Rights Without Trimmings

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To participate in an intellectual dispute, one must explicitly or implicitly define its terms; and, by defining the terms of the dispute, one will already have begun one's participation therein. This essay, which joins the debate between the Will Theory (or 'Choice Theory') and the Interest Theory (or 'Benefit Theory') of rights, will seek to define the terms of that debate precisely and expressly. In doing so, the essay will prepare the way for its verdict that the Interest Theory—in a somewhat modified form—is superior to the Will Theory.

Before endeavouring to set forth directly the points of contention between the Interest Theory and the Will Theory, this essay discusses at length the analytical framework of jural relations that was devised by the American legal theorist Wesley Hohfeld. Hohfeld's work has received wide attention since the second decade of the twentieth century, but it has often met with misguided criticisms and incorrect applications. We are therefore well advised to take a careful look at his analytical scheme. Though Hohfeld's work is not entirely beyond reproach, it offers a matrix of conceptual distinctions that is elegant, rigorous, and subtle. His distinctions are invaluable for anyone trying to make an informed assessment of the Interest Theory/Will Theory debate. While Hohfeld's analytical framework is strictly neutral in that debate (for reasons which will later become apparent), it enables the contenders in the debate to achieve exactitude when stating their differences. It is a framework that significantly informs each of the essays in this book.

1 Setting the Hohfeldian Table

Hohfeld distinguished four sets of legal relations, comprising eight legal positions.[1] His basic table of relations, slightly modified, is as follows:

[1] The main essay by Hohfeld on which I am drawing is 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,' in his *Fundamental Legal Conceptions*

Right	Liberty	Power	Immunity
Duty	No-right	Liability	Disability

Each of the columns in the table consists of a pair of 'jural correlatives': namely, two legal positions that entail each other. By contrast, the diagonal pairs in the first two columns ('right'/'no-right' and 'duty'/'liberty') and the diagonal pairs in the last two columns ('power'/'disability' and 'liability'/'immunity') each consist of 'jural contradictories': namely, two legal positions that negate each other.

Hohfeld wrote about legal relations, as opposed to strictly moral relations. Hence, my exposition below will concentrate chiefly on legal entitlements and will make few references to starkly moral entitlements. None the less, virtually every aspect of Hohfeld's analytical scheme applies as well, *mutatis mutandis*, to the structuring of moral relationships. (Only two differences are worth even a brief mention here. First, the distinction between genuine

as Applied in Judicial Reasoning (New Haven: Yale University Press, 1923) (W Cook, ed) [hereinafter cited as *FLC*], 23–64. Also important for my purposes is his 'Fundamental Legal Conceptions as Applied in Judicial Reasoning,' in *FLC*, 65–114. I have departed from Hohfeld on two points of terminology. First, I have substituted 'liberty' for 'privilege'. Notwithstanding Hohfeld's arguments to the contrary in *FLC*, 44–9, the latter term strikes me (and many other analysts) as highly misleading. Second, I have substituted 'contradiction' or 'negation' for 'opposite'. As has been recognized since the 1920s, Hohfeld's analyses define jural contradictories rather than jural opposites. (To avert misunderstandings, I should here include a few clarificatory words in anticipation of the subsequent junctures where I write of 'abstaining' or 'forbearing' or 'refraining' from particular actions. As construed in this essay, abstaining from ϕ is equivalent to not doing ϕ. That is, abstaining from ϕ is the negation or contradiction of doing ϕ. As glossed here, an abstention *can* of course involve a refusal to take an opportunity, but it does not *have* to involve such a refusal; it can arise as well from the absence of any opportunity. Even if one has not had any realistic chance to do ϕ, and therefore even if one has not consciously kept oneself from doing it, one has abstained or refrained or forborne from ϕ by simply not doing it.)

My resistance to Hohfeld's use of 'opposite' does not lead me to endorse the criticisms of his analytical scheme that are levelled in Andrew Halpin, 'Hohfeld's Conceptions: From Eight to Two', 44 Cambridge LJ 435 (1985). For some other highly unsatisfactory critiques of Hohfeld, see Roy Stone, 'An Analysis of Hohfeld', 48 Minnesota L Rev 313 (1963); and Arthur Jacobson, 'Hegel's Legal Plenum', 10 Cardozo L Rev 877 (1989). More sophisticated than these other critical articles, but just as unhelpfully confused, is Alan Anderson, 'Logic, Norms, and Roles', 4 *Ratio* 36 (1962). Anderson attributes to Hohfeld the indefensible thesis that 'x is privileged [ie, is at liberty] to do p if and only if x has no duty to do not-p' (ibid, 48). In fact, the perfectly sound thesis to which Hohfeld subscribed was that x has a liberty to do p if and only if x has no duty not to do p. Anderson's article is aptly criticized in Philip Mullock, 'The Hohfeldian Jural Opposite', 13 *Ratio* 158 (1971).

entitlements and nominal entitlements—a distinction that will surface at several junctures in this essay—is of uncertain application in the domain of morality. Second, the potential for conflicts between duties is not as uncontroversially demonstrable in the domain of morality as in the domain of law.)

An Exposition of the Jural Relations

Being endowed with a legal **right** (which Hohfeld also labelled as a **claim**) consists in being legally protected against someone else's interference or against someone else's withholding of assistance or remuneration, in regard to a certain action or a certain state of affairs. The person who is required to abstain from interference or to render assistance or remuneration is under a **duty** to behave so. A right or claim, then, is the legal position created through the imposing of a duty on someone else. If a person X has a right to be free from any interference by a person Y with X's project P, then Y has a duty to abstain from interfering with P; conversely, if Y has a duty to abstain from interfering with P, then X has a right to be free from any such interference by Y.

A genuine right or claim is enforceable. (Unlike a purely moral claim—which is also enforceable in certain ways—a genuine legal claim is enforceable through the mobilizing of governmental coercion, if necessary.) None the less, as will become clearer shortly, the power to seek enforcement does not necessarily lie within the discretion of the person who has the claim. So long as a claim is duly enforceable, its status as a genuine Hohfeldian claim is unaffected by the precise location of the power to seek enforcement; that power may be held by the claim-holder, or it may be held by someone acting as a fiduciary on behalf of the claim-holder, or it may be held by a governmental agency.

Each right or claim is held by a specific person or group of persons against another specific person or group of persons. However, each right can exactly parallel any number of other rights held by the same person in regard to the same activity or state of affairs.[2]

[2] Hohfeld insisted that a right held 'against the world' is really a set of indefinitely numerous rights, each of which is held against a particular person. See *FLC* (n 1 above), 91–6. For a colourful presentation of Hohfeld's position on this matter, see Karl Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1951), 98. For two recent endorsements of Hohfeld's position, see Pavlos Eleftheriadis, 'The Analysis

Suppose, for example, that X is a typical landowner. He will not only have a right to be free from any encroachments on his land by Y but will also have a right to be free from any encroachments by every other person to whose presence he has not consented. (In the arsenal of X's legal entitlements, some of his other rights might not be accompanied by indefinitely numerous parallel rights or indeed by any parallel rights. For instance, if X has formed a contract with Y and has not formed a similar contract with anyone else, then X's contractual right against Y is *sui generis* in the assemblage of his legal entitlements.)

To have a **liberty** to engage in a certain action is to be free from any duty to eschew the action; likewise, to have a liberty to abstain from a certain action is to be free from any duty to undertake the action. Like any right, each liberty is held by a specific person or group of persons against another specific person or group of persons. The person against whom the liberty is held has a **no-right** concerning the activity or state of affairs to which the liberty pertains. None the less, although that person has no *right* to the halting of the activity or state of affairs, he himself may well have a *liberty* to interfere. He cannot successfully have recourse to the mechanisms of public governance, but he can have recourse to his own devices (within the confines imposed by the liberty-holder's rights).

of Property Rights', 16 Oxford J of Legal Studies 31, 43–53 (1996); Christopher Wellman, 'On Conflicts Between Rights', 14 Law and Philosophy 271, 278 (1995). In the present essay, by and large, I do not challenge Hohfeld's view. (And I certainly disagree with Joseph Raz, who dismissively proclaims that 'Hohfeld's insistence that every right is a relation between no more than two persons is completely unfounded and makes the explanation of rights *in rem* impossible, as has often been noted.' Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1980) (2nd edn), 180.) None the less, I see no harm whatsoever in the view which Hohfeld vigorously rejected—ie, the view that a right held 'against the world' is a single entitlement with indefinitely numerous applications, each of which brings a particular person within the sway of the duty that is correlative to the right. Though this latter view is not always superior to the view taken by Hohfeld, it often is indeed preferable. *Pace* Hohfeld, it is fully consistent with the defined correlativity of rights and duties; and, for some analytical purposes, a characterization of a right-in-rem as an abiding entitlement with continually shifting applications can be clearly more pertinent than a characterization of such a right as a bundle of continually shifting entitlements.

I should add that I agree with Max Radin's observation that the crucial feature of a right held 'against the world' is not the *numerousness* of the parallel rights, but the *indefiniteness* of their number. Hohfeld did not distinguish sufficiently between those two features. See Max Radin, 'A Restatement of Hohfeld', 51 Harvard L Rev 1141, 1155–6 (1938).

Consider an example. Suppose that Z enjoys a liberty, against Y, to express opinions about various public matters. Y therefore cannot correctly maintain that his rights are violated by Z's pronouncements on those matters. As a consequence, there will not warrantedly occur any governmental intervention for the purpose of upholding Y's rights by suppressing Z's speech. Yet, although Y cannot rely on the coercive mechanisms of government to stop Z from speaking, he can permissibly do his utmost himself to interfere with Z's voicing of opinions, so long as he does not violate any of Z's rights (such as the right to be free from physical assaults). Perhaps Y will contort his face in ways that cause Z to laugh helplessly and thus to stop speaking. Or perhaps Y will make so much noise that he drowns out Z's words and thereby causes the frustrated Z to desist from further pronouncements. Whatever be the exact methods of interference, Y himself enjoys a liberty—within the constraints imposed on Y by Z's rights—to impede the activity of speaking which Z is at liberty to undertake. (Of course, if Z has a right to be free from any such obstructive behavior by Y, then Y will owe Z a duty to refrain from that behavior and will accordingly not enjoy a liberty to engage in it.)

As the example in the last paragraph suggests, acts or omissions that are based on liberties can be protected quite extensively even though the liberties do not themselves place restrictions on anyone. Not only will a liberty-to-do-ϕ combine sometimes with a right-to-be-free-from-interference-with-the-doing-of-ϕ specifically, but it often combines with other rights—such as the right to be free from physical assaults—which effectively shield the doing of ϕ, albeit perhaps imperfectly. Though Z's liberty to consume her dinner does not itself require Y to abstain from impeding her consumption, her right to be free from bodily attacks and her right to be free from the theft of her belongings (and also her right to be free from severe emotional distress) will very likely make the impeding of her consumption quite difficult. Much the same can be said about Z's liberty to donate some of her money to a charity. Y is free to try to dissuade Z from handing over the money, but the laws against theft and assault and defamation confer rights on Z and on the charity which substantially limit Y's freedom to prevent the transfer of funds. In these examples and in countless other possible situations, one's actions or inactions grounded in liberties are effectively protected—to a considerable extent—by rights that do not pertain

specifically to those actions or inactions. Indeed, in almost every situation outside the Hobbesian state of nature, conduct in accordance with a liberty will receive at least a modicum of protection through a person's basic rights.[3]

The shielding effect just mentioned is only one aspect of the relationship between the right/duty axis and the liberty/no-right axis; there are also some important formal or structural aspects. One such dimension that has already been indicated is the contradictoriness between the diagonal poles of the two axes. If Y has a right to be free from Z's interference with Y's project ϕ, then Y does

[3] This point has been widely recognized in the literature on rights. For some important discussions, see John Finnis, 'Some Professorial Fallacies About Rights', 4 Adelaide L Rev 377, 378–9 (1972); HLA Hart, 'Legal Rights', in *Essays on Bentham* (Oxford: Oxford University Press, 1982) [hereinafter cited as Hart, 'Legal Rights'], 162, 171–3; Alf Ross, *On Law and Justice* (London: Stevens & Sons, 1958) [hereinafter cited as Ross, *Justice*], 165–6; Alf Ross, *Directives and Norms* (London: Routledge & Kegan Paul, 1968) [hereinafter cited as Ross, *Directives*], 129–30; Nigel Simmonds, 'The Analytical Foundations of Justice', 54 Cambridge LJ 306, 322–31 (1995); and Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994) [hereinafter cited as Steiner, *Rights*], 75–6, 86–101 *passim*. For an untenable view that liberties are reducible to the rights which protect the exercise of them, see Andrew Halpin (n 1 above). For an equally unsustainable view that liberties entail duties of non-interference, see Michael Freeden, *Rights* (Milton Keynes: Open University Press, 1991), 44, 77–8, 79. See also Richard Flathman, *The Practice of Rights* (Cambridge: Cambridge University Press, 1976) [hereinafter cited as Flathman, *Practice*], 89–90, 91. For some more accurate views of right/duty and liberty/no-right relationships, see R M Hare, *Moral Thinking* (Oxford: Clarendon Press, 1981), 149–50; and Jonathan Harrison, *Our Knowledge of Right and Wrong* (London: George Allen & Unwin, 1971), 363. An accurate view is also taken (albeit not for entirely correct reasons) in Theodore Benditt, *Law as Rule and Principle* (Hassocks: Harvester Press, 1978), 162–4.

Of course, if the exercise of a liberty-to-do-ϕ is protected by a perimeter of rights so sweepingly that all physically possible ways of interfering with the doing of ϕ are outlawed, then we can aptly say that a right-against-interference-with-the-doing-of-ϕ exists—just as much as it would exist if it had been created *directly* (or by logical implication) via one or more authoritative enactments or decisions. This sort of situation will not very often arise, since a perimeter of rights will usually fall short of debarring all physically possible ways of interfering with the exercise of some liberty. Nonetheless, when X's doing of ϕ does indeed enjoy comprehensive legal protection by virtue of the cumulative shielding effects of some of X's rights, we should agree that X holds a right-against-interference-with-the-doing-of-ϕ. My arguments throughout this essay do not need to distinguish between rights created in this indirect manner and rights created directly (or by logical implication) under the terms of enactments or judgments. (Incidentally, for an otherwise sophisticated analysis which gives insufficient attention to the fact that legal rights (as opposed to legal liberties) must be based directly or indirectly on a source or set of sources, see Stephen Hudson and Douglas Husak, 'Legal Rights: How Useful is Hohfeldian Analysis?' 37 *Philosophical Studies* 45 (1980). For an apt rejoinder, see Thomas Perry, 'Reply in Defense of Hohfeld', 37 *Philosophical Studies* 203 (1980).)

not have a no-right in regard to Z's interference. Likewise, if Y has no right to be free from Z's interference, then, obviously, he does not have a right of that sort against Z. More subtle is the contradictoriness between duties and liberties. As Hohfeld was fully aware, the contradiction lies not between a duty to do ϕ and a liberty to do ϕ but between a duty to do ϕ and a liberty to *abstain from* ϕ—or between a duty to abstain from ϕ and a liberty to do ϕ.[4] If Y has a duty to abstain from interfering with Z's project ϕ, then Y does not have a liberty to interfere. Similarly, if Y has a duty to render certain assistance to Z for the doing of ϕ, then Y does not have a liberty to refuse to give such assistance. Conversely, if Y does have a liberty to interfere with Z's doing of ϕ, then Y does not have a duty to refrain from interfering; and if Y does have a liberty to withhold assistance from Z, then Y does not have a duty to provide the assistance.

An important contrast between Hohfeldian rights and liberties, often overlooked because of everyday patterns of discourse, is that rights must be specified by reference to the actions of the people who bear the correlative duties—rather than to the actions of the people who hold the rights—whereas liberties must be specified by reference to the actions of the people who hold the liberties. Any right of Y against Z concerning ϕ will mean that Z has to forbear from interfering with ϕ or has to assist with ϕ in some way. In itself, the right does not directly specify how Y must or should behave; it specifies only the conduct which Z is duty-bound to undertake (or the conduct which Z is duty-bound to eschew). Hence, our ordinary

[4] See *FLC* (n 1 above), 39. In spite of having emphasized this point—as is recognized in Benditt (n 3 above), 160; Stig Kanger and Helle Kanger, 'Rights and Parliamentarism', 32 *Theoria* 85, 102–3 (1966); and Thomas Perry, 'A Paradigm of Philosophy: Hohfeld on Legal Rights', 14 *American Philosophical Quarterly* 41, 42 (1977)—Hohfeld has been reprimanded for failing to notice it. See, eg, RWM Dias, *Jurisprudence* (London: Butterworths, 1976) (4th edn), 40; Frederic Fitch, 'A Revision of Hohfeld's Theory of Legal Concepts', 10 *Logique et Analyse* 269, 270–1 (1967); J W Harris, *Legal Philosophies* (London: Butterworths, 1980), 81; Glanville Williams, 'The Concept of Legal Liberty', 56 Columbia L Rev 1129, 1135–9 (1956). (For an extreme version of this gratuitous reprimand, see Andrew Halpin (n 1 above).) Still, we are doubtless warranted in paying attention to the general point that lies behind the reprimands, since some analysts have neglected it. See, eg, Flathman, *Practice* (n 3 above), 38–9: 'Hohfeld's analysis of rights is cast largely in terms of what he called the *opposites* [ie, contradictions] and *correlates* of each of the main uses of the concept that he identified. The *opposite* [ie, the contradiction] of a right refers to that which is the opposite of what A has if he has a right in a particular sense. In the case of liberties the opposite is a duty; the opposite of A's having a liberty to do X is for him to have a duty to do X.' (Emphases in original.)

ways of speaking about rights as entitlements to do various things are loose and non-Hohfeldian. As Glanville Williams has remarked: 'No one ever has a right to do something; he only has a right that some one else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another.'[5] Though the urge to talk about someone's right to do something is probably irrepressible even among analysts of Hohfeld, we should recognize that such talk is in fact referring to an entitlement which requires that a *duty-bearer* forgo interference or afford assistance or provide remuneration.

A liberty, by contrast, specifies some behavior in which the *liberty-holder* is free to engage (or behavior which the liberty-holder is free to avoid). From our knowledge that Y has a liberty against Z to do ϕ, we indeed know something about the conduct of Y himself; we know that, at least as far as Z is concerned, Y is legally or morally free—though perhaps not physically able—to do ϕ. At the same time, the liberty held by Y against Z does not in itself establish how Z ought to behave. Simply from our knowledge of such a liberty, we cannot yet know if Z is legally or morally free to interfere with Y's doing of ϕ. Nor, of course, do we yet know if Z is legally or morally required to assist Y in the doing of ϕ. The content of Y's liberty against Z stipulates what Y is allowed to do, not what Z is required or permitted to do.

One of the most important features of the relationship between rights and liberties is the absence of any entailment between them. A right to do ϕ—that is, a right to be free from interference with the doing of ϕ, or a right to be assisted in the doing of ϕ—will not entail a liberty to do ϕ and is not entailed by such a liberty. Someone can have a right to be free from interference with the carrying out of some act which she is not at liberty to perform, and someone can be at liberty to carry out some act even though she is not entitled to be free from manifold obstacles that prevent her from performing the act successfully. The latter of the two points just mentioned, the point that a liberty to do ϕ does not entail a right to be free from interference with the doing of ϕ, is quite straightforward and has

[5] Glanville Williams (n 4 above), 1145. For similar insights, see John Finnis (n 3 above), 380; LW Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987) [hereinafter cited as *MFR*], 25. Such insights are unfortunately obscured in Rex Martin, *A System of Rights* (Oxford: Clarendon Press, 1993) [hereinafter cited as Martin, *System*], 40–50.

already been touched upon. In the Hobbesian state of nature, no one has any rights to non-interference even though everyone has a liberty to do all that is necessary for survival. In any less bizarre situation as well, we find that a liberty to do ϕ cannot per se entail a right which would demand that no interference with ϕ should occur. Think, for example, of a merchant who is free—within the confines of antitrust laws, anti-fraud laws, and the like—to outperform his competitors and thus to take business away from them. Although the competitors are not entitled to be shielded from the merchant's permissible striving, they very likely do not have any duties to refrain from selling their own wares expeditiously (within the confines of the aforementioned laws). If each merchant has a liberty to peddle his goods rapidly, then each has no entitlement to be insulated from the other merchants' similar practices which sap the efficacy of his own endeavors. Each has a liberty without having a cognate right.

Less easily grasped than the absence of entailment between liberties and rights is the absence of entailment between rights and liberties. Quite plainly, a legal or moral liberty to do ϕ does not entail a legal or moral right to be unimpeded in the doing of ϕ; equally surely, but less plainly, a legal or moral right to be unimpeded in the doing of ϕ does not entail a legal or moral liberty to do ϕ. Someone can have a right to be unobstructed in the performance of an activity which she is not allowed to perform. In order to see this point clearly, we should look at an example more elaborate than the ones offered so far.

Suppose that a huge factory begins to operate along the shore of a lake. Noxious discharges from the factory contaminate the lake's waters so badly that the fishermen who once earned their livelihood on the lake are forced out of business. As effluents continue to spew into the once vibrant body of water, the fishermen sue the factory's owner for his violation of their right to non-interference with the plying of their trade. The court holds that the fishermen should indeed be awarded damages for the fouling of the lake and for the consequent loss of their livelihood. (Most likely the damages are in the form of a lump-sum payment, but they can also be in the form of year-to-year payments. Note that the granting of an injunction against the factory would introduce certain complications into this example but would not alter its basic point at all.) None the less, despite the compensation to the fishermen for the factory owner's

breach of his duty to abstain from spoiling the lake and their livelihood, they remain disgruntled. They make their way to the factory's outlet pipes, where they manage to occlude the pipes and thus force a temporary shut-down of the factory's operations. Once again the parties to the dispute appear in court, but now the factory owner sues the fishermen for their obstruction of his outlets which has caused extensive interference with the running of his business. The court now holds that the factory owner should be awarded damages for the fishermen's breach of their duty to abstain from interfering with the normal operations of his factory. Albeit the factory owner does not have a liberty to emit large quantities of toxic substances into the lake, he has a right to be unimpeded in the discharge of just such emissions. (Incidentally, nothing in this example hinges on the order in which the lawsuits are brought. Whether the fishermen are the first to sue or the first to be sued, the point of this example will stand.)

In the scenario just sketched, the factory owner has an obligation to abstain from polluting the lake but also has a right to be unhindered in his pollution. If we were to adopt the loose 'right to do' phrasing of which Glanville Williams disapproved, we could say that the factory owner has a right to commit a wrong—or a right to undertake what he is not permitted to undertake. If one opts instead for more accurate but less exciting terminology, one will say that the factory owner has a right to be free from interference with his perpetration of a wrong. His enjoyment of a right to be unobstructed in his processes of manufacturing does not entail his enjoyment of a liberty to carry on the processes that are protected against obstruction. (Note that the focus of my example—its focus on (1) a right to be free from interference with a certain activity and (2) a (non-existent) liberty to engage in the same activity—is quite different from the focus of the following remarks by Joseph Singer: '[R]ights do not imply privileges [ie, liberties]. A's right to keep trespassers off her land does not necessarily imply a privilege in A to use the land. Thus one might conceive of a remainderperson who has no liberty to enter the land but retains a right to keep trespassers off.'[6] We should hardly be surprised that the right and the liberty

[6] Joseph Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld', (1982) Wisconsin L Rev 975, 988. For a fine critique of Ronald Dworkin that is broadly similar to my own analysis of the fishermen and the factory (though very different in its specifics), see Finnis (n 3 above), 382–4. See also Benditt

discussed by Singer are not connected in any relationship of entailment, since they have different contents. The right is a right to be free from the encroachments of interlopers, whereas the liberty is a liberty to enter the land from which the interlopers are barred. Even a *liberty* to keep trespassers out would not entail, or be entailed by, a liberty to enter the land oneself. Hence, the remarks by Singer are correct but glib. What he could and should have demonstrated—but what he clearly has not demonstrated—is that one's right to be free from interference with one's entry onto some land does not entail one's liberty to enter the land.)

Also in need of highlighting here is the absence of entailment between *duties* and liberties. In an extremely sophisticated discussion of Hohfeld, L. W. Sumner errs when he proclaims that

(n 3 above), 162–3; Theodore Benditt, *Rights* (Totowa: Rowman & Littlefield, 1982), 9, 24–5; Duncan Kennedy and Frank Michelman, 'Are Property and Contract Efficient?' 8 Hofstra L Rev 711, 752–3 (1980); Nigel Simmonds, 'Epstein's Theory of Strict Tort Liability', 51 Cambridge L J 113, 135 (1992); Jeremy Waldron, *Liberal Rights* (Cambridge: Cambridge University Press, 1993), 73–6. For an example of the position that is refuted by my analysis, see Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973) [hereinafter cited as Feinberg, *Social Philosophy*], 58: 'One can have a liberty which is not also a right, but one cannot have a right which is not also a liberty, for rights can be understood to contain liberties as components. If I have a right to do *X*, then I cannot also have a duty to refrain from doing *X*. ... Hence, if I have a right to do *X*, I must also be at liberty to do *X*'. See also Alan White, *Rights* (Oxford: Clarendon Press, 1984) [hereinafter cited as White, *Rights*], 59: '[T]he presence of a duty (or obligation) not to V implies the absence of a right to V'. For a subtle variant of the same error, see Wellman (n 2 above), 285. (Wellman wrongly maintains that the defendant in *Vincent v Lake Erie Transp Co*, 10 *Minn* 456, 124 *NW* 221 (1910), had a liberty to tie his boat to someone else's dock during a storm. In fact, the boat owner had a duty to abstain from using the dock and a right not to be prevented from using it.) For yet another variant of this *faux pas*, see Eleftheriadis (n 2 above), 40–1, where we are incorrectly told that one's retention of absolute rights against interference with one's use of some asset would preclude the retention of such rights by anyone else in any other asset.

I should observe, incidentally, that my example of the fishermen and the factory can be redescribed in ways that would remove the parallelism between the content of the factory owner's duty and the content of his right. I have presented the example in order to show that the factory owner holds a right-against-interference-with-his-polluting-of-the-lake and also bears a duty-not-to-pollute-the-lake. Either the right or the duty could be recharacterized so as to eliminate the precise homology between their contents. None the less, given that every set of circumstances can be accurately described in myriad ways, and given that any other appropriate ways of characterizing the situation of the fishermen and the factory would be consistent with my own characterization, the potential for redescriptions of that situation is utterly harmless. To make my point, I need maintain merely that my own formulations of the factory owner's legal positions are accurate; I need not maintain that they are *uniquely* accurate.

'an act is permitted if it is required' and that a 'liberty to do something is... entailed by, a duty to do it' (*MFR*, 23, 33). These statements affirm that a duty to undertake something must entail a liberty to undertake it. Yet a Hohfeldian duty to undertake ϕ does not perforce involve a liberty to undertake ϕ; it involves merely the absence of a liberty to abstain from ϕ. The absence of a liberty to abstain from something does not entail a liberty to undertake it, since a person can be under conflicting duties—that is, a duty to undertake ϕ *and* a duty to refrain from ϕ. Such a posture is somewhat strange but is far from inconceivable, as can be seen from the following example.

Suppose that a law places a non-waivable duty on the eldest son in each family to pay his mother £3,000 per year while she is still alive after he has reached the age of forty. Suppose further that the penalty for non-compliance with the duty is a fine of some specified amount. Now presume that Joe and his mother have formed a contract under which the mother (who treasures her sense of independence) has agreed to visit Joe weekly in return for his promise to refrain from paying her any money. And, finally, presume that the relevant body of contract law provides that the contract between Joe and his mother is valid even though the contract fails to relieve him of his duty to support her with the required payments. Hence, Joe is under a duty to pay £3,000 per year to his mother, and is also under a duty to forbear from making the payments (so long as she visits him weekly). His duty to do ϕ is accompanied by a duty to abstain from ϕ, and thus his duty to do ϕ is not accompanied by a liberty to do ϕ. (Sumner elsewhere appears to recognize this point, when he writes as follows: 'If we assume that a rule system will not both require and prohibit the same act then if I am required to attend [a] meeting I am also permitted to do so. It follows that I have a liberty to do whatever I have a duty to do' [*MFR*, 26]. In this passage, Sumner again adverts to the uncombinability of a duty-to-do-ϕ and a duty-to-abstain-from-doing-ϕ, but he presents that uncombinability as wholly contingent. No one should gainsay that a legal system *can* rule out any junctions of such duties;[7] the contention here is simply that a legal system or any other system of

[7] Indeed, as Glanville Williams points out, Anglo-American law has generally avoided the imposition of conflicting duties; see Williams (n 4 above), 1140–1. For a partly insightful but partly muddled discussion of such duties, see Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) (rev edn), 65–70. For a much more perceptive discussion, see Simmonds (in 3 above), 334–40. (Simmonds, however, does not ponder any conflicting duties that are owed to one person rather than to separate people.) For several instances of the error which I am here confuting—the erroneous view that a duty to do ϕ entails a liberty to do ϕ—see Mullock (n 1 above, 159–60, 161–2. (Mullock's article is otherwise admirably rigorous.) For some further writings which commit the same error, see Anderson (n 1 above), 39, 45; Fitch (n 4 above), *passim*; Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) (2nd edn), 89–90. Similarly mistaken is Andrei Marmor, 'On the Limits of Rights', 16 Law and Philosophy 1, 5 (1997): 'A duty to do wrong is surely an oxymoron'. See also Feinberg, *Social Philosophy* (n 6 above), 69, where we are told of 'the permission trivially entailed by duty'. (Later, however, Feinberg correctly observes that there 'is no contradiction in saying of a person that he *ought* not to perform one of his duties' (ibid, 75, emphasis in original).)

Through some straightforward formal notation, one can show the non-contradictoriness of conflicting duties. Let 'X' and 'Y' stand for any two persons. Let 'O' designate a relationship of obligation between one person and another, such that '$O(X\mathrm{d}_1 Y)$' indicates that X owes a duty to Y with a content symbolized by 'd_1'. Now, suppose that a current jural relationship between two particular people can indeed be properly formulated as '$O(X\mathrm{d}_1 Y)$', which means that X owes a duty of such and such a content to Y. What relationship between the two people would contradict the relationship just mentioned? Clearly, the contradiction of '$O(X\mathrm{d}_1 Y)$' is '$\neg O(X\mathrm{d}_1 Y)$', where the symbol '$\neg$' indicates negation. The contradictory formula can be rendered as 'It is not the case that X owes a duty of such and such a content to Y', which in turn is equivalent to 'X has a liberty *vis-à-vis* Y to abstain from whatever d_1 would require, or to do whatever d_1 would prohibit'. A conflicting duty is different, both in formal notation and in English. Formally, a duty that conflicts with '$O(X\mathrm{d}_1 Y)$' would be '$O(X\neg\mathrm{d}_1 Y)$', which can be rendered as 'X owes Y a duty that conflicts with '$O(X\mathrm{d}_1 Y)$' would be '$O(X\neg\mathrm{d}_1 Y)$', which can be rendered as 'X owes Y a duty to abstain from whatever d_1 would require, or to do whatever d_1 would prohibit'. Hence, although conflicting duties certainly involve competing demands on the duty-bearer, and although the fulfilment of one such duty therefore precludes the fulfilment of the other, the duties themselves are not contradictory. They can coexist. A conflict between two duties (between a duty to ϕ and a duty not to ϕ) pertains solely to each duty's *content*, whereas a contradiction between a duty and a liberty (between a duty to ϕ and a liberty not to ϕ) pertains not only to the duty's content but also to its *existence*.

norms will not *necessarily* rule out such junctions. Unlike a duty to do ϕ and a liberty to abstain from doing ϕ, a duty to do ϕ and a duty to abstain from doing ϕ are not starkly contradictory. They are in conflict rather than in contradiction. Though the fulfilment of either one must rule out the fulfilment of the other, the existence of either one does not in any way preclude the existence of the other. This non-contradictoriness is one main feature of jural logic (with its categories of 'permissibility', 'impermissibility', and 'obligatoriness') that prevents it from being collapsed into modal logic (with its categories of 'possibility', 'impossibility', and 'necessity').)

Because conflicting duties are possible, conflicting rights—a right to X's performance of ϕ and a right to X's non-performance of ϕ—are possible as well, of course. Even more obviously possible are

contrary rights, that is, rights to inconsistent states of affairs. Joel Feinberg commits an error when he declares that 'Grunt's right to the exclusive possession and control of ten acres at Blackacre is logically inconsistent with Groan's right to the exclusive possession and control of precisely the same ten acres' (Feinberg, *Social Philosophy*, 69). Logically inconsistent are Grunt's exclusive possession and Groan's exclusive possession; but the two men's *rights* to exclusive possession can perfectly well coexist. If those two rights do coexist, they can eventuate in one of the following three outcomes, among others: (1) Grunt and Groan both refrain from entering the ten acres at Blackacre, in which case neither man's right of exclusive possession has been violated by the other man; (2) one of the two men takes possession of the ten acres and is required to compensate the other man for the violation of the other's right of exclusive possession; (3) each man takes possession of part of the land, and each is required to compensate the other for the partial infringement of the other's right to exclusive possession.

Let us turn now to the third and fourth pairs of legal positions in Hohfeld's analytical table. Whereas the initial two pairs of legal positions are first-order relations, the subsequent two pairs are second-order relations. Some first-order relations apply directly to people's conduct and social intercourse, without the mediation of any second-order relations; by contrast, all second-order relations apply directly to people's entitlements and only indirectly (but crucially) to people's conduct and social intercourse.

Someone who holds a **power** can expand or reduce or otherwise modify, in particular ways, his own entitlements or the entitlements held by some other person(s). Someone who bears a **liability**, on the other hand, is exposed to the exercise of a power; the entitlements of the liability-bearer are open to being amplified or diminished or shifted in certain ways. In short, a power consists in one's ability to effect changes in legal or moral relations, while a liability consists in one's being unshielded from the bringing about of changes by the exertion of a power.

As Hohfeld was plainly aware (*FLC*, 60 n 90), a susceptibility to changes in one's entitlements is by no means always unpleasant. A promisee can benefit greatly from the entitlements vested in her by a promisor, and an heir can benefit greatly from the entitlements vested in him by a will. Of course, not all changes imposed on one's legal or moral standing by someone else are desirable from one's own perspective; but many such changes are indeed desirable, and thus an exposure to the imposition of such changes is not necessarily onerous at all. (As will become clear later, the chief reason for the possibility of advantageous exposures is that the distinctive functions of the third and fourth pairs of Hohfeldian legal positions are definable in a strictly non-evaluative manner.)

Like the other Hohfeldian legal positions, powers and liabilities are always held between particular persons in regard to specified actions or states of affairs. A power is always a moral or legal ability to change *someone's* entitlements (quite often the power-holder's own entitlements). In a corresponding fashion, a liability is always a susceptibility to *someone's* exercise of a power (quite often the liability-bearer's own exercise of a power). *X* may therefore hold a power to change *Y*'s entitlements in a certain way, without holding a power to change anyone else's entitlements in a parallel fashion. Alternatively, of course, *X*'s power over *Y*'s entitlements may be paralleled by *X*'s similar powers over the entitlements of any number of other people.

Likewise strictly relational between persons are **immunities** and **disabilities**. The holder of an immunity is not exposed to the exercise of a power by someone, with respect to any entitlements covered by the immunity. If *X* has an immunity from any efforts by *Y* to alter *X*'s proprietary rights in a piece of land, for instance, then *Y*'s efforts to modify those rights will come to nought. With regard to those proprietary rights, *Y* will have run afoul of a disability. Perhaps various other people can change *X*'s proprietary rights—or perhaps not—but, in any event, *Y* will be unable to change them so long as *X* has an immunity that shields her from his attempts.

The connections between the two dyads of second-order legal positions (the immunity/disability axis and the power/liability axis) are precisely similar to the connections between the two first-order dyads (the right/duty axis and the liberty/no-right axis). Just as a liability is the absence of an immunity, so a no-right is the absence of a right; and just as a disability is the absence of a power, so a duty to abstain or to do is the absence of a liberty to do or to abstain. Note that immunities are the second-order counterparts of rights, while powers are the second-order counterparts of liberties. Just as a liberty has to be specified by reference to the liberty-holder's conduct and latitude, so a power has to be specified by reference to the

power-holder's legal or moral ability. Likewise, just as a right has to be specified by reference to what the duty-bearer must do or not do, so an immunity has to be specified by reference to what the person disabled by the immunity cannot do.[8]