rights discourse.<sup>14</sup> It is tempting to try to argue that when an individualistically justified right possesses features (ii) and (iii), this is precisely because it is individualistically justified. For feature (ii), this argument would be that if something (an interest, need etc.) is sufficiently important to ground an individualistic justifica-

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force could be merely social and hence need not involve the type of international military intervention that would make position (ii) collapse into the “political” position (iii) that I am about to introduce in the next paragraph of the main text (Skorupski 2010, 310).

12 See, e.g., Pogge 2002, ch. 2.

13 Weaker versions of the ‘political’ account – such as that (iv) support for, condoning, or maybe even simply allowing violation of human rights is sufficient to undermine a state's legitimacy, or to render certain weak forms of intervention justified – do not so obviously help exclude all the moral rights recognised by criminal law from qualifying as human rights. For it is not implausible to say that the more a state supports, condones or allows common assaults, rape, murder, fraud and theft, the less legitimate it is, and the more justified weak international intervention (e.g. official reprimands) can be.

14 See especially Charles Beitz's argument that the ‘political’ account best reflects the actual ‘practice’ of human rights (Beitz 2009).

tion for a right then it will be important enough to legitimate anyone's demanding respect for it, unless (as in the case of "private" spousal and familial rights) so doing would fail to respond appropriately to the particularly "private" grounding value in question. For feature (iii), the argument would be that if something is sufficiently important to ground an individualistic justification for a right then it will be important enough *ceteris paribus* to justify international intervention in the right's support – it is just that for many individualistically justified rights in many contexts *ceteris* is not *paribus* when the costs of international intervention are considered.

Luckily, I do not need to pursue these arguments for my purposes. All I need is the thesis that individualistic justification is one of the defining features of human rights. I must confess that I am doubtful that a political function in terms of international intervention is a further defining feature. Taking this as essential to human rights makes their existence too contingent on the existence of a system of nations, on intervention being a genuine possibility etc.; and it risks overly narrowing the set of human rights. But I do not need to pursue this here. My aim in this section has been merely to argue that individualistic justification is one of the defining features of human rights; this offers a plausible secular way of thinking about human rights as forms of "natural right", a way that makes sense of the distinctive importance of human rights without tying them to any particular grounding value. It does not rule out supplementary defining features of types (ii) and (iii).

### The temptation to deny that human rights are rights

Surprisingly many theorists deny, implicitly or explicitly, that human rights need be rights. This position allows that of course some human rights are rights, such as the right not to be tortured. But other human rights – often socioeconomic human rights in particular (to food, holidays or "the highest attainable standard of physical and mental health")<sup>15</sup> – are, it is alleged or implied, not genuinely rights at all, but

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15 The quotation is from the notoriously demanding Art. 12 of the International Covenant on Economic, Social and Cultural Rights.



rather goals or important values.<sup>16</sup> This thesis that human rights are not all genuine rights, and that this is not a problem for human rights discourse, has been explicitly defended by James Nickel:

One approach that should be avoided puts a lot of weight on whether the norm in question really is, or could be, a right in a strict sense. [...] This approach begs the question of whether human rights are rights in a strict sense rather than a fairly loose one. The human rights movement and its purposes are not well served by being forced into a narrow conceptual framework (Nickel 2010).

Note that the position under consideration accepts that the majority of human rights listed in international law are genuine human rights; it simply denies that this makes them genuine rights. Some human rights are better conceived not as rights but as goals or important values or some other non-right consideration.

Why think this? All the reasons to think it stem from the premise that genuine rights have a strict logical relation to directed duties (duties owed to someone). Most common is the assumption that rights must entail such duties. This can mean either that rights are Hohfeldian claims, in which case there must be a one-to-one relation between rights with a certain content and correlative directed duties (owed to the right-holder) with the same content, or that a given right must (in non-Hohfeldian fashion) be the ground for a changing set of directed duties owed to the right-holder and perhaps to others.<sup>17</sup> Some also allow Hohfeldian privileges, powers and immunities – and combinations of these positions along with claims – to constitute rights.<sup>18</sup> But, the premise maintains, something cannot be a right if it lacks some such relation to directed duties.

Thus one reason for adopting the position sketched by Nickel above is that socio-economic human rights work in a duty-independent way in international law. Carl Wellman writes: “a real right imposes definite

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16 For the charge that Griffin 2008 does not do enough to distinguish his account of human rights as genuinely grounding *rights*, see Tasioulas 2010; see Griffin 2010 for a reply.

17 For the former position, see Hohfeld 1964, Kramer 1998. For the latter, see Raz 1986, 171. See the discussion in the next section below.

18 See e.g. my Cruft 2004; Wellman 2011; Wenar 2010. A privilege to do X is constituted by the absence of a duty not to do X; a power is (to put it roughly and imprecisely) constituted by the ability to create a new duty; an immunity is (similarly roughly) constituted by someone else's disability to create a new duty for one (for precise details, see Hohfeld 1964).

obligations upon some second party, but the International Covenant on Economic, Social, and Cultural Rights commits state parties only to take steps progressively to achieve the goals it affirms. This seems to give unlimited discretion to state parties as to what steps they will take and when they will take them” (Wellman 2011, 71). Those who think that all human rights are genuine rights can respond to this concern in two ways. First, one might argue that even a mere discretionary requirement to take “steps progressively to achieve” socio-economic goods for individuals is a directed duty owed to right-holders, and hence can correlate with a genuine right in international law, a right that such steps be taken within the addressee’s discretion. If one takes the Hohfeldian view that the content of a claim-right is given by the content of the duties it entails, then this will make the content of the right to health (to take one example) in international human rights law rather weaker than perhaps it should be – but it will leave it as a genuine right, entailing genuine (if weak) directed duties.<sup>19</sup> Secondly and perhaps more persuasively, one might argue that the International Covenant on Economic, Social, and Cultural Rights is simply mistaken in its account of what is entailed by socio-economic human rights. The morally justified rights that ground human rights law in this area entail demanding moral directed duties that go beyond the weak requirement to take progressive steps within one’s discretion.

This response takes us to a second reason to deny that socio-economic human rights are genuine rights: they are perceived to be too demanding to be justified as rights. Thus Nickel again:

Treating very demanding rights as goals has several advantages. One is that proposed goals that exceed one’s abilities are not as farcical as proposed duties that exceed one’s abilities. Creating grand lists of human rights that many countries cannot at present realize seems fraudulent to many people, and perhaps this fraudulence is reduced if we understand that these “rights” are really goals that countries should promote. [...] Another advantage is that goals are flexible; addressees with different levels of ability can choose ways of pursuing the goals that suit their circumstances and means. Because

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19 See Nickel’s related thoughts on ‘right-goal mixtures’ (Nickel 2010). One might see the ‘discretion’ element as incompatible with genuine rights-correlative duties, because it seems to make the duty in international law at most a Kantian ‘imperfect’ duty. However, I see no reason why ‘imperfect’ duties, *if defined as duties which allow discretion in their exercise*, need not be owed to people and thereby correlate with rights, *pace* Kant.

of these attractions of goals, it will be worth exploring ways to transform very demanding human rights into goals.<sup>20</sup>

Note that Nickel is not here appealing to “ought implies can” to deny the logical possibility of rights entailing jointly unfulfillable duties.<sup>21</sup> He is rather arguing that it is “farcical” or “fraudulent” to ascribe rights that entail duties which vastly exceed what their bearers can do. The thought is that if an impoverished state could not afford to educate more than a few of its citizens, then all citizens’ holding genuine rights to be educated entailing state-borne duties to all citizens to educate them would be “farcical” or “fraudulent” – but not logically inconsistent, because the state could afford to educate each individual, taken separately.<sup>22</sup>

One response – a response that Nickel partially endorses<sup>23</sup> – takes this worry to conceive human rights as too state-focused. If states are not the primary addressees of human rights, but just one addressee among others (including all other human individuals, all states and international institutions), then while some socio-economic duties for impoverished states might “farcically” vastly exceed their abilities, similar rights-derived socio-economic duties borne by wealthy individuals, states and international institutions will often not do so. Certainly there can be no human right to that which cannot be provided by human agency at all, but most people’s socio-economic rights are not

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20 Nickel 2010. Somewhat similar thoughts are evident in Dorsey 2006. For the related thought that fixating on the violation of the Hohfeldian duties correlative to human rights impoverishes human rights discourse, see Brems 2009. And for the claim that even ‘negative’ or ‘civil’ human rights frequently fail to entail individually borne directed duties in a traditional way, see Ashford 2006. For reasons of space I cannot examine Ashford and Brems in the detail they merit; instead I focus on Nickel’s approach here – and, indeed, on just the one aspect of Nickel’s approach sketched in the quotations in the main text. Nickel’s full position encompasses many alternative moves too.

21 For a plausible argument that sometimes jointly unfulfillable duties are logically consistent, see Waldron 1989.

22 For a similar concern – about taking Waldron’s argument for the compatibility of unfulfillable duties as a ready answer to those who worry about conflicting rights – see Eddy 2006 at p. 351: “An uncomfortable implication of [Waldron’s] approach is that if there are twenty million people who are at risk of disease, and only enough vaccine for one person, we would have to say that all twenty million people had a right to the vaccine”. Not inconsistent, perhaps, but surely farcical.

23 See, e.g., Nickel 2007, 150.

in this category.<sup>24</sup> Instead, there is enough wealth in the world that some allocation of directed duties (to educate Joe, provide medical care for Jill, etc.) will be possible that ensures that most people have most of their socio-economic human rights fulfilled. The allocation will confer weighty duties on the wealthy, but not on impoverished states. In this way farcicality can be avoided even with genuine Hohfeldian duty-correlative socio-economic rights.

A more concessive response accepts that it is valuable to regard a person's state or government as having special responsibilities vis-à-vis her human rights. We might therefore resist the conclusion that if your state genuinely cannot afford to educate more than a few of its citizens, then you no longer hold the human right to education against your state but only against those who can afford to educate you. But denying that you and your fellows' human rights against your state entail genuine directed duties borne by that state is not the only way to go. One could instead maintain that you and your fellows' rights to education entail less demanding duties for your state, but directed duties nonetheless: duties owed to citizens, to work towards universal education, say, by developing the national economy and infrastructure. Nickel considers and partially endorses this alternative too.<sup>25</sup> It involves abandoning the Hohfeldian premise that a person's genuine claim-right, against some second party, to X (e.g. to be educated) must entail duties, borne by that second party, to ensure X for that person (i.e. to educate the person). But it is consistent with the non-Hohfeldian view that a right to X can ground a range of contextually variable directed duties, not all of which will be straightforwardly to supply X. A position inconsistent even with non-Hohfeldian views would have to maintain that you and your fellows have human rights to education against your state but your state has no directed duties generated by this right; at most, it has some strong reasons or maybe some undirected duties to adopt some relevant goals, say. I shall return to this position in a moment (I split it into positions (2) and (3) below).

First I should consider a third reason to deny that socio-economic human rights are genuine rights. Onora O'Neill writes:

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24 See Miller 2007, 186. As Miller's discussion makes clear, that duties cannot require what humans cannot provide is compatible with some very demanding duties and rights.

25 See, e.g., Nickel 2007, 151–152.

[T]he correspondence of universal liberty rights to universal obligations is relatively well-defined even when institutions are missing or weak. For example, violation of a right not to be raped or of a right not to be tortured may be clear enough, and the perpetrator may even be identifiable, even when institutions for enforcement are lamentably weak. But the correspondence of universal rights to goods and services to obligations to provide or deliver remains entirely amorphous when institutions are missing or weak. Somebody who receives no [subsistence supplies] may no doubt assert that her rights have been violated, but unless obligations to deliver that care have been established and distributed, she will not know where to press her claim, and it will be systematically obscure whether there is any perpetrator, or who has neglected or violated her rights (O'Neill 2000, 105).

Without institutionalization of assistance duties, it is (sometimes) extremely unclear who bears the duty to assist a person needing assistance. But if there is nobody who bears the duty to the needy individual, then that individual cannot have a right, because rights correlate with duties.

Against this charge, one can argue that while the directed duties correlative to socio-economic rights are epistemically obscure without institutions, they are nonetheless genuinely allocated, and closer examination of principles of justice will reveal their allocation. Proposals in the literature include Barry's contribution principle, Kamm's principle of the importance of proximity, Miller's "connection theory" of responsibility, Wenar's least-cost principle, Wringer's suggestion that such duties are borne by everyone collectively (Barry 2005; Kamm 2007, sect. III; Miller 2007, 99–107; Wenar 2007, Wringer 2005). If any one of these proposals is correct, then while the allocation of directed duties correlative to pre-institutional socio-economic rights is obscure, it is nonetheless determinate.

However, it is unlikely that any such principle will always allocate directed duties to states or governments. Impoverished states or governments will not be captured by either the "capacity" or "least cost" principles, and if they are also post-apartheid or postcolonial states or governments, then they might not be captured by the "contribution" principle. It seems to me that the strongest reason to go down the route sketched in the quotation from Nickel at the start of this section – to weaken the link between human rights and directed duties, and thereby undermine the thesis that human rights are always genuine rights – arises from a commitment to seeing human rights as always importantly held against one's state or government. This thesis is evident in the way

human rights language is used, and in the popularity of the “political” conception.

If on this basis we want to say that even citizens of deeply impoverished states hold human rights against their governments to a range of socio-economic goods that their governments cannot supply widely, then to avoid “farcicality” we will need to allow that such human rights need not entail directed duties to supply their precise content to each right-holder. Instead, we must hold one of the following three positions:

- (1) Certain socio-economic human rights held against impoverished governments entail, contra Hohfeld, directed duties (owed to right-holders) borne by the relevant governments, the content of which differs from the content of the human right in question (e.g. my human right to a primary education entails for my government only a duty, owed to me, to work towards primary educational provision, rather than a duty to educate me).

As noted earlier, even fairly demanding socio-economic human rights like the right to be educated might well entail directed duties borne by beings other than the state in a way that fits the Hohfeldian model (e.g. duties to educate Joe and Jill, allocated by principles like the “capacity” or “least cost” ones) – and to that extent such human rights will be genuine rights even on the Hohfeldian view. But in their central, important role as binding governments, they will on the Hohfeldian view not be genuine rights held against governments if they only entail governmental duties of type (1).

- (2) Certain socio-economic human rights held against impoverished governments entail, contra even non-Hohfeldians, only undirected duties borne by the relevant governments.

- (3) Certain socio-economic human rights held against impoverished governments entail no duties whatsoever for the relevant governments, but at best non-right normative factors such as strong reasons to adopt certain policy goals.

Anything less than (3) – e.g. the view that socio-economic human rights need entail only weak reasons, or perhaps need entail no normative factor whatsoever, for their holders’ governments – will leave human rights doing very little indeed in terms of their relationship to right-holders’ governments.

Position (1) is quite common in the literature, though its adherents do not normally think of it as involving a rejection of the thesis that human rights are genuine rights. They simply reject the Hohfeldian

premise that a genuine claim-right to X must involve a one-to-one relation to a directed duty to supply X; instead, they maintain merely that genuine rights must entail some directed duties, though the duties entailed might change, and need not share the content of the right.<sup>26</sup> Position (2) is much less common,<sup>27</sup> and I am rather doubtful about it. For don't impoverished states that do not even attempt to move towards fulfilling human rights let their citizens down, wronging them and thus violating directed duties towards them? Aren't we compelled to see this if we think citizens hold rights against their states? I am even more doubtful about position (3): Don't impoverished states bear some duty-type normative demands in relation to their citizens' human rights?

Suppose, however, that we accept one of these positions (1)–(3). The approach to human rights outlined in the previous section – according to which individualistic justification is one of the defining features of human rights – gives us a way to make sense of human rights as distinctive even when they are not genuine rights in one sense or another. For we can say that human rights include any case in which some proper feature F (perhaps needs, important interests, freedom) of a person P is of sufficient non-instrumental importance to justify some serious normative factor protecting that feature: either a directed duty with some content or other that will protect F, or an undirected duty protecting F, or some serious high-weight non-duty reason, important goal or aim, etc. that asks for protection for F. On this account, we take individualistic justification as the hallmark of human rights and thereby allow human rights to include individualistically justified moral factors that are not rights.

Nickel argues that if we allow that some human rights are not genuine rights, then we can accept international human rights law and human rights discourse without making these practices farcically demanding (Nickel 2010). My individualistic account of human rights offers a way of explaining why this might be correct: if individualistic justification is the hallmark of human rights, then it would be quite natural for our practices to have extended the concept to encompass other individualistically justified serious normative factors. For on this approach, the human rights that are genuine rights and those that are not will share a distinctive role as protectors of aspects of an individual sufficient on their own – before others are considered – to constitute powerful

26 See, e.g., Raz 1986, 171; Tasioulas 2010, 656–657.

27 But see Ashford 2006.

grounds for such protection. In this way even the human rights that are not genuine rights play the Rawlsian role of protecting the “separateness of persons”.

## The cost of denying that human rights need be genuine rights

The position sketched in the two paragraphs above should perhaps appear no great innovation to those who reject the Hohfeldian approach to rights. In replying to O'Neill, John Tasioulas writes:

Why should this indeterminacy [in the pre-institutional allocation of duties entailed by socio-economic rights] [...] undermine the very existence of such rights prior to their institutional embodiment? Why is not the person's interest and the fact that it is sufficient to generate duties to respect, protect, and further it, etc., enough to warrant the existence of the right? In view of the strength of the argument for recognizing and imposing duties based on that interest, there is a strong case for regarding the issue of claimability [i.e. the issue of the determinate allocation of duties] as separate from that of the right's existence (Tasioulas 2007, 94).

On this view rights are prior to the directed duties they entail, and the directed duties they can generate vary over time. From this view it might seem a small step to add that as well as generating a changing set of directed duties, a right might in certain contexts also generate un-directed duties and other normative phenomena such as important goals. And it might well then seem rather a small step again to add that sometimes some rights do not generate or have any relation to duties at all, but only to other normative phenomena like goals. Although Tasioulas himself insists that rights must entail directed duties (Tasioulas 2010, 656–657), these further steps might seem consistent with the view of rights he sketches above; an adherent of this view might thus seem able to embrace each of positions (1)–(3) without abandoning the thesis that the human rights modeled by these positions are genuine rights.

In my view, though, there is a cost attached to any position that abandons the thesis that genuine rights are constituted by Hohfeldian claims, privileges, powers, or immunities or some cluster of these positions. I have already suggested that those who abandon this position – including those like Tasioulas who stick to position (1), maintaining that rights must entail some directed duties – are often motivated by what Raz calls rights' “dynamic character”:



[T]here is no closed list of duties which correspond to [a] right. The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties based on the old right. The right to political participation is not new, but only in modern states with their enormously complex bureaucracies does this right justify [...] a duty on the government to make public its plans and proposals before a decision on them is reached, as well as a duty to publish its reasons for a decision once reached (Raz 1986, 171).

Many, including Raz, infer that if rights can entail changing waves of directed duties, then rights should not be construed as Hohfeldian positions, with their one-to-one relationships between rights and directed duties (or, in the case of privileges, between rights and the absence of directed duties, or in the cases of powers and immunities, between rights and the ability or inability to alter specific directed duties).

But, as Matthew Kramer points out, there is no need to abandon Hohfeld's framework in order to make sense of rights' dynamic character. For – to focus only on Hohfeldian claim-rights here – we can explain this character as involving a rather abstract right (e.g. respect for one's life) that correlatively entails rather abstract directed duties (to respect the right-holder's life), which in changing circumstances will entail differing more specific right-duty pairs (e.g. in certain contexts the abstract right might generate a right to a dialysis machine correlating with a duty to provide it; in others it might not but might still generate a right to assisted suicide correlating with a corresponding duty). As Kramer puts it, "[a]n abstract right that is strictly correlated with an abstract duty can comprise or undergird any number of concrete rights, each of which will of course be strictly correlated with a concrete duty".<sup>28</sup>

When considering rights in general (as opposed to specifically human rights), I believe we have strong reasons to favor Kramer's Hohfeldian suggestion over the rival view implicit in Raz and Tasioulas. This is because abandoning the Hohfeldian framework – even while, as in position (1), retaining the thesis that genuine rights entail directed duties – makes the individuation of rights worryingly indeterminate.

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28 Kramer 1998, 43. See also Raz's own awareness that "[t]his objection to the reduction of rights to duties [i.e. the concern to respect rights' dynamic character] does not rule out the possibility that 'A has a right to X' is reducible to 'There is a duty to secure in A in X'" (Raz 1986, 171).

What are the existence conditions for my right to park my car in the space I have purchased? The Hohfeldian approach naturally characterizes this right as a combination of (a) my privilege to use the space and (b) my claim to be unimpeded in using it.<sup>29</sup> These Hohfeldian positions exist if (a) I do not bear a duty to refrain from using the space and (b) some persons have a directed duty, to me, to allow me to use it unimpeded. If these conditions are not fulfilled then I cannot have such a right, according to the Hohfeldian approach. Furthermore, if somebody has a directed duty to me that is derived from duty (b) (e.g. a traffic warden's duty not to attempt to give me a parking ticket when they see my car in the space), then the Hohfeldian approach tells us that this will correlate with a right derived from the former right to the parking space.<sup>30</sup> And if somebody has a directed duty to me with a different content to (b), and which is not derived from duty (b), but that is grounded in the same sorts of considerations that ground (b) (e.g. a duty to allow me to take priority when I am on the main road and they are waiting to turn onto it, grounded – like my right to the parking space – in the importance of efficiency in the movement of traffic around town), then the Hohfeldian approach tells us that this will correlate with a different right not derived from my right to the parking space.

By contrast, what will the non-Hohfeldian approach of type (1) imply about the existence conditions of this right to park in the space I have purchased? It says that the right is in some sense “prior” to the directed duties it generates, and that it need not correlate with any one particular such duty. Instead the right is the ground for a range of directed duties that vary with context. Which duties are grounded by or associated with this right, then, and which with other rights? It seems natural to regard the duty not to impede me in using the space as the primary duty correlating with the right, while the traffic warden's duty to leave me alone is in some sense secondary: derived from the right, but not correlating with it. And the other driver's duty to let me take priority when I am on the main road seems naturally not to be derived from the right to the parking space at all. But I am not sure how the non-Hohfeldian approach can deliver these conclusions.

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29 Both (a) and (b) should be qualified with the phrase “within reasonable limits”, but I ignore this for simplicity.

30 For useful discussion of different ways that rights and duties can be derived from other rights and duties, see Wellman 2011, 48–49.

Once one abandons the Hohfeldian assumption that each right (or at least, each claim-right) correlates with or, perhaps, is constituted by a directed duty with the same content, it is unclear what can enable us to say that one duty entailed by a right somehow takes priority in the way it is entailed by the right – is more fundamentally grounded by the right – than some other duty also entailed by it. It thereby becomes difficult to distinguish how my right to the parking space relates to the (fundamental) duty to leave my space unimpeded from how it relates to the (derivative) traffic warden's duty not to bother me. Both duties are entailed by the right. What – other than the Hohfeldian approach – can allow us to say that one is more fundamentally entailed by it than the other? Perhaps we could say that the latter duty is only entailed given a certain contingent background in which traffic wardens exist and have a certain role, etc., while the former duty will exist in any possible world where my right to the space exists. On this account, we can seemingly continue as non-Hohfeldians but note that some duties necessarily exist whenever a right exists while others do not. But on closer inspection this seems like a way of returning to (or, indeed, of elucidating) the Hohfeldian notion of correlativity that we were attempting to move beyond: a right's correlative duty is whatever duty must exist wherever the right exists, no matter the changing context.

An even more worrying problem for the non-Hohfeldian approach is that it threatens to extinguish the distinction between a right and its grounds.<sup>31</sup> For the approach says that a right is the ground for a range of duties, a ground that exists independently of and prior to these duties. But what is it for a right to function as a ground in this way? When we look for the ground for some duty associated with a right, it is very natural to “look straight through” the right directly to the considerations – interests, needs, etc. – that ground both right and duty. For instance, if we enquire into the ground for the duty not to torture Joe, we will be most unlikely to focus on Joe's right not to be tortured; instead, we will look directly at Joe's basic interest in not being tortured. Similarly, if we look for the ground for your duty not to impede my parking space, I think we will look at the important efficiency considerations that justify a town's system of parking regulations. If, instead, we ‘stop’ immediately at my right to my parking space (or Joe's right not to be tortured), then

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31 That is, I think, the non-Hohfeldian approach threatens to collapse into something like what Tasioulas calls the “Reductive View”. See Tasioulas's essay in this volume, ●.

in my view we are not really investigating the duty's ground. There might be a sense in which the rights in these examples ground the relevant duties, but I suspect this is an epistemic rather than a metaphysical sense: if I want to know what duties I have vis-à-vis Joe, then sometimes I can learn about this by focusing on Joe's rights (e.g. not to be tortured).<sup>32</sup> In the non-epistemic or 'metaphysical' sense of grounding – the sense in which when X grounds Y, X makes Y the case – the grounds of duties are naturally conceived as certain values; if rights are the grounds of duties, they seem to be identified with these values. But this would leave us unable to distinguish my right to my parking space from my right to priority on the main road, because the duties they generate (to leave my space unimpeded, and to cede me priority on the main road) are both grounded in the same value: efficiency in traffic management.

In response to this the non-Hohfeldian will insist that two rights can differ while sharing the same 'metaphysical' ground, and that these two rights can each themselves 'metaphysically' ground a range of differing duties (without privileging any special correlative duties whose content matches the rights). On this picture, rights occupy an intermediate level 'between' ultimate grounding values and particular duties (Raz 1986, 181). This picture makes it extremely unclear what individuates one right from another. Their grounds do not do the individuating: we have seen that this would bizarrely imply that my right to my parking space was the same right as my right to priority on the main road. But there are no special correlative duties, duties invariably tied to rights with matching content, by which we can individuate one right from another. So we cannot individuate my right to my parking space from my right to priority by attention to the difference between your duty to let me use the space and your duty to let me use the road: both duties might well be entailed by the same single right in a way that gives them an equal status in relation to that right. For the two rights to remain individuable as "distinct existences", then, it must be on the basis of some other characteristic that distinguishes them, but I am not sure

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32 Raz stresses the epistemic role of rights as grounds for duties when he describes them as "intermediate conclusions in arguments from ultimate values to duties" (Raz 1986, 181). That this role in argument is epistemic – that is, it concerns the uncovering of the implications of ultimate values, rather than the non-epistemic determination of such implications – seems clear from Raz's discussion of the epistemic utility of rights' role as grounds for duties (*ibid.*).

what this could be. Perhaps some might point to differing legal sources for the traffic-related rights on which I have focused but, first, this would not work for rights that were purely conventional rather than legally instituted and secondly, how can we be confident that the relevant Acts of Parliament (or similar law-making events) genuinely succeeded in creating two rights here, rather than (despite what was intended) actually creating just one right or none? To answer this question, we need to know already what individuates one right from another; appeal to what law-making acts say cannot resolve this. Nor, of course, can we distinguish the rights spatio-temporally.

Things are murkier still for those non-Hohfeldians of types (2) or (3) – those who allow that rights need not entail directed duties at all, but only undirected duties or non-duty considerations. For these positions seem, even more than position (1), to make it difficult to distinguish rights from their grounding values. To take one example that is sometimes considered to fit (2) or (3), if my right to education does not entail any duties owed to me (or any other relationship to directed duties)<sup>33</sup>, but instead entails perhaps only an undirected duty on my government to build what schools it can, then what enables us to refer to a right of mine here, as opposed simply to the value of my being educated or, indeed, the value of education as such? What distinguishing feature identifies what we are faced with as a right? If the duty to build schools is not directed to me, then it is unclear in what sense my being educated can be said to be a right, or in what sense not building schools wrongs me. Positions (2) and (3) cut off what seems most characteristic of rights: that they involve duties to others whose violation is not just a matter of doing wrong, but of wronging a particular person who is thereby distinguished as a right-holder.<sup>34</sup> This problem presses even before we note that positions (2) and (3) also bear the other difficulties of position (1): difficulties in distinguishing some primary duty generated by a right from secondary derived duties, and in individuating different rights with the same ground.

The Hohfeldian approach avoids these various problems by taking any (claim-)right to have correlative directed duties – duties that must exist if the right exists – that are intrinsic to the right's nature and hence its individuation from other rights; rights constituted by Hohfel-

33 For let us not forget Hohfeldian privileges, powers and immunities.

34 See Tasioulas 2010, 657–658 and Thompson 2004. Privileges, powers and immunities similarly involve relations to directed duties.

dian privileges, powers and immunities are similarly essentially defined and individuated by their relationship to directed duties. This approach makes rights clearly distinct from important values for, first, there is nothing about the nature of values as such that is tied to directed duties and secondly, when defined by certain logical relationships to directed duties (i. e. as what someone holds when owed a duty, or as the ability to alter directed duties) different rights can clearly be grounded on a range of varied values. In the traffic example examined earlier, the Hohfeldian approach can allow that both my right to my space and my right to priority on the road are grounded in the same way, but one of the rights (my right to the parking space) is constituted – at least in part<sup>35</sup> – by a certain duty (your duty not to impede me) while the other (my right to priority on the main road) is constituted by another (your duty not to pull out in front of me when I am on the main road). The value of the Hohfeldian approach lies in how it enables us to individuate rights clearly through the focus on correlative duties, and thereby to preserve the distinction between a right and its grounds.

For non-individualistically justified rights – that is, on my approach, rights other than human rights – these considerations are good enough to settle the matter in favor of Hohfeld. For human rights, things are more complex. This is because human rights' individualistic justification provides an alternative effective means of individuating rights: by their grounding source in their holder.

## Why human rights might nonetheless not be genuine rights

Undirected duties need not, by their very nature, foreground a particular person in the reasoning of the duty-bearer (although they might, say, be duties to do something for a particular person, this is not essential to their character as undirected duties). By contrast, directed duties necessarily foreground a particular person for the duty-bearer: the person to whom the duty is owed. Similarly, Hohfeldian powers, privileges and immunities are also intrinsically bipolar, placing someone on a pole opposite the relevant liability-, no-right- or disability-bearer. Such a structure in the determination of how one ought to behave foregrounds someone in the reasoning of the agent subject to this structure (the directed-duty-, liability-, no-right- or disability-bearer), and the Hohfel-

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35 It is also constituted by the Hohfeldian privilege to use the space.

dian approach maintains that it is to label a person's status as so foregrounded that we use the term "a right".<sup>36</sup> On this approach, genuine rights are identified as a structural-functional kind in the determination of what people ought to do: the kind we encounter when we encounter directed duties – or at least when we encounter them and some further conditions are fulfilled.<sup>37</sup>

I have suggested that non-Hohfeldian approaches, which sharply distinguish rights from any directed duties they entail, struggle to find some determinate kind for talk of rights to denote, a kind that is distinct from the values that ground the relevant duties. But the individualistic approach that I believe defines human rights can, even in its extended non-Hohfeldian form, arguably sidestep these worries. The extended approach, as sketched in the final two paragraphs of the section preceding the last one, maintains, in non-Hohfeldian fashion, that human rights include any case in which some proper feature *F* of a person *P* is of sufficient non-instrumental importance to justify some serious normative factor (including directed and undirected duties, and other normative considerations) protecting that feature; no special correlative duty is attached to each human right, on this view.

This approach, although encompassing positions (2) and (3) as well as (1), can avoid the particular worry outlined earlier for (2) and (3): the worry that rights so conceived will fail to involve the foregrounding of anyone in the reasoning of those encountering them, and hence will make no sense as things whose violation wrongs right-holders. The individualistic approach can evade this worry even in its extended non-Hohfeldian form, for on this approach the presence of a human right will always involve the foregrounding of a particular person: the *P* whose *F* is the justifying source of the relevant normative factors. Sometimes, on this approach, a human right will entail merely that certain goals ought to be pursued, and failure to pursue such goals will not qualify as a "violation" but simply as a failure to do all that one ought – or perhaps even simply as a failure to respond to all the reasons bearing on

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36 The term "bipolar" comes from Thompson 2004.

37 For rights involve more than just claims, privileges, powers or immunities. My power to get myself sent to prison for dangerous driving is not a right, nor is my claim that you thank me (i. e. your duty to me to thank me) for helping me cross the road. But rights are a subset of claims, privileges, powers, immunities and complex mixtures of these things. There is, in my view, no right that fails to fit the Hohfeldian structure – except, perhaps, human rights, for which read on.

one. But even then, there will necessarily be a sense that a particular person has been let down by such failure: the person whose F is the justifying source of the 'ought' or reason. So the individualistic approach generates a form of 'directedness' or foregrounding that gives human-right-holders special status even without the Hohfeldian structure – and hence even when it does not involve genuine Hohfeldian rights.

Alternative accounts of human rights, such as those which say that it is essential to human rights only that (ii) they are demandable by anyone or that (iii) their violation can justify international intervention, will, if extended in the non-Hohfeldian manner I have envisaged for the individualistic account, lack the individualistic account's resources to avoid the problem considered in the previous paragraph. For such accounts give human rights no way of foregrounding a particular individual other than as the terminus of a directed duty. There is nothing about an undirected duty's, goal's or reason's being demandable by everyone, or triggering international intervention, that can ensure that this undirected duty, goal or reason foregrounds a particular person in the way that its being individualistically justified ensures. (Indeed there seem to be examples of undirected duties, goals and reasons conformity with which is demandable by anyone but that foreground no particular person for the duty-, goal- or reason-bearing agent – I would include here our reasons to promote happiness in general and to respect beauty in general, to pursue important but instrumentally useless knowledge, and our undirected duty not to destroy distant barren planets; the latter also looks like something whose violation could (in situations where such destruction was possible) legitimately trigger international intervention.) Because individualistic justification, by contrast, necessarily foregrounds a particular person just as directed duties do,<sup>38</sup> it can thereby necessarily preserve a conception of human rights as having bearers, bearers who are let down when their human rights are not fulfilled, even when these 'rights' do not entail directed duties. The individualistic approach thus seems particularly well-suited to non-Hohfeldian extensions of human rights language.

How does the individualistic non-Hohfeldian extended conception of human rights individuate one human right from another? One quasi-

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38 Though this is not, of course, to claim that the two modes of foregrounding are identical. They are clearly not, for directed duties can be justified on non-individualistic grounds. To deny this is to return to Raz's erroneous general theory of rights.



Hohfeldian option is to say that any given normative factor that is individually justified – a particular directed duty, undirected duty, goal etc. – identifies a different human right. This suggestion is very distant from the spirit of those, like Nickel and Tasioulas, who support a non-Hohfeldian expansion of human rights; these theorists clearly favor the view that a given human right could ground a range of changing duties and (for Nickel) other factors. But the only alternative (unless one can find some other feature of human rights conceived in this way that enables their differentiation – and as I argued earlier, I do not see what this could be) is to individuate human rights by their grounds. On the individualistic non-Hohfeldian extended account, my human right to education will entail both a directed duty to educate me, borne by those wealthy enough and appropriately related to me so as to be allocated such a duty,<sup>39</sup> and a strong non-duty reason for my impoverished government to work towards educating me insofar as it can, along with various other normative factors. The individuation of this human right from other human rights will, on this approach, be done by appeal to the justifying value it protects: perhaps the value of my being educated. Alternatively, perhaps two or more fundamentally important features of me are each sufficient on their own individually to justify the same set of duties, reasons and other normative considerations relating to my education – such as the value of my gaining knowledge, and the value of my autonomy (which requires education); if so, we need not say that there are two human rights here (though we could say that); we can instead see the two grounding values with identical education-related normative implications as differentiating my human right to education from other human rights (of mine and others) with different grounding values that do not have exactly the same implications, even if they include some overlap. Thus even if it entails no directed duty, my human right to education will differ from my human right to liberty because of their differing justifying sources, which for each right might be one or many, sources which have (somewhat) differing implications in terms of duties and other normative factors.<sup>40</sup>

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39 The appropriate relation here might be specified by a “least-cost”, “contribution” or some other principle. See note 25 above.

40 And, of course, the individualism of the approach says that both such justificatory sources will have individualistic justificatory force, where this means that each is a value sufficiently important on its own to ground certain weighty duties, reasons and other normative factors independently of whether these things (duties, reasons, other factors) would serve other people.

Individuating human rights by their ground is not as costly in the case of human rights, when conceived as individualistically justified, as it is in the example of my right to park and my right to priority on the main road. The latter are clearly different rights despite their entirely shared justificatory source, and denying this seems absurd. But it is not clear that the blurring into one of what might initially have looked like several human rights with the same individualistic justificatory source need be a problem. Nor is it clear that the blurring of such rights with the value that grounds the duties associated with them is clearly a problem. Such blurring is, instead, rather natural when discussing human rights. The first blurring occurs when one slips, as if these were the same right, from reference to Joe's human right to education in general to reference to Joe's human right to be taught to write. The second blurring occurs when one slips from reference to either right to reference to the fundamental importance of Joe's being educated. Both slips are very common indeed. If the non-Hohfeldian individualistic approach is correct, this is to be expected, since the only way to individuate human rights is by the justificatory source of the duties and other normative factors associated with them. And, importantly, it does not seem like a big leap to accept this view, even if its details need further spelling out. (In particular, I have avoided discussing the relationship between the individuation, the identity and the existence of human rights, but this needs spelling out before we can fully assess the position.) It preserves the distinction between my human right to be educated and yours, of course, because the approach sees these as having differing grounds (the one grounded in features of me, the other in features of you). And it preserves the distinction between my human right to be educated and my human rights to liberty, to bodily integrity and so on. Where the blurring happens is where it feels right anyway – between things with the very same ground.

The extended non-Hohfeldian individualistic approach can perhaps also make sense of a form of the distinction between duties and other factors correlative to a human right and duties less immediately derived from it. For the approach will allow that the duties and other factors grounded in one individualistic justificatory source might generate new duties or other factors when taken in conjunction with the duties and other factors grounded in some other individualistic justificatory source. For example, let us say that Joe's need for an education grounds a powerful reason for Joe's government to do what it can to educate him, and Jill's need for an education grounds a similar reason for the

same government; enough individually grounded powerful reasons of this type could together entail that the government has a duty to start a school-building program. On its own, Joe's human right cannot generate this duty, but in conjunction with enough others it can. The powerful reasons (or, perhaps even directed duties to do something towards Joe's education) are here analogous to correlative duties in the Hohfeldian structure, while the duty to build schools is analogous to a secondary derived duty.

## Conclusion

I have suggested that an extended non-Hohfeldian individualistic account of human rights can avoid some of the difficulties attendant on abandoning Hohfeld's conception of rights: even without regarding every human right as defined by a relation to directed duties, it preserves the premise that human rights have bearers who are let down (or, in some sense, 'violated') when human rights are not respected, and it can replicate something like Hohfeld's distinction between primary correlative duties and secondary derived duties. It threatens to extinguish the distinction between human rights and their grounds, but this is perhaps not an enormous cost.

More importantly, something like this approach is maybe what we should expect if human rights are individually justified. For given that the individualistic justificatory structure allows some mimicking of Hohfeldian structures, it would probably be no surprise if language users had begun to extend the concept "human rights" to encompass other normative phenomena that were individually justified but not rights in the strict Hohfeldian sense. Indeed perhaps we should rather see two rival notions of foregrounding at work in our use of the language of rights: one captured by the Hohfeldian notion of a directed duty, a notion that can encompass rights that are not individually grounded, including such trivial rights as those in games and regulations, another captured by my extended Razian notion of the individualistic source of a serious normative requirement.

We might wonder, though, why we should bother with this complex new approach rather than sticking to Hohfeld. To my mind, it depends largely on our reaction to the fact that the Hohfeldian approach will require us – if we are to avoid Nickel's worry about farcicality – to say that citizens of impoverished nations hold no human right against

their governments to such goods as education or health care, but only to their governments working towards education. Human rights to the full important goods of education and health care might still be held against wealthy outsiders, but not against the relevant citizens' own governments. The individualistic extended non-Hohfeldian approach allows us to say that there are human rights to the full goods, held against the poor governments: it is just that such rights do not entail directed duties with the same content as the rights. (Instead, they can exist while entailing weaker directed duties or no directed duties at all but simply other powerful normative factors.) Is the value of saying this worth the cost of muddying the individuation of different human rights with the same grounds?<sup>41</sup>

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41 Many thanks to participants at an AHRC-funded workshop on human rights in the University of Stirling, for comments on some of the ideas presented here.

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