



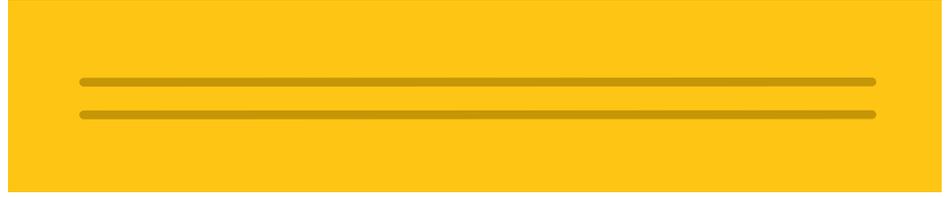
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# DISABILITY RIGHTS: CHALLENGES AND OPPORTUNITIES

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September 2020



**H**istorically, views on the causes of disability ranged from divine punishment, karma, or moral failing, to biological deficit in the post-Enlightenment era. Accordingly, disabled people were often regarded as objects of pity and charity, and later as appropriate recipients of medical treatment and welfare services.

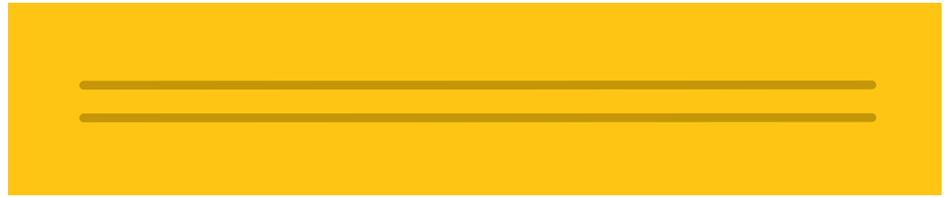
In recent decades, a social conceptualization of disability emerged, with the so called ‘social model’ of disability coming to the fore (Shakespeare 2014). On the social model, disability is defined as “the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities” (Union of the Physically Impaired Against Segregation 1975). This model mandates ameliorating the disadvantage facing disabled people through the removal of ‘social barriers’: practices and physical structures that exclude people with impairments from fully participating in social life. This social conceptualization of disability prompted a shift from a ‘welfare-approach’ to a ‘rights-approach’ in the social response to disability, manifested in disability rights legislation in many jurisdictions<sup>1</sup> and in the United Nations’ Convention on the Rights of Persons with Disabilities (CRPD).<sup>2</sup>

This note discusses the concept of disability rights, the advantages and possible challenges in framing issues relating to disability in terms of rights. Section I begins by explaining the structure of disability rights assertions. Section II then goes on to discuss some possible benefits in framing claims regarding disability in terms of rights, and its impact on disability related policies. Section III ends with highlighting two challenges that asserting disability rights may bring.

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<sup>1</sup> Prominent examples from the United States and the United Kingdom include the Americans with Disabilities Act 1990 (ADA) and the Disability Discrimination Act 1995 (later integrated into the Equality Act 2010), respectively.

<sup>2</sup> Adopted by the United Nations’ General Assembly in 2006, the Convention defined ‘disability’ as resulting from ‘the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’ (Preamble, paragraph e).



## I - The structure of disability rights

In common usage, most rights include some combination of distinct incidents of rights. As identified by Wesley Hohfeld (1919), these incidents of rights are privileges, claims, powers, and immunities. A ‘privilege’ to act in some way is the absence of the right holder’s duty not to act in this way, and it correlates with others having no-right vis-à-vis the right holder’s acting. And a ‘claim’ to act in some way includes the correlating duty of others toward the right holder’s acting, for example their duty not to interfere with one’s acting. The last two incidents involve making changes to one’s privileges and claims. Thus, a ‘power’ is one’s ability to alter another’s privileges, claims, and duties, and an ‘immunity’ is one’s freedom from another’s power to alter such normative relations (see also Wenar 2005).

To illustrate, consider some classic liberal rights such as free movement or speech. These rights include the right holder’s privilege to move or speak freely, coupled with a claim that others not interfere with the right holder’s moving or speaking. They also normally include the right holder’s power to waive others’ duties vis-à-vis one’s moving or speaking, for example by promising to stay put or silent. These classic liberal rights also typically involve others’ lack of normative power to allow interference with the right holder’s moving or speaking, so they include the right holder’s immunity.

The Hohfeldian framework sheds light on the structure of disability rights assertions, which can be roughly divided into two kinds. The first kind of assertions is that disabled people, despite their impairments, have the same rights as nondisabled people. To use Hohfeldian terms, assertions of this first kind involve the claim that disabled people have the same privileges as nondisabled people, they are not subject to special duties to act or not to act in certain ways due to their disability, and they are owed the same kinds of duties as nondisabled people. Furthermore, like nondisabled people, disability



rights assertions of this first kind typically involve the claim that disabled people have the power to alter the normative relations vis-à-vis their right, for example by waiving others' duties toward them, and that they are further immune to others' alterations.

The second kind of disability rights assertion is that disabled people have certain entitlements that nondisabled people do not have, by virtue of their disability. Using the Hohfeldian framework, assertions of this second kind involve the claim that disabled people are owed certain duties that nondisabled people are not owed; that disabled people may act in certain ways or obtain certain services and goods that nondisabled may not.

To illustrate the two kinds of disability rights' assertions consider disabled people's right to education, recognized in Article 24 of the CRPD. The first kind of disability rights assertion is found in paragraphs 2(a)-(b) prohibiting the exclusion of disabled people from the general education system on the basis of their disability. Against the backdrop of widespread denial of education services from disabled children, asserting the right to education in this context involves claiming that duties to provide education services to all are owed to people with disabilities as to nondisabled peers.<sup>3</sup> The second kind of disability rights assertion is found in the claim that disabled people are entitled to accommodations or adjustments in education services, as stipulated in paragraphs 2(c)-(e) and 3 of Article 24. It is based on the realization that for many children with disabilities, simply granting school admissions will not suffice in allowing them to obtain education, on an equal basis with others, because school infrastructure and ways of teaching pose barriers to their full participation. Accordingly, disabled people are distinctly entitled to certain adjustments in schools, from ramps or lifts to allow physical access to supportive staff and assistive devices to enable effective learning.

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<sup>3</sup> Analytically, the right to education also plausibly includes the claim that disabled children (like nondisabled peers) are not under any obligation to refrain from seeking such services. However, such a claim is less prominent in real life, plausibly given that the denial of education services rarely rests upon such assumptions about disabled people's duty to refrain from seeking education.



## II. Some advantages in framing claims about disability in terms of disability rights

**W**ith the notion of rights figuring prominently in legal, political, and moral discourse, there is an ongoing philosophical discussion on what makes rights such important moral concepts. The different views on this question shed light on the advantages of inviting rights discourse into the disability debate.

Joel Feinberg famously argues that rights are particularly important moral concepts for they bring people a sense of entitlement in what they are due. To demonstrate his point, Feinberg introduces a thought experiment. He portrays the imaginary world of ‘Nowheresville’, where people are benevolent, compassionate and sympathetic but no one (or hardly no one) has rights (Feinberg 1980). While Nowheresvillians are even subject to certain duties, for example duties of charity and duties to obey the law, none of their duties are conceived as correlating to other people’s rights. The main drawback in a world without rights, Feinberg holds, is that when people have no notion of rights, they “do not have a notion of what is their due”. Moreover, having rights makes claiming possible, and it is through the activity of claiming, Feinberg says, that people assert their dignity and self-respect.

Feinberg’s view about the value of rights explains how framing claims about disability in terms of disability rights empowers people with disabilities to claim what they are entitled to in practice. For example, recognizing disabled people’s right to education allows disabled people to grasp education services as their entitlements and to insist that these are provided to them in practice (see e.g. Malhotra and Rowe 2014).



Furthermore, according to Feinberg, invoking disability rights should allow disabled people to assert their dignity and self-respect through the activity of claiming. In real life, however, the experience of disabled people claiming their rights is not always as Feinberg describes. For some disabled people, insisting on their rights in education has the effect of increasing stress and lowering their sense of self-worth (Malhotra and Rowe 2014, 77). In other contexts, such as claiming disability allowance in the United States, the process of claiming is at times perceived as humiliating due to the need to downplay one's abilities and present oneself as being worse off than one genuinely feels (Dorfman 2015, 2017). Such accounts might serve as basis for changes in disability related policies in order to support disabled people in claiming their rights with dignity and self-respect. Yet the tension between theory and practice in this context can also serve as basis for revisiting Feinberg's account of the value of rights.

Another feature of rights is their normative force over other normative considerations. Ronald Dworkin (1984) famously used the metaphor of rights as 'trumps' to explain how rights, as a distinct element in political theory, override other considerations and undermine certain political decisions that seem to make the community as a whole better off. According to Dworkin, we invoke rights when we want to criticize a decision that is on its face beneficial, because it pays insufficient attention to some minority.

In the context of disability related policies, this feature of rights goes to the heart of why framing claims about disability in terms of disability rights is so valuable. Securing the rights of disabled people often involves considerable costs. For example, policies that secure disabled people's participation in social and economic lives typically impose costs on public and private service providers and employers. Accordingly, claims that the community as a whole is better off without such policies are not uncommon (although their merit is debatable). Framing claims about disability related policies in terms of disability rights is therefore particularly valuable because it invokes rights' normative force to suggest that other background considerations should give way.



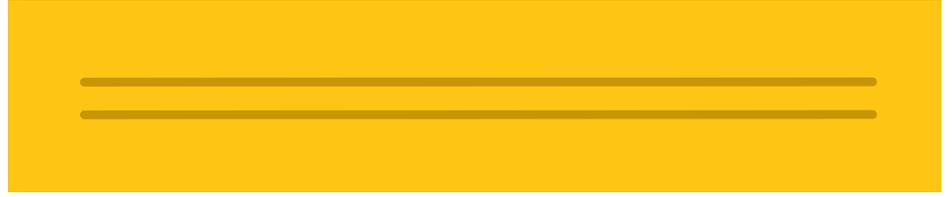
Consider for example the right of disabled people to live independently and being included in the community, recognized in Article 19 of the CRPD. The right includes not only disabled people’s liberty to choose their place of residence and with whom they live, but also their entitlement to access “a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community”.<sup>4</sup> Given that policies aiming to provide such services involve significant costs, it may be objected to on the grounds that they take up resources that would be better spent elsewhere, for the benefit of the entire community. However, if denying people with disabilities such services amounts to violating their rights, then other considerations must give way. Stated differently, asserting the rights of disabled people to live independently in the community provides strong reason for the allocation of resources for related implementing policies, overriding other considerations.

Importantly, this trumping power of rights does not imply that complying with duties that correlate to one’s rights as disabled takes priority to all other claims people may have in a society. In fact, securing rights gives rise to many urgent priorities facing a society at a given time. To illustrate, recall the landmark United States’ Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). There, the Court held that States’ available resources and the range of services provided to people with mental disabilities, should be taken into account when determining whether placing an individual in an institution—rather than in community settings—amounts to unlawful discrimination.

However, as Jonathan Wolff explains, while prioritizing urgent claims appears challenging in theory, in practice, identifying those who are ‘worst off’ in order to prioritize their claims is more straightforward (Wolff 2009). In the context of disability, the living conditions of some people with disabilities—especially those segregated in incarceration or hospitals, subject to forced

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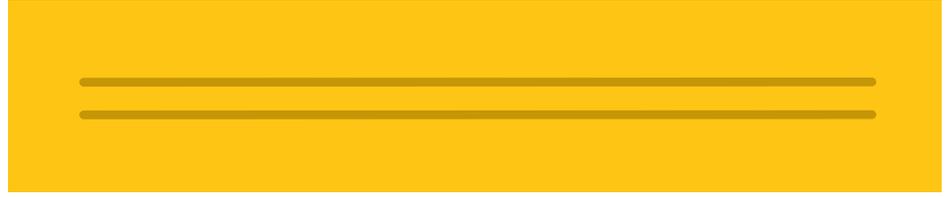
<sup>4</sup>Article 19, paragraphs (a)-(b).



treatment and denied legal capacity—warrant prioritizing securing their rights through complying with correlated duties. Whether they are the most urgent priorities in a society or not, the language of rights suggests that they override at least other non-rights considerations.

Finally, a crucial distinction between claims involving rights as opposed to other normative considerations such as charity and welfare turns on appropriate responses in case of failure to comply with related duties. Duties of charity are typically perceived as moral duties that do not correlate to anyone to receive charity (Waldron 1984). In such instances, violating the duty is a moral wrong, but it does not wrong anyone in particular. By contrast, when rights involving Hohfeldian claims are at play, some other is under a duty toward the right holder to act, and that failure to act is not merely doing a wrong but rather that it wrongs the right holder in particular. When a right has been violated, the right holder who has been wronged may demand redress in the form of compliance or compensation, and could justifiably hold a range of moral responses such as resentment, blame, or forgiveness. If some wrong has been committed, but no right has been violated, no one in particular is entitled to demand compliance or compensation, nor is someone in particular justified in resenting, blaming or forgiving the wrongdoer.

Accordingly, framing claims about disability as in terms of disability rights opens up the possibility of certain responses from disabled people in the case of failure to comply with duties toward them, which are inappropriate when there is no right at play. Given that notions of charity and welfare underpinned the social response to disability in the past, this feature of rights marks a significant change with practical implications. Specifically, rather than merely setting goals to address the disadvantage facing disabled people, policies based on disability rights recognize disabled people's claim to redress in case of violation. For example, disability related policies in education not only involve setting goals of inclusion and equal opportunities for disabled pupils, but they also recognize disabled pupils' right to demand compliance and, at times, compensation in case discrimination on the basis of disability or failure to provide reasonable accommodations in the delivery of education services.

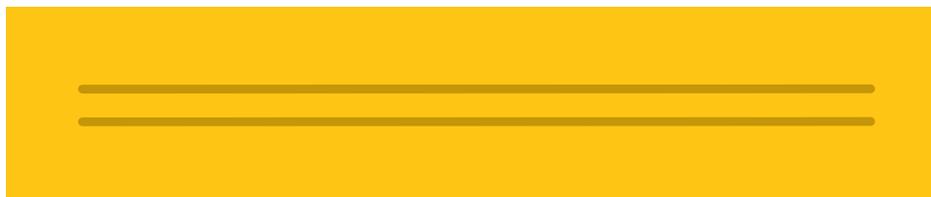


### III. Two challenges in framing claims about disability in terms of disability rights

To conclude this note, this third section explores two challenges that asserting disability rights gives rise to: the first revolves around delineating who holds disability rights, and the second involves the nature and scope of duties that correlate to disability rights.

One key challenge arising in the context of disability rights assertion concerns the fundamental question regarding the definition of ‘disability’. The term ‘disability’ was originally used to describe a limitation on one’s ability to perform a legal act, such as voting or forming contracts, that was not tied to impairments (Silver 2009). At the time, people with impairments were classified not as a group, but rather in accordance with their individual conditions, such as deaf, blind, or paraplegic. The concept of ‘disability’ outgrew this original meaning predominantly due to the legislative need to find a suitable term to delimit entitlements to state benefits, such as payment of supplementary income. Ever since, the link between the term disability and the rights that people classified as disabled hold has continued to evolve to the point that the category of disability now delimits who holds certain rights. Yet, ‘disability’ still has no universally accepted meaning. Instead, the concept of ‘disability’ generates much debate and controversy, plausibly due to the diversity among people classified as disabled and their range of experiences, which do not seem to share a single unifying criterion, as well as the various usages of ‘disability’ in policy contexts.

In practice, the challenge in defining ‘disability’ proves crucial for implementing disability related policies, especially disability rights legislation. For example, the ADA defines ‘disability’ as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;



(B) a record of such an impairment; or (C) being regarded as having such an impairment” (emphasis added).<sup>5</sup> Over the years, federal courts in the United States interpreted this definition narrowly, finding that most claimants did not qualify as disabled under the Act and therefore were not entitled to antidiscrimination protection under the Act. This jurisprudence became known as the ADA ‘backlash’ (Krieger 2003). In 2008, Congress passed the ADA Amendments Act (ADAAA), with the stated purpose of restoring its original ADA intent by superseding the Supreme Court’s narrow interpretation of ‘disability’ and adopting a broader construction of the term.<sup>6</sup> And indeed, an analysis of cases after the ADAAA came into force suggests that more courts have since found that plaintiffs have a disability, or at least that whether or not they have a disability is a matter for trial (Buonocore Porter 2014). Yet the debate on who is—or should be—entitled to ADA rights is on-going. Some even argue that all work-capable members of the general community should be entitled to ADA mandated accommodations in employment, regardless of their disability status, provided that such accommodations would be effective in enabling them to perform the essential functions of the job and thus remain employed (Stein et al. 2014).

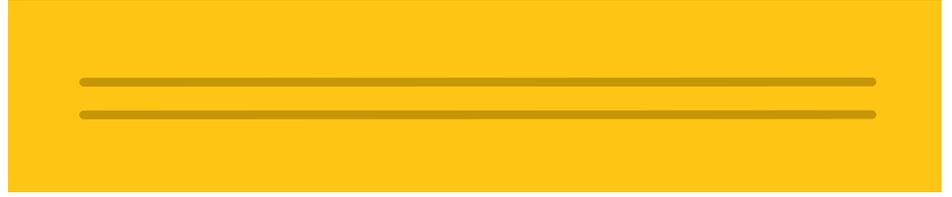
A second challenge in claiming disability rights has to do with what these rights entail, namely: what duties they correlate to and who bears them. As discussed above, rights involving Hohfeldian claims correlate to others’ duties of action or forbearance. Asserting disability rights therefore involves claiming that some other is subject to correlative duties toward disabled people. Yet, specifying who duty bearers are and exactly what correlative duties entail is not always straightforward.

Notably, the challenge pertaining to duties that correlate to rights has implications for our conceptualization of disability rights. For example, discussing

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<sup>5</sup> Sec. 12102(1).

<sup>6</sup> Sec. 12101 note: Findings and Purposes of the ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553. (Americans with Disabilities Act n.d.)



the concept of human rights, Onora O’Neill (2005) points out that rights are distinct from noble aspirations set out to help mobilize support and energy to advance some cause, in that rights are “seen as one side of a normative relationship between right-holders and obligation-bearers” (429-30). This, O’Neill explains, poses a problem for rights to goods and services, where no one is subject to a duty to provide goods and services until a duty has been allocated by some institution (such as administrative agency or legislature). Accordingly, it seems that such rights are not universal human rights after all, for that would require us to jettison our entire normative understanding of rights. And by the same token, if disability rights to goods and services specified in the CRPD do not correlate to pre-institutional obligations, then perhaps these should not be designated as universal human rights either.

At times, specifying the duties that correlate to disability rights also poses a practical challenge. The Hohfeldian framework of rights is again instructive in this regard, demonstrating that many disability rights assertions involve claims and privileges that nondisabled people’s rights do not involve. Thus, the task of specifying which duties correlate to particular disability rights requires a case by case analysis.

Take for example the rights of disabled people to accommodations in the workplace, which has become a common feature of disability antidiscrimination legislation.<sup>7</sup> Familiar questions in this context revolve around what financial costs are reasonable for employers to endure in changing physical structures in the workplace. Other interesting questions arise from cases involving claimants with mental disorders; such as to what extent accommodating them in the workplace should include tolerating their otherwise unacceptable and possibly harmful behaviour (Carle 2017; Emens 2006; Timmons 2005).

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<sup>7</sup> See e.g., CRPD Article 27, paragraph 1(i); the ADA 42 U.S.C. Subchapter I, Sec. 12112 (b)(5); The Equality Act, Schedule 8: Work: Reasonable adjustments.



## Conclusion

This note focused on disability rights, exploring the structure of disability rights' assertions, the advantages in framing claims relating to disability in terms of rights, and two challenges that asserting disability rights may involve. Situated at the intersection of theory and practice, this short note can hopefully serve both practitioners and theorists working in the area of disability rights. First, the thought that asserting disability rights provides people with a sense of what is their due, gives them a 'trumping card' over other background considerations, and entitles them to specific kinds of responses in case of failure to comply with correlative duties, both explains and underlines the prominence of rights in disability related advocacy, prompted by the social model of disability. At the same time, spelling out the possible challenges that may arise in the context of disability rights, revolving around delineating the category of disability and specifying correlative duties, presents theoretical challenges which practitioners also face in the design and implementation of disability related policies. Finally, thinking through the complexities involved in asserting disability rights invites rethinking some familiar conceptions about rights, which in turn links to the ongoing philosophical project of understanding the nature of rights and how they function.



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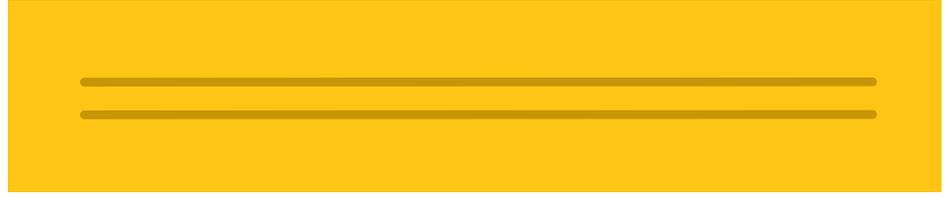
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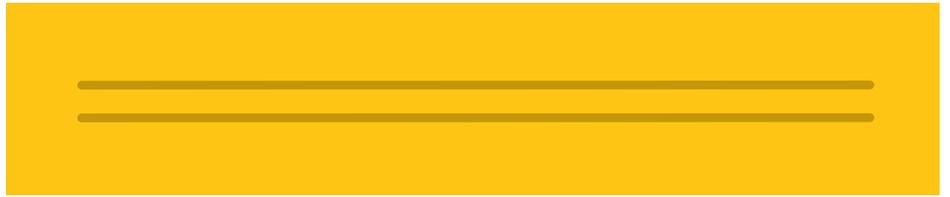
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