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The Hohfeldian Analysis of Legal and Moral Relationships

Wesley Hohfeld, an American legal theorist who died in 1918 at the age of thirty-nine,[1] devised a table of legal relationships that has been enormously influential since its first appearance. Hohfeld believed that the eight positions delineated in his table were fundamental and that the table as a whole was comprehensive. As will be seen in this chapter and in some subsequent chapters, the attribution of fundamentality to the Hohfeldian categories is defensible so long as it is construed with due caution. Also partly defensible is the notion that the Hohfeldian analytical framework as a whole is comprehensive; that framework does indeed encompass all legal and moral relationships, when we take account of the fact that the Hohfeldian categories can be combined in often intricate ways. However, as will become apparent, there are many aspects of the structures and operations of legal systems that cannot be subsumed under those categories. A full understanding of such systems, and of the positions occupied within them, has to recognize the limits of the Hohfeldian analysis as well as its remarkable breadth.

A key insight of Hohfeld was that every position within his schema of legal entitlements and correlates is thoroughly relational, in that each such position constitutes—and is constituted by—any other position(s) to which it is related. Before we start to examine each type of legal position in depth, we should scrutinize the Hohfeldian matrix as a whole in order to fathom the relationships that are central to it. Notwithstanding that Hohfeld himself presented his network of legal positions in a slightly different format, Table 2.1 can suitably convey to readers the relationships just mentioned.

Table 2.1 Hohfeldian Table of Legal Positions

Entitlements	claim-right (or claim)	liberty	power	immunity
Correlates	duty	no-right	liability	disability
	First-order positions		*Higher-order positions*	

[1] For some interesting discussions of Hohfeld's life and career, see Hull 1997, 97–115 and Schlegel 2022. By contrast, quite remarkably, there is almost nothing about Hohfeld in Duxbury 1995.

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Although this schema is labeled as the "Hohfeldian Table of Legal Positions" (in accordance with Hohfeld's own understanding of it), and although I shall be differentiating between legal positions and moral positions at quite a few junctures in this book, my present discussion cuts across any division between the legal and the moral. My remarks here are applicable to moral positions as much as to legal positions.

2.1 Some Remarks on General Terminology

To each of the four positions in the upper half of Hohfeld's framework, the umbrella term "entitlement" applies. Hohfeld himself revealed that, in everyday discourse and in juristic discourse, the noun "right" is very frequently employed to denote each of the positions in the upper half of the framework. As I have mentioned in my opening chapter, one of his principal concerns was to disambiguate that noun by distinguishing carefully among the four types of entitlements to which it is commonly attached. Given how he strove to elucidate the term "right" and to warn against the confusion bred by the use of that term as a catch-all label, any such use of it within this book should be sparing. I have in fact employed the noun "right" expansively in the title of the book and in my opening chapter—which, of course, has foregone my presentation of the Hohfeldian table of relationships here—and I shall at times also employ it expansively in this chapter and in the second half of the volume, where I discuss a capacious version of the Interest Theory of right-holding. For the most part, however, this book abides by Hohfeld's strictures about the need for regimentation of the noun "right" in philosophical and juristic discourse. As has already been noted in my opening chapter, that noun is usually confined herein to Hohfeldian claim-rights coupled with Hohfeldian immunities. However, precisely because the term "right" or "rights" is usually not employed capaciously in this book to cover each of the four positions in the top row of the Hohfeldian table, some other overarching label is required. For that purpose, the term "entitlement" or "entitlements" can serve admirably.

Like the noun "right," the noun "entitlement" is frequently used in everyday discourse and in juristic or philosophical discourse to cover each of the four positions in the upper half of the Hohfeldian matrix. As will become evident when we go through each of those positions in depth—and, indeed, as might already be evident from one's pre-theoretical acquaintance with those positions and with the language applied to them—formulations along the lines of "I am entitled to" are as idiomatic as "I have a right to" in statements that ascribe to oneself any of those top four positions. Nevertheless, the term "entitlement" or "entitlements" used in this book as an umbrella label for those positions is a bit of technical parlance. We should not presume that the appropriateness of it as such a label is due to something which all of the top four positions have in common. In particular, we should

not suppose that instances of those positions are always or typically advantageous for the parties who possess them. Hohfeld himself floated just such a supposition when he wrote that the word "right" in its capacious sense is "used generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity."[2] As will become evident subsequently in this chapter and in Chapter 4, a supposition about the typically advantageous character of entitlements would be correct in application to the left-hand half of Hohfeld's schema but not in application to the right-hand half. In keeping with what Hohfeld himself observed at a different juncture (1923, 60 n. 90), we shall find that numerous instances of the entitlements on the right-hand half of the Hohfeldian matrix are not even typically beneficial for the parties who hold them. All that can be said at an abstract level about the right-hand entitlements, then, is that the numerous instances just mentioned are coexistent with many other instances that are typically beneficial for the parties who hold them. This point will be explained and amplified later in this chapter.

Despite what has just been said, there is a clear sense in which Hohfeld was correct to suggest that each legal position commonly designated as a "right" is typically advantageous for anyone who holds it. As we shall discover in Chapter 4 when I explore a capacious version of the Interest Theory of right-holding, any particular legal or moral position that would indeed be idiomatically designated as a "right" is of a kind that is normally beneficial for someone who occupies it. Much the same is true of any particular legal or moral position that would idiomatically be designated as an "entitlement." Nonetheless, precisely that aspect of common usage is what has led me in the preceding paragraph to emphasize that the term "entitlement" as it is used in this book is broader than the term in its everyday applications. As an overarching label, that term covers not only every claim-right or liberty and not only every power or immunity that is typically beneficial for the holder thereof, but also every power or immunity that is typically detrimental or neutral for its holder. That overarching designation encompasses all instances of the four positions in the upper half of the Hohfeldian table, rather than only the subset of instances that would be characterized as "rights" or "entitlements" in ordinary discourse. Hence, as has been stated, that designation is a bit of technical parlance; it has a strong rooting in everyday usage, but it is considerably more expansive.

As for the noun "correlates," it too is a bit of technical parlance—though with a more tenuous rooting in ordinary discourse. It comprehends all instances of each of the four positions in the lower half of Hohfeld's matrix. However, just as the

[2] Hohfeld 1923, 71. For a similar suggestion, see Morris 1993, 830: "It would not be inaccurate to analyze [Hohfeldian] legal entitlements merely by saying that every entitlement is a legal advantage of some kind." See also Kennedy and Michelman 1980, 752, where we are told that Hohfeld supplied "a lexicon for distinguishing among several discrete types of legal advantages (entitlements, as we now commonly say)."

entitlements on the right-hand side of that matrix differ from those on the left-hand side in that many instances of them are not typically beneficial for the parties who hold them (even though many other instances of them are typically beneficial for the parties who hold them), so too the correlates on the right-hand side differ from those on the left-hand side in that many instances of them are not typically disadvantageous for the parties who bear them (even though many other instances of them are typically disadvantageous for the parties who bear them). Until we probe each of the Hohfeldian positions in depth, the preceding sentence might strike some readers as rather opaque. What warrants attention at this juncture is simply that the appropriateness of the umbrella label "correlates"—like the appropriateness of the umbrella label "entitlements"—is not due to any straightforward linkages between the positions covered by that label and the interests of the parties who occupy those positions. Numerous Hohfeldian entitlements are not typically beneficial for their holders, and numerous Hohfeldian correlates are not typically disadvantageous for their bearers.

Instead of being focused on any evaluative considerations like the ones just mentioned, my choice of "correlates" as a term that encompasses all instances of the four positions in the lower half of Hohfeld's schema is focused on a logical consideration. That is, each of those four positions is logically correlated with the position directly above it in the table. That logical relationship of correlativity within each of the four columns of Hohfeld's schema will be expounded in §2.2 and invoked repeatedly thereafter.

Before we move on, we should note one further pair of phrases in the Hohfeldian framework above: "first-order positions" and "higher-order positions." Those phrases together indicate another important division between the left-hand half of the Hohfeldian table and the right-hand half. The four positions on the left-hand side are classified as "first-order" because the contents of many instances of those positions do not refer to any other legal or moral positions. For example, if John owes David a duty not to punch him in the face, the content of that duty is John's not punching David in the face. That content, which adverts simply to the non-occurrence of a certain mode of physical conduct, does not itself make reference to any other legal or moral positions. Similarly, if David is at liberty vis-à-vis John to walk along Grange Road every morning, the content of David's liberty is his walking along Grange Road every morning. That content, which adverts simply to the occurrence of a pattern of physical conduct, does not itself make reference to any other legal or moral positions.

By contrast, the content of every instance of each position on the right-hand half of the Hohfeldian schema does refer to some other legal or moral position(s). Although this point will not become fully clear until the nature of each position on the right-hand side of the schema has been thoroughly elucidated, a couple of terse examples can clarify it adequately for now. Just as the preceding paragraph has relied on one's pre-theoretical grasp of the nature of duties and liberties, this

paragraph can rely on one's pre-theoretical grasp of the nature of powers and disabilities. If Mary has a legal power to waive a legal duty owed to her by Sally, the content of her power is the extinguishing of Sally's duty. That content makes reference to some other legal position—namely, Sally's duty. Likewise, if Jennifer is legally disabled from terminating Alison's legal liberty to walk along Grange Road each morning, the content of Jennifer's disability is her terminating Alison's liberty to walk along Grange Road. That content, too, makes reference to some other legal position: namely, Alison's liberty.

My exposition of the "first-order"/"higher-order" terminology in the two foregoing paragraphs has perhaps conveyed the impression that the division between the left-hand half and the right-hand half of the Hohfeldian table is tidier than it is. Although the contents of many instances of the positions on the left-hand half of the table do not refer to any other legal or moral positions, the contents of quite a few other instances of the positions on the left-hand half of the table do so refer. For example, if a legal-governmental official is under a legal duty to exercise a certain legal power under specified conditions, the content of the official's duty makes reference to some other legal position—namely, the official's power. Hence, while all instances of the positions on the right-hand half of the Hohfeldian matrix have contents that refer to other legal or moral positions, some instances of the positions on the left-hand half of the matrix have contents that likewise so refer. In that respect, the first-order/higher-order distinction is not quite as straightforward as it might initially appear.

Of course, somebody might demur at my first-order/higher-order taxonomy and might maintain that the higher-order category should instead encompass every instance of a Hohfeldian position that has a content which makes reference to some other Hohfeldian position(s). Under that alternative taxonomy, all first-order legal positions would be on the left-hand side of the Hohfeldian table, but not all instances of the positions on the left-hand side of the table would be classified as first-order. Conversely, all instances of the positions on the right-hand side of the schema would be classified as higher-order, but not all instances of higher-order positions would be on the right-hand side; certain positions on the left-hand half of the schema, such as the duty of a legal-governmental official to exercise some legal power under specified circumstances, would be classified as higher-order.

Now, within the purposes of this book, the alternative taxonomy just outlined could be readily countenanced. As far as the purposes of this book are concerned, the divergence between that alternative taxonomy and the taxonomy presented in my chart of the Hohfeldian relationships is purely classificatory or terminological. It is not a divergence of philosophical substance. My point in demarcating the first-order/higher-order distinction is merely to draw attention to the fact that many instances of the legal or moral positions on the left-hand half of the Hohfeldian framework differ from all instances of the legal or moral positions

on the right-hand half of the framework—in that many instances of the left-hand positions have contents that do not refer to any other legal or moral positions. That difference, which is philosophically important, is recognized both by the first-order/higher-order taxonomy broached in the preceding paragraph and by my preferred first-order/higher-order taxonomy in the Hohfeldian table above. Hence, the only point of contrast between those two approaches is a matter of classification in regard to the instances of the left-hand Hohfeldian positions that have contents which do refer to other legal or moral positions. That classificatory matter is not something of philosophical importance.

2.2 Correlativity

As has already been observed, the four positions in the lower half of the Hohfeldian matrix are designated as "correlates" because each of them is logically correlated with the position directly above it in the matrix. "Correlativity" and cognate terms such as "correlates" and "correlations" are elements of the vocabulary that Hohfeld employed. In the terminology of standard logic, the relationship between the two positions in each of the four columns of the Hohfeldian table is that of biconditional entailment. Each column delineates a type of legal or moral relationship where each end of any such relationship is fully constituted by, and fully constitutive of, the other end. Neither end of such a relationship can ever exist unless the other end exists. Each side of the relationship obtains if and only if the other side obtains; the existence of each side is a necessary and sufficient condition for the existence of the other side. Thus, for example, if and only if John owes Mary a legal duty to pay her $10 on a certain day, Mary holds a legal claim-right vis-à-vis John to be paid $10 by him on the specified day. His legal duty to pay her exists if and only if her legal claim-right to be paid by him exists. If either the claim-right or the duty has ceased to obtain, then *ipso facto* the other has likewise ceased to obtain.

Of course, the relationship of biconditional entailment within each column of the Hohfeldian table is scarcely unique to the deontic and normative positions that are comprehended by that table. For instance, the fact that John is six inches shorter than Harry entails the fact that Harry is six inches taller than John, and vice versa. Neither of those facts can ever obtain unless the other obtains. Similarly the fact that a certain slope inclines upward at a specified angle is constituted by, and constitutive of, the fact that the slope inclines downward at that specified angle. Neither of those facts can ever obtain unless the other obtains.

Let us briefly ponder a further example of Hohfeldian correlativity. If Alicia has a legal power to bring about some specified change X in the legal positions of Vincent, then Vincent is legally liable to undergo X through Alicia's exercise of her power. Vincent's liability to undergo the change at the hands of Alicia is constituted by, and constitutive of, her power to bring it about. Neither of those legal positions

can exist unless the other exists. Each is a necessary and sufficient condition for the other.

Although the relationship of correlativity as biconditional entailment within each column of the Hohfeldian schema can initially seem obvious and incontestable, it has been more frequently assailed than any other aspect of the Hohfeldian analysis. Queries have been raised especially often about the correlativity of claim-rights and duties. Some of the objections are the badly confused criticisms which I have rebutted in my 1998 essay "Rights without Trimmings." Having mentioned those criticisms near the end of the opening chapter of this book, I shall not revisit them in the present volume—because, as I have stated in Chapter 1, my refutations of them a quarter of a century ago are satisfactory. However, some other objections do merit attention in this volume. I shall therefore devote Chapter 3 to them, in connection with claim-right/duty relationships. As will be seen, some of the worries will prompt me to meditate upon subtleties in logical quantification. Quantification is pivotal in several ways for the Hohfeldian analysis, and it is essential for any thorough defense of the proposition that claim-rights and duties are correlative in the manner indicated by that analysis. We shall enter into those complexities subsequently, but for the moment this chapter is simply endeavoring to outline the basic logical features of the framework which Hohfeld propounded. For that latter purpose, the following general statement can suffice at present as a summary of Hohfeldian correlativity. The existence of either of the two positions in any column of the Hohfeldian table, with a certain content and obtaining between parties P and Q, entails the existence of the other position in that column with the same content and obtaining between parties Q and P.

2.3 The Diagonals: Duality and Contradictoriness

Whereas correlativity between the two positions in each column of the Hohfeldian framework is a logical feature that obtains in every column, the diagonal relationships between the two columns on the left-hand half of the framework are different from the diagonal relationships between the two columns on the right-hand half. In other words, the relationships between claim-rights and no-rights and between duties and liberties are different from the relationships between powers and disabilities and between liabilities and immunities. Whereas the relationship between duties and liberties and the relationship between claim-rights and no-rights each consist in logical duality, the relationship between powers and disabilities and the relationship between liabilities and immunities each consist in logical contradictoriness.[3]

The distinction between logical duals and logical contradictories can best be explicated with an example. Let us ponder the proposition that Sally owes Joe a

[3] My discussion of logical duality in Kramer 2019 is confusedly criticized in Halpin 2020. For a bracing corrective to Halpin's confusion, see McBride 2021.

legal duty to pay him $10 on a certain day, and the proposition that Sally is legally at liberty vis-à-vis Joe not to pay him $10 on the specified day. Each of those propositions is true if and only if the other is false. Each proposition is the negation of the other, and the content of the deontic predicate (that is, the content of the duty or liberty) in each proposition is the negation of the content of the deontic predicate in the other proposition. These twofold instances of negation, the negation at the level of the proposition and the negation at the level of the predicated content—which are often classified as external negation and internal negation—are characteristic of logical duals.

This point about the negation of the predicated content is crucial because "Sally owes Joe a legal duty to pay him $10 on a certain day" is logically consistent with "Sally is legally at liberty vis-à-vis Joe to pay him $10 on the specified day." Indeed, the latter proposition will usually be true when the former proposition is true. Only when the content of the deontic predicate in each proposition is the negation of the content of the deontic predicate in the other proposition, will each proposition itself be the negation of the other proposition. Whereas "Sally owes Joe a legal duty to pay him $10 by a certain date" is logically consistent with "Sally is legally at liberty vis-à-vis Joe to pay him $10 by the specified date," it is the negation of "Sally is legally at liberty vis-à-vis Joe *not* to pay him $10 by the specified date."[4]

Different from logical duals are logical contradictories, for in the latter the only negation is at the level of the proposition. Again, let us proceed with an example. "Peter is legally liable to undergo some change C in his legal positions brought about through the performance of some action A by Brenda" is the negation of "Peter is legally immune from undergoing the specified change C in his legal positions that could otherwise have been brought about through Brenda's performance of A." Each of those propositions is true if and only if the other is false. Yet, whereas there is clearly negation at the level of the proposition, there is no negation at the level of the content of the predicate. The content of the liability in the first of those propositions—a content that consists, of course, in Peter's undergoing of C through Brenda's performance of A—is the same as the content of the immunity in the second of the propositions. Hence, those two propositions are contradictories rather than duals.

In §2.1 we have encountered one major difference between the left-hand half and the right-hand half of the Hohfeldian schema, in the form of the distinction between first-order legal or moral positions and higher-order legal or moral positions. Here we have encountered another significant difference between the two halves of the schema, in the form of the distinction between diagonal relationships of logical duality and diagonal relationships of logical contradictoriness. We shall

[4] Among the theorists who have missed this point is Pavlos Eleftheriadis, who writes as follows: "The existence of a [claim-right] and duty over some act … means the absence of a no-right and liberty over the same act" (2008, 109–10).

encounter some further differences as we go along. Notwithstanding that the relationship of correlativity or biconditional entailment between the two positions in each column is the same across the whole array of four columns, some of the other logical relationships operative in the Hohfeldian framework are divergent between its two sectors.

Although a number of other logical aspects of the Hohfeldian analysis will emerge in this chapter and my next chapter, the relationship of correlativity within each column and the diagonal relationships between the positions in adjacent columns on each half of the Hohfeldian table are especially salient. With those relationships delineated, we can start to go through the eight positions in Hohfeld's framework. One thing that should be emphasized at this juncture is that the relationship of biconditional entailment within each column is not paralleled by any relationships of biconditional entailment across the columns. Similarly, the relationships of logical duality or logical contradictoriness between the diagonal positions on each half of the framework are not paralleled by any further relationships of duality or contradictoriness within that framework. These points should be kept in mind throughout my discussions because—as we shall see—many philosophers have erroneously presumed that certain types or instances of Hohfeldian positions across the columns are biconditionally entailing, or have presumed that certain duties (conflicting duties) are logically inconsistent. Detecting the illusiveness of those putative logical relationships is as important as recognizing clear-sightedly the genuine logical relationships that have been explicated heretofore in this chapter.

2.4 Claim-Rights and Duties

Whereas Hohfeld usually applied the term "right" or "claim" to the first of his four entitlements, I in this book usually designate that entitlement as a "claim-right" (with the term "right" itself largely reserved for any claim-right that is combined with sundry immunities against the elimination or suspension of the claim-right). A claim-right is a position of deontic protectedness; when someone holds a claim-right, some aspect of his or her situation is deontically protected against interference or uncooperativeness. Both the notion of interference and the notion of uncooperativeness are to be understood very broadly here. Interference occurs whenever there befalls some event that worsens the situation of somebody in any way, and uncooperativeness occurs whenever there does not befall some event that would have improved the situation of somebody in any way. Although countless types of interference or uncooperativeness can be legally and morally permissible,

any types that fall within the protective ambit of a claim-right are legally or morally impermissible.[5]

As will be highlighted in Chapter 3's defense of the proposition that claim-rights and duties are always correlative, the holder of a claim-right can be a collectivity as well as an individual. Likewise, the party vis-à-vis whom a claim-right is held can be a collectivity. In Chapter 5 of this book, where I seek to delimit the class of potential holders of claim-rights, we shall find that many non-human animals are similarly in that class. Also to be noted here is that the party who holds a certain claim-right can be the same as the party who bears the correlative duty. In other words, the holder of a claim-right and the bearer of the correlative duty can be the same party in two different statuses. Duties owed to oneself are not typical in the realm of law, but—both in the realm of morality and in the realm of law—they are far from outlandishly uncommon. We shall return to this point about self-directed duties in considerably greater depth in Chapters 3 and 4.

The protection afforded by a claim-right is deontic, as it consists in making certain types of interference or uncooperativeness impermissible legally or morally. Deontic protection is here contrasted with physical protection, but of course claim-rights that are enforced through governmental mechanisms or other means of coercion do also involve physical protection. Though the claim-rights themselves are not physically protective, the processes of enforcement that back them up do provide some physical security. In some cases, the physical security ensues from anticipatory measures that preclude outright the proscribed interference or uncooperativeness. More often, however, the physical security that ensues from the functioning of mechanisms of legal enforcement is due to the deterrent effects of those mechanisms. Because regularity in the operations of the institutions of enforcement supplies potential malefactors with good grounds for knowing that they are likely to be subjected to legal sanctions if they perpetrate the wrongs which they might otherwise be inclined to perpetrate, the incidence of wrongdoing will typically be reduced substantially by such regularity. As a consequence, the physical security of people who may have been the victims of the wrongdoing (if it had occurred) will *pro tanto* have been enhanced. Still, that increase in physical protection is attributable not to any legal claim-rights themselves but instead to the processes whereby they are regularly given effect. Claim-rights themselves—whether legal or moral—furnish their holders with deontic protection rather than with physical protection.

Correlative to any claim-right held by some party X vis-à-vis some party Y is a duty with the same content owed to X by Y. A legal or moral duty is a requirement that makes some type(s) of interference or uncooperativeness impermissible. In

[5] Hohfeldian categories are applicable not only to legal and moral positions but also to the positions that are operative in activities such as games and linguistic communication. Within this book, however, I concentrate almost entirely on the legal and moral realms.

other words, some type(s) of non-interference or cooperativeness will have been rendered mandatory—whether legally or morally—by the existence of any duty. A bearer of a duty is legally or morally accountable for the fulfillment of that duty.

2.4.1 Contents and Conduct

Most frequently the fulfillment of a duty consists in the duty-bearer's performing some action or refraining from the performance of some action, but—contrary to what some philosophers have presumed[6]—not every duty has such a content. A duty-bearer's conduct is almost always involved, but sometimes only in bringing about the existence of a duty rather than in bringing about what the duty requires. Suppose for example that Phineas, who has been consulted by Hephzibah because he is endowed with meteorological expertise, has stoutly and repeatedly assured her that the weather throughout the following day will be agreeably sunny and that she can therefore safely array some expensive works of art on her lawn during the morning of that day for an exhibition in the afternoon. Phineas in these circumstances has placed himself under a moral duty that will be breached if the weather on the afternoon of the following day turns out to be miserably rainy rather than sunny. We can assume furthermore that the doctrines of contract law and tort law in the relevant jurisdiction are such that there is now incumbent on him a legal duty with the same content as that of the moral duty under which he has placed himself. (If Hephzibah has paid Phineas for his meteorological advice, he has imposed on himself a contractual duty under the law of the jurisdiction. If she has not made any payment, then his legal duty—which will have been breached only if he has acted negligently in his proffering of the advice—is imposed on him under the law of tort rather than under the law of contract.) Although the conduct of Phineas is patently involved in bringing into existence the duties which he owes to Hephzibah, the content of each of those duties does not make any reference to his conduct. Rather, the content pertains only to the climatic conditions on the following afternoon. Hence, the satisfaction of the duty consists in the materializing of those conditions rather than in any instances of Phineas's conduct.

When some philosophers too sweepingly presume that what is made mandatory by any duty is always some conduct on the part of the duty-bearer, they really are concerned to deny that conduct on the part of the holder of the correlative claim-right is what is made mandatory by a duty. On that point, those philosophers are almost always correct. Even when someone owes a duty to herself, any conduct

[6] See, for example, Finnis 1972, 380; Gilbert 2018, 48; Saunders 1990, 478; Sumner 1987, 25; Williams 1956, 1145. In Kramer 1998, 13, I myself committed such a misstep. I first corrected that misstep in Kramer 2005, 352 n 8. See also Kramer 2009a, 75–6. I have subsequently extended my correction by showing that, in unusual circumstances, someone can be under a moral or legal duty that makes mandatory the occurrence of a logically impossible event. See Kramer 2016, 178–9.

made mandatory by the existence of the duty is not her own conduct in her status as the holder of the correlative claim-right; rather, it is her own conduct in her status as the bearer of the duty. Furthermore, even in most versions of the following special situation, it is not the case that the conduct of someone as the holder of a claim-right is made mandatory by the correlative duty. Suppose that Ruth is a singer who often experiences severe anxiety about plying her trade in public, and suppose that her career will be set back if she withdraws from a major recital that has been arranged for her. She enters into a contract with Boaz, who specializes in hypnosis and other techniques of mind-control through which he overcomes people's inhibitions. According to the terms of the contract, Boaz is required to ensure that Ruth sings at the recital which has been scheduled for her. Should we conclude that the contractual duty incumbent on Boaz makes mandatory some conduct on the part of Ruth as the holder of the correlative claim-right? Regardless of the specific wording of the contract, the answer to this question will almost always be negative.

Let us here prescind from any circumstances in which Ruth's singing at the recital is precluded by some adventitious event such as a fire that burns down the venue in which the recital would have occurred. In virtually every jurisdiction, the contract will be interpreted as not requiring of Boaz the non-occurrence of such an event. If the fire has ignited through no fault of his, it will not have contravened his contractual duty—because the duty does not cover any circumstances of that kind. What is required under the contract, rather, is simply that Boaz ensures that Ruth is not prevented by her anxiety or other inhibitions from going ahead with her performance. In any case, even in a peculiar jurisdiction where the contract would be interpreted as requiring of Boaz the non-occurrence of any adventitious calamities, the duty incumbent on him can go unbreached without any singing by Ruth. If his techniques of mind-control do indeed remove all her inhibitions, and if she nonetheless decides for some other reason to refrain from performing, his duty under the contract will have been fulfilled. That duty does not make mandatory any conduct on the part of Ruth.

If instead the duty incumbent on Boaz is accurately interpretable as requiring him to envelop the mind of Ruth in such a blanketing form of control that she is rendered unable to reach any decision to refrain from singing, then what the duty makes mandatory is not any conduct by her but instead some movements of her body that are brought about by Boaz. Those movements occur independently of her volitions, and are thus akin to reflexes that respond to certain stimuli such as a doctor's tapping of a mallet against a knee. Hence, notwithstanding that the duty imposed on Boaz does make mandatory the occurrence of certain movements of Ruth's body—when the contract is interpreted in this latter way—it still does not make mandatory any instances of conduct on her part. Taking place under Boaz's comprehensive control of her mind, her singing is an array of bodily movements that occur willy-nilly. Those movements are thus not instances of her conduct.

They are directly attributable to actions performed by Boaz rather than to actions performed by Ruth.[7]

Still, there could be a fanciful contract between Ruth and Boaz which states explicitly—or which will be interpreted as if it states explicitly—that what is strictly required of Boaz is Ruth's singing at the recital of her own volition without the blanket control of her mind that has been envisaged in the preceding paragraph. Let us suppose that the contract expressly provides that the requirement incumbent on Boaz will remain fully binding even if an adventitious catastrophe occurs and even if Ruth uninhibitedly decides against singing. Such a contract would be quite bizarre, and there might well be jurisdiction-specific obstacles that disallow its legal bindingness in any particular country; but there would not be any logical barriers to its existence and legal bindingness. Thus, although philosophers are almost entirely correct when they submit that volitional actions on the part of the holder of a claim-right CR are not ever made mandatory by a duty that is correlative to CR, they fall slightly short of being entirely correct. In some highly unusual but logically possible circumstances, just such actions on the part of the holder of a claim-right are indeed made mandatory by a correlative duty.

2.4.2 Deontic Conflicts

Somebody can be under a legal or moral duty to φ and can simultaneously be under a legal or moral duty not to φ. In such circumstances, the two duties incumbent on him or her are in conflict. Their contents are contradictories, and therefore the two duties cannot ever be jointly fulfilled. At any given time, one and only one of them will be fulfilled.

Another type of deontic conflict occurs when somebody is under a duty to do X and is simultaneously under a duty to do Y, where doing X excludes doing Y and vice versa. In such a situation, the contents of the duties are contraries rather than contradictories. Ergo, although the two duties cannot ever be jointly satisfied, they can be jointly unsatisfied. At any given time, at least one of them will be unsatisfied.

Let us ponder briefly an example of a deontic conflict of the second kind just outlined. Suppose that Jeremy has formed a contract with Susan whereby he undertakes to be present at a conference hall in New York for an in-person lecture on a certain day during a certain stretch of time. Suppose further that he subsequently forms—or has previously formed—a contract with Melanie whereby he undertakes to be present at a conference hall in Los Angeles for an in-person lecture on the specified day during the specified stretch of time. Each of his contractual

[7] Of clear relevance to this paragraph are my reflections on mind-control in Kramer 2003, 23–4, 255–60. As is evident, the comprehensive mind-control which I envisage in the latter half of the paragraph is a matter of science fiction rather than something that is technologically feasible at present.

partners has spent money for costly arrangements in reliance on the undertaking received, and neither of them has had any grounds for knowing of the agreement between Jeremy and the other contractual partner. (It does not matter, for my purposes, whether Jeremy has been devious or has instead been remissly forgetful when he enters into the second contract.) Now, in these circumstances, the judges or other officials responsible for giving effect to legal requirements could undoubtedly handle the conflict between Jeremy's contractual duties by holding that only one of those duties actually exists. They might, for example, declare that his first contract takes priority over the second. Nonetheless, although a conflict-resolving approach of the sort just mentioned or of some other sort would manifestly be feasible, it most likely would be grossly unfair to one or the other of Jeremy's two contractual partners. In the absence of special mitigating factors, Jeremy should not so leniently be absolved of the burden of dealing with the quandary in which he has placed himself. His moral agency is not compromised by his being required to live up to the obligations which he has incurred. Inevitably, of course, he will breach at least one of those two obligations. His presence at either of the specified locations during the specified span of time will entail his absence from the other specified location during that span of time. Accordingly, regardless of how he acts, he will incur at least one additional legal obligation to remedy a breach of duty (most likely through the payment of compensation). In the circumstances depicted, however, such an outcome is entirely fair to all parties concerned.

Doubtless, although a ruling that holds Jeremy to be under both of his conflicting legal obligations is admirably fair in the circumstances envisioned, there can be other situations where the existence of conflicting legal duties would be unfair to anyone who might bear those duties. After all, somebody under such duties is bound to commit a legal wrong irrespective of how she acts. There can be sundry credible situations in which the unavoidability of committing a legal wrong would be unjust for anyone who faces such a prospect. Accordingly, judges or other legal-governmental officials can frequently be warranted in taking steps to avert conflicts between legal duties (Fuller 1969, 66–9; Williams 1956, 1140–1). Through appropriate interpretive methods or other techniques, the adjudicators or administrators in a system of law can smooth away a deontic conflict by holding in effect that one of the clashing duties does not exist, and they can clearly sometimes be justified in adopting such an approach.

However, three things should be said in response to the preceding paragraph. First, although there can undoubtedly be situations in which maneuvers by adjudicators or administrators to avert conflicts between legal duties are morally justified, there are other circumstances in which such maneuvers would not be morally justified. My scenario of Jeremy and Susan and Melanie in the penultimate paragraph above depicts one set of circumstances in which any maneuvers of that sort would not be warranted. Second, whether or not the adjudicators in the relevant jurisdiction would hold that Jeremy owes both of two conflicting *legal*

obligations, Jeremy patently does face a conflict between two *moral* obligations that are incumbent on him. Deontic conflicts in the realm of morality are even more common than deontic conflicts in the realm of law. I have ruminated upon conflicts between moral duties at length in some of my past writings (Kramer 2004, 280–5; 2014, 2–19; 2016). Third, and most important in the present context, is that deontic conflicts are logically possible regardless of their fairness or unfairness. Although it is logically impossible for two conflicting duties to be fulfilled simultaneously, there is nothing logically amiss about the coexistence of those duties. Indeed, the very fact that deontic conflicts are straightforwardly possible as a matter of logic is why adjudicators or administrators employ certain techniques to avert such conflicts between legal duties in various circumstances. Whereas duties and liberties are logical duals, duties with contradictory or contrary contents are not inconsistent with each other at all.

Quite baffling, then, is that standard deontic logic—the system of logic that supposedly encapsulates the fundamental features of obligations and permissions—has long deemed the occurrence of deontic conflicts to be logically impossible. That aspect of standard deontic logic has been uncritically endorsed by numerous philosophers over the years.[8] For example, L.W. Sumner errs when he proclaims that "an act is permitted if it is required" and that a "liberty to do something … is entailed by a duty to do it" (Sumner 1987, 23, 33). Andrei Marmor similarly goes astray when he declares: "A duty to do wrong is surely an oxymoron" (Marmor 1997, 5). Joel Feinberg likewise blundered when he wrote of "the permission trivially entailed by duty" (Feinberg 1973, 69). Hillel Steiner joins this chorus of mistakes as he proclaims that "a duty to do an action implies a liberty to do it," and as he insists that "obligatory actions form a subset of permissible actions" (Steiner 1994, 86; 1998, 268 n. 55). These and many other comparably misguided pronouncements reveal the correctness of my observation in Chapter 1 that the veracity of any logical framework as a representation of the domain which it purports to formalize is dependent on the solidity of the philosophical assumptions that are incorporated into the framework. Regardless of how often philosophers have asserted that the occurrence of deontic conflicts is logically impossible, their assertions remain false. Quite risible is the notion that adjudicators or administrators would be envisaging a logically impossible state of affairs if they were to hold that Jeremy in the scenario above is indeed under two legal duties that cannot be jointly fulfilled.

[8] For a small sample of the philosophical writings that endorse this aspect of standard deontic logic, see Alchourrón and Bulygin 1971; Anderson 1962, 39, 45; Conee 1982; Dworkin 2006, 110–11; Feinberg 1980, 235, 237; Fitch 1967; Hare 1972; Hare 1981, 25–43; Hill 1996, 177; Hughes and Cresswell 1996, 43; Hurd and Moore 2018; McConnell 2010, §4; Mullock 1971, 159–60, 161–2; Raz 1990, 89–90; Simester 2008, 292 n. 10; Vallentyne 1987, 119–20; Vallentyne 1989. See also Bobbitt 2008, 363–5; Curzer 2006, 45; Gross 2004, 1498; Himma 2007, 240–1; Paskins 1976, 143; Posner and Vermeule 2006, 676–7. I have assailed such views in many of my previous writings. See, for example, Kramer 1998, 17–20; 1999, 52–3; 2001, 73–4; 2004, 280–3; 2005, 336–40; 2007, 125–7; 2009a, 117–26; 2009b, 203–6; 2014, 2–19; 2016; 2018, 198–9; 2021, 4–5, 307–11.

Readers might reasonably wonder why numerous philosophers have embraced the canard about the impossibility of deontic conflicts. Having addressed that query elsewhere at length (Kramer 2014, 2–19; 2016), I will here adduce only a few tersely stated considerations. First, the confusion has sometimes stemmed from a failure to differentiate between "obligated not to φ" and "not obligated to φ." Whereas there is no logical inconsistency whatsoever in a situation where Raphael vis-à-vis Michael is morally obligated to φ and at the same time is morally obligated not to φ, there can never as a matter of logic be a situation where Raphael vis-à-vis Michael is morally obligated to φ and at the same time is not morally obligated to φ. That elementary distinction should be unmistakably apparent to anyone with even a modicum of logical training, but some estimable philosophers have failed to heed it. For instance, in an essay published in 1989, Richard Hare wrote as follows: "If I say 'I ought, but there is someone else in exactly the same circumstances, doing it to someone who is just like the person I should be doing it to, but he ought not to do it,' then logical eyebrows will be raised; it is *logically inconsistent* to say, of two exactly similar people in exactly similar situations, that the first ought to do something and the second ought not" (Hare 1989, 179, emphasis in original). Seeking to expose a logical inconsistency, Hare located the negation in the wrong place. Whereas "I ought to φ" logically contradicts "It is not the case that I ought to φ," it is logically consistent with "I ought not to φ." In other words, "not ought" rather than "ought not" is the contradictory of "ought." Given that the structure of a deontic conflict comprises "I ought to φ" and "I ought not to φ," and given that no role is played in any deontic conflict by "It is not the case that I ought to φ," there are no logical inconsistencies in such a conflict. As a logical matter, the occurrence of deontic conflicts is entirely unproblematic.

Second, although a disinclination to recognize the possibility of conflicts between moral duties has been prominent on each side of the division between consequentialists and deontologists, it has been far more widespread among consequentialists. On the deontological side, a disinclination of that type is confined chiefly to Kantians. By contrast, most consequentialists of sundry stripes have been intent on gainsaying the reality of moral conflicts. Though some versions of consequentialism can take account of the occurrence of moral conflicts, the general consequentialist prioritization of the good over the right is largely antithetical to any clear recognition of such conflicts. Every thoroughly consequentialist doctrine takes some overarching desideratum or set of desiderata as an objective that is a touchstone for the rightness or wrongness of any mode of conduct (in accordance with the tendency of the conduct to promote or impede the realization of the objective). Under such a doctrine, one's sole fundamental moral obligation is to contribute maximally to the realization of the commended objective. Hence, when contemplating a clash between moral duties where one duty is more stringent than the other, the supporters of such a doctrine are disposed by it to perceive the less stringent duty as merely ostensible and thus as not genuinely a

moral duty at all. They typically believe that, although the factors which constitute the less stringent obligation do *tend* toward the existence of a moral obligation, those factors fall short of actually giving rise to such an obligation on the occasion under consideration. Actions in accordance with those factors, at the expense of alternatives that are more strongly promotive of some consequentialist objective, would produce the net effect of detracting from the realization of that objective. Accordingly, consequentialists are disposed to maintain that such actions are morally non-obligatory as well as morally impermissible. In the eyes of consequentialist theorists, the lone source of moral obligatoriness is the conduciveness of any mode of conduct to the maximal attainment of the desideratum or set of desiderata which the theorists favor. If the net effect of some mode of conduct MC would be to detract from the attainment of the specified desideratum or set of desiderata—because some alternative mode of conduct would be more conducive to that attainment—then MC does not partake of the aforementioned source of moral obligatoriness. By the reckoning of consequentialists, then, MC is neither morally obligatory nor morally permissible. By their reckoning, a person faced with the possibility of performing MC in these circumstances is not under any moral duty to perform it and is thus not confronted with any moral conflict that involves such a duty. In short, because of the emphasis of consequentialism on the balancing of considerations that respectively tend toward the existence of moral duties, consequentialists are not well equipped to recognize the reality of moral conflicts. Hence, as I have submitted elsewhere (2014, 11–14), and as Bas van Fraassen observed half a century ago (1973, 12), the inclinations of the founders of standard deontic logic to deny the possibility of deontic conflicts were very likely due in part to the consequentialist predilections of most of those founders.

Third, the clear ambition of the devisers of standard deontic logic was to have it parallel modal logic very closely. Quite unexceptionable is the proposition that the necessity of the occurrence of some event entails the possibility of its occurrence, and likewise unexceptionable is the proposition that the necessity of the non-occurrence of some event entails the possibility of its non-occurrence. However, when the property of necessity is replaced with the property of obligatoriness, and when the property of possibility is replaced with the property of permissibility, there are no entailments homologous to those just stated. Consequently, the project of assimilating deontic logic to modal logic has been partly responsible for the blindness of so many deontic logicians to the possibility of deontic conflicts.

Fourth, because moral theories and principles are supposed to provide answers to questions about the correct courses of conduct in multitudinous sets of circumstances, one complaint sometimes voiced about the specter of moral conflicts is that we would have no grounds for deciding what to do when confronted with clashing obligations (Dworkin 2011, 90; McConnell 2010, §§4 and 7). In other words, moral conflicts are thought to leave people bereft of action-guidance. Any anxiety along those lines is largely baseless. In most moral conflicts,

the clashing duties are of unequal stringency; hence, the uniquely correct response to such a conflict is to fulfill the more stringent duty. Of course, the adjective "correct" here does not denote permissibility. Within a moral conflict, no morally permissible course of conduct is available. Nonetheless, although the uniquely correct mode of conduct in such circumstances is itself morally impermissible—and although the adoption of that course of conduct will therefore give rise to remedial duties—it is indeed uniquely correct in that the non-adoption of it would be an even graver wrong. Accordingly, there is no lack of action-guidance in any such moral conflict. Morality determinately prescribes the mode of conduct that is to be undertaken as the less gravely wrong way of dealing with the quandary which such a moral conflict presents. Furthermore, even when we ponder a moral conflict where the clashing duties are evenly balanced in their stringency or are incommensurably counterpoised, we should still conclude that the fulfillment of either duty will amount to a breach of the other and will thus impose remedial obligations on anyone who has committed the breach (Nussbaum 2000, 1009). Hence, although neither the fulfillment of the duty-to-φ nor the fulfillment of the duty-not-to-φ in a conflict of this latter kind is a morally better course of conduct than the other, we are not wholly devoid of guidance in a situation of this sort. Anyone aware of the nature of a moral conflict that confronts her has grounds for knowing that, regardless of whether she complies with her duty to φ or with her duty not to φ, she will have incurred a further moral obligation to remedy the wrong that she has thereby done.

Fifth, most of the founders of standard deontic logic believed that norms are non-propositional. Those founders were therefore inclined to cash out the logical relationships between norms by reference to the fulfillment-conditions thereof. However, as I have maintained elsewhere (2018, 198–9, 203, 214 n. 16), such an approach disastrously conflates the fulfillment-conditions and the existence-conditions of norms. That is, it conflates the conditions under which duty-imposing norms are satisfied and the conditions under which duty-imposing norms are operative. In any situation of deontic conflict, where someone is simultaneously under an obligation to φ and under an obligation not to φ, the bearer of those conflicting obligations cannot fulfill both of them. The joint fulfillment of conflicting duties is a logical impossibility. All the same, the conflicting duties can perfectly coherently coexist. A bearer of such duties will inevitably breach one or the other of them, but the very reason for the inevitability of a breach in one direction or the other is that the duties are simultaneously binding. Hence, a system of logic that gauges the logical relationships between norms (or between the duties imposed by norms) with reference to their fulfillment-conditions is fundamentally distortive.[9]

[9] That distortive method antedates the advent of standard deontic logic. It is also characteristic of Jeremy Bentham's "logic of the will," which is ably expounded in Hart 1982, 111–17.

Sixth, and finally, with regard to the realm of morality there have arisen concerns about unfairness or excessive onerousness that parallel the concerns about unfairness or excessive onerousness in the legal realm. Michael Moore has raised such a concern when he explains why he hopes to show that moral conflicts are very uncommon. On the one hand, Moore does briefly acknowledge the potential for conflicts between deontological duties, and he allows that "[i]t may not be, as Kant famously proclaimed, that a conflict of such obligations is literally 'inconceivable'" (2007, 37). On the other hand, he declares that "it would be unfortunate for us in the extreme if morality often confronted us with choices where we will be 'damned if we do and damned if we don't.' The distinctions we shall examine hold out the possibility of so limiting our stringent obligations as to minimize or even eliminate such situations of moral conflict" (2007, 37–8).

Moore's ambition to establish the infrequency of moral conflicts is focused not on the problem of action-guidance but instead on the onerousness or unfairness of a world in which someone often finds that every mode of conduct open to her is morally wrong. Such a worry is pertinent, of course, but Moore draws an inapt conclusion from it. Instead of indulging in the puerility of wishful thinking by trying to expound the general structure of morality in a manner that whisks most moral conflicts out of sight, we should quite frequently seek to act in ways—and to arrange our institutions in ways—that will reduce the incidence of such conflicts (Marcus 1980). Acting in conformity to a practically oriented conclusion of that sort is the best means of allaying the anxiety felt by Moore and others about the prospect of unavoidable wrongness. To act in such a fashion, one needs to be alert to the possibility and actuality of moral conflicts in a diversity of settings.

In other words, the consternation engendered by the specter of unavoidable wrongness should incline us away from the wishful thinking which Moore recommends. Far from trying to delineate the contours of morality in a manner that will obscure the emergence of moral conflicts, we should be seeking to grasp those contours with keen sensitivity to the likelihood of such conflicts. Only thus can we informedly fix upon the practical steps that are best suited to avert predicaments of unavoidable wrongness (insofar as they can and should be averted).

2.4.3 Contradictions

Unlike deontic conflicts, which can and do occur both in the realm of morality and in the realm of law, contradictions between moral positions or between legal positions cannot ever genuinely occur. Positions that contradict each other cannot coexist. This point applies to the right-hand half of the Hohfeldian table as much as to the left-hand half, but it is best broached here—because the contrast between the possibility of deontic conflicts and the impossibility of contradictions is illuminating, and because purported discoveries of contradictions among the

norms of any particular legal system (or warnings against such contradictions) are usually focused on situations involving claim-right/duty relationships.

Of course, frequently the putative discoveries of contradictions stem from outright confusion as theorists fail to differentiate between contradictions and deontic conflicts. For instance, as I have remarked elsewhere (2007, 125–30), Lon Fuller persistently ran together contradictions and conflicts as he professed to be discussing the former while providing examples of the latter. Similarly, both Hans Kelsen and Eugenio Bulygin were sometimes guilty of such conflations. For example, near the outset of Bulygin's ruminations on Kelsen's thesis that there cannot ever be genuine contradictions between any of the norms of a legal system that are in effect at a given time, we encounter the following passage (Bulygin 2013, 225, quoting Kelsen 1967, 328):

> This thesis states that no two legal norms that belong to the same system can ever contradict each other. In other words, no two contradictory norms can be simultaneously valid. "It is not possible," Kelsen writes, "to describe a normative order by asserting the validity of the norms '*a* ought to be' and at the same time '*a* ought not to be.'"

Although Kelsen was correct in espousing his thesis about the impossibility of contradictions among the laws that are simultaneously valid in any system of governance, and although Bulygin went astray in trying to impugn that thesis, the quotation here from Kelsen muddies the water by encapsulating a deontic conflict rather than a contradiction.[10] Had Kelsen's thesis about consistency been aimed against the possibility of deontic conflicts within a legal system, it would have been badly misguided—for, as has just been argued, such conflicts are abidingly possible and are sometimes actual. Fortunately for Kelsen, however, his thesis was in fact aimed against the possibility of contradictions within a legal system. So directed, the thesis was indeed sound. There cannot ever be a situation where one norm in a legal system L makes it the case that Ezekiel owes Obadiah a duty to φ, while another norm in L simultaneously makes it the case that Ezekiel vis-à-vis Obadiah is at liberty not to φ. Those two deontic upshots cannot coexist within a single legal system.

At least as common as the conflation of conflicts and contradictions is another misstep that has led some philosophers to believe that contradictions are possible among the laws that are in effect in any particular jurisdiction. Often, such philosophers have failed to distinguish adequately between the legal norms in a jurisdiction and the formulations of those norms. Ironically, Kelsen was

[10] I am here construing the normative auxiliary verb "ought" as a deontic auxiliary verb of obligation. If that auxiliary is instead construed as non-deontic, then the situation recounted by Kelsen involves neither a contradiction nor a conflict.

guilty of just such a failure—and furthermore of running together conflicts and contradictions yet again—even while he affirmed the impossibility of contradictions among the laws of any system of governance. He committed the norms/formulations muddle both in the passage quoted above and in the following passage: "Contradictions are also banned within the sphere of [law and morality]. Just as it is logically impossible to assert both 'A is' and 'A is not', so it is logically impossible to assert both 'A ought to be' and 'A ought not to be' " (Kelsen 1945, 374–5). Even if we leave aside the conflation of conflicts and contradictions in this statement, Kelsen erred in proclaiming that it is impossible to assert two contradictory propositions. Anybody can assert two such propositions, even though the state of affairs jointly denoted by them can never possibly obtain. I can easily assert that some specified mathematical theorem is provable, even if that putative theorem subsequently turns out to be false and therefore unprovable. In such an event, the proposition which I asserted was necessarily false, but there were no logical barriers or other impediments to my asserting it. Similarly, the lawmakers (whether legislative or adjudicative or administrative) in some system of governance can bring into existence various legal materials—statutes, regulations, ordinances, rulings, and so forth—which formulate norms that would be in contradiction if those norms were simultaneously in effect. The simultaneous existence of those contradictory formulations is entirely possible, just as my assertion about the provability of the mathematical theorem is entirely possible. What is impossible, of course, is the coexistence of the two norms that are denoted by the contradictory formulations. Those two norms cannot ever both be in effect at the same time, notwithstanding that the formulations of them are simultaneously "on the books" as some of the legal materials which the lawmakers of a jurisdiction have brought into existence. A promulgated norm-formulation which ordinarily denotes an operative norm can become a referentially empty formulation in the presence of a contradictory norm-formulation promulgated by the same system of legal governance. The contradictory norm-formulations can be "on the books" simultaneously, but at any given time one or the other of them is referentially empty whenever they are simultaneously on the books.

My latest quotation from Kelsen is especially puzzling because he himself proceeded straightaway to make the very point which I have just made about the importance of distinguishing between legal norms and the formulations of those norms (Kelsen 1945, 375):

> It is one of the main tasks of the jurist to give a consistent presentation of the material with which he deals. Since the material is presented in linguistic expressions, it is *a priori* possible that it may contain contradictions. The specific function of juristic interpretation is to eliminate these contradictions by showing that they are merely sham contradictions.

Kelsen here rightly highlighted the distinction between norms and norm-formulations, and the concomitant distinction between genuine contradictions and ostensible contradictions. Because the materials of a legal system are presented in written or spoken formulations, they can contain contradictions and inconsistencies. Nonetheless, the contradictions in the materials never correspond to contradictions between the norms that are simultaneously valid within the system. In a given jurisdiction, there might be one statute which purports to place anyone like Ezekiel under a duty-to-φ owed to anyone like Obadiah, and there might be another statute which purports to endow anyone like Ezekiel with a liberty-not-to-φ that is held vis-à-vis anyone like Obadiah. However, the legal norms respectively denoted by those two statutes cannot ever be in effect simultaneously. One or the other of those norms is in effect at any particular time, and the remaining one of them is not in effect at that time. The point here is not simply that the two norms are insusceptible to being implemented jointly—in that the effectuation of the first statute would result in the imposition of sanctions on Ezekiel for his not φ-ing, whereas the effectuation of the second statute would result in the withholding of any sanctions against Ezekiel for his not φ-ing. Although the norms denoted by the two statutes obviously cannot be implemented jointly, my point here is more deeply that the deontic upshot of each norm excludes the deontic upshot of the other. Not only can the two norms never be *given* effect jointly when Ezekiel does not φ, but additionally they can never be *in* effect jointly. It can never be the case that, within a single jurisdiction, Ezekiel owes Obadiah a legal duty to φ and simultaneously does not owe Obadiah any legal duty to φ. Consequently, the norm-formulations "on the books" in the relevant jurisdiction are not in congruity with the norms that are actually in effect there.

As I have remarked in a somewhat different context (2003, 66), the term "laws" is ambiguous in everyday discourse and in philosophical discourse. In some contexts it refers to norm-formulations such as the texts of statutes, and in other contexts it refers to the norms that are encapsulated by those formulations. That ambiguity does not inevitably engender confusion, since the distinct senses of "laws" can be kept suitably separate. Nonetheless, confusion can readily arise—as theorists who come upon some contradictions among laws in the first sense are tempted to infer that they have discovered some contradictions among laws in the second sense. Any such inference is to be resisted, for the incoherence that is possible at the level of norm-formulations is not ever paralleled at the level of deontic relationships that are actually in effect.

As Kelsen suggested in my latest quotation from him, a jurist or theorist who does encounter some contradictions at the level of the norm-formulations in a particular jurisdiction is faced with the task of explaining how the legal relationships in the jurisdiction are free of contradictions. One tack, which Kelsen seemed to have in mind, is to reconstrue the norm-formulations themselves with the aim of showing that the contradictions therein are only apparent and are not genuine

even at the level of the formulations. Thus, for example, a jurist or theorist might interpret one of the two seemingly contradictory formulations in a way that reconciles it with the other such formulation. In many jurisdictions, these reconciliatory interpretations are commonly undertaken by adjudicative or administrative officials who are confronted with what appear to be contradictory provisions in the statutes or regulations or other materials which they are called upon to construe (Twining and Miers 2010, 146). In a closely related vein, the officials might conclude that one of two contradictory norm-formulations has superseded or precluded the operativeness of the other formulation. They might maintain, for instance, that a later enactment supersedes any portions of an earlier enactment with which it is in contradiction—even if the supersession is not explicitly signaled in the later enactment. Or the officials might conclude that, in the absence of any such explicit signal, the earlier enactment takes precedence over any portions of the later enactment which contradict it. Techniques of these kinds can often quite plausibly be wielded to resolve apparent contradictions at the level of the norm-formulations in a jurisdiction.

Still, there are of course no guarantees that those techniques or other cognate approaches will be plied by the officials in any particular set of circumstances where the legal materials in a jurisdiction contain some contradictory formulations. In a situation where a contradiction between formulations has not been explicitly addressed through any such techniques, legal scholars and philosophers will have to try to ascertain which of the formulations denotes a norm that is currently in effect and which of them denotes a norm that is not currently in effect. The most obvious tack for such an enquiry resides in examining the patterns of implementation pertaining to the contradictory formulations. Let us consider again a situation in which one enactment E_1 purports to place anybody like Ezekiel under a duty-to-φ owed to anyone like Obadiah, while another enactment E_2 in the same jurisdiction purports to endow anybody like Ezekiel with a liberty-not-to-φ that is held vis-à-vis anyone like Obadiah. Suppose that, whenever Ezekiel or anyone else like him in the jurisdiction has not φ-ed, the legal-governmental officials there take no steps whatsoever to give effect to the legal duty that has supposedly been imposed on Ezekiel and on everybody else like him by E_1. Observing such a pattern of wholesale non-enforcement, legal theorists can quite safely conclude that the norm denoted by E_1 is not currently in effect in the relevant jurisdiction—and that the norm denoted by E_2 is instead in effect there. Such a conclusion is importantly different from the conclusion that would be warranted if there were no E_2 "on the books." Without the presence of any E_2, legal theorists who observe the wholesale absence of enforcement pertaining to the duty imposed under the norm denoted by E_1 are warranted only in concluding that the norm denoted by E_1 is regularly unenforced. They would lack any basis for concluding that that norm is not currently in effect as a valid law of the jurisdiction.

As has already been suggested, the reason for this difference between the conclusion warranted in the absence of E_2 and the conclusion warranted in the presence of E_2 is that the deontic upshot of E_2 cannot coexist with the deontic upshot of E_1. The norms denoted by those enactments cannot ever simultaneously be in effect within a single jurisdiction, because Ezekiel cannot ever simultaneously owe Obadiah a legal duty to φ and not owe Obadiah any legal duty to φ within a single jurisdiction. Consequently, when E_2 is "on the books," and when the pattern of law-administration is along the lines envisaged in the preceding paragraph, the appropriate conclusion is that the norm denoted by E_2 is currently in effect and that the norm denoted by E_1 is not currently in effect within the jurisdiction where those two enactments are both "on the books." Accordingly, any duties that would have been imposed under the norm denoted by E_1 are currently non-existent. By contrast, when E_1 is "on the books" whereas E_2 is not, and when the pattern of law-application is along the lines envisaged in the preceding paragraph, the apposite conclusion is that the duties imposed under the norm denoted by E_1 are existent but are regularly unenforced. Although those duties are *in* effect, they are not *given* effect. Perhaps they are unenforceable, or perhaps they are simply unenforced; in either case, the bindingness of the duties as a deontic matter is not currently backed up by the wielding of sanctions or other measures through which a system of governance can seek to secure compliance with legal requirements.

2.4.4 Unenforcedness and Unenforceability

In my discussion of the impossibility of contradictions among the legal norms or legal positions that are in effect at any given time within a system of governance, we have just glimpsed the matter of legal duties that are regularly unenforced. Although the topic of legal powers to enforce legal duties will figure saliently in Chapter 4 of this book, and although the power/liability axis in Hohfeld's table of legal relationships will be examined later in this chapter, we can fruitfully consider now the matter of unenforcedness and unenforceability. That matter is an ingredient in any full explication of the claim-right/duty axis in the Hohfeldian table.

Whether merely unenforced or also unenforceable, a legal duty that does not receive any backing from the mechanisms of a system of governance through sanctions or preventative measures is nonetheless in existence as a legal duty. The deontic upshot of the law that imposes the duty does obtain, even though that deontic upshot is not accompanied by any measures of material implementation in response to contraventions of it. For example, suppose that a municipality enacts an ordinance that prohibits jaywalking on the streets of the city. Suppose further that acts of jaywalking never or almost never trigger any responses from the administrative officials (such as constables) who are responsible for enforcing the city's laws. In such circumstances, the duty imposed on each person under the

terms of the ordinance is regularly unenforced. All the same, that duty incumbent on each person is existent as a genuine legal duty. Until the ordinance is repealed either expressly or implicitly, its deontic upshot resides in legally obligating everyone within the municipality to refrain from acts of jaywalking. That upshot is not undone by the sheer fact that the obligation in question is regularly unenforced. Indeed, as I will explain shortly, a duty that is regularly unenforced can nevertheless be of considerable practical importance.

Before we explore that point about practical importance, however, we should ponder the difference between mere unenforcedness and unenforceability. In the scenario of the anti-jaywalking ordinance, the duty incumbent on each person to refrain from acts of jaywalking is very likely enforceable even though it is persistently unenforced. That is, very likely the constables of the municipality and other local officials are legally empowered to give effect to the ordinance by apprehending and fining people who jaywalk on the streets of the city. Though the constables and other officials do not exercise their powers of enforcement in response to breaches of the anti-jaywalking ordinance, they could do so if they were differently inclined. Hence, the ordinance is not legally unenforceable. By contrast, some other readily envisioned laws are unenforceable as well as persistently unenforced.

For instance, suppose that a law in some jurisdiction J places every school in J under a legal duty to have inner doors that are all made entirely of wood, and suppose that there is no law in J which provides that each school there is legally at liberty not to have inner doors that are all made entirely of wood. Let us suppose further that some of the schools in J have inner doors that are made of glass rather than of wood. In response to this situation, no measures of enforcement whatsoever are undertaken. Though the absence of any such measures could have stemmed simply from the disinclination of the officials in J to exercise powers of law-enforcement with which they are vested, it in fact stems instead from their not being endowed with any such powers that would cover the situation of the schools. Neither any general authorization nor any specific authorization empowers the officials in J's system of governance to proceed against schools in connection with violations of construction-safety laws. Moreover, when a student suffers an injury to her hand through the shattering of a portion of a glass door in her school, and when she pursues legal proceedings against the school to recover damages for her injury, the courts in J correctly hold that—in the absence of any negligence on the part of the school—there is no basis, under the law of J, for an injunction or an award of damages against the school. Under the law of J, the sheer fact that the construction-safety enactment has been breached is not such a basis. Neither through public-law administrative measures nor through private-law adjudicative proceedings, then, are there any legal powers to enforce the duty which requires that all the inner doors of each school in J be made entirely of wood. That legal duty is unenforceable rather than merely unenforced. Nonetheless, it is a perfectly genuine legal duty. Its deontic upshot, or the deontic upshot of the law that imposes

it, is not dissolved or precluded by its unenforceability. Every school in J is legally obligated to have inner doors that are all made entirely of wood. A school in J will be committing a legal wrong if it does not have such doors.

No functional system of law could operate entirely or predominantly through duties that are unenforceable. As H.L.A. Hart maintained in *The Concept of Law* (1994, 193–200), the need for sanctions as means of giving effect to legal duties is something that follows from certain elementary characteristics of human nature. Still, any functional system of governance can operative effectively while a small proportion of the duties imposed by it are not only unenforced but also unenforceable. In J, the effectiveness of the overall operations of its system of governance is compatible with the fact that the law pertaining to the composition of the inner doors of schools is not enforceable by any of the coercive mechanisms of that system.

Still, although the overall system of governance in J can function effectively despite the unenforceability of its legal requirement pertaining to the doors of schools, some readers might wonder about that requirement itself. Why should it be classified as a genuine legal duty, given that it cannot be enforced at all by J's legal-governmental officials? Two replies to this question are appropriate. First, even if every unenforceable legal duty were devoid of all significance on a quotidian practical level, the deontic upshot of each such duty would abide. As has been stated in the penultimate paragraph above, the placing of a party (such as each school in J) under a legal duty to φ will have made it legally wrong for that party not to φ. For such a party, φ-ing is legally mandatory. Precisely because that deontic upshot ensues from the imposition of a legal duty-to-φ even when the duty in question is unenforceable, the law which imposes the duty will have been repealed or suspended—implicitly if not explicitly—by another law that is in contradiction with it. If no deontic upshot were produced by the imposition of an unenforceable legal duty-to-φ on any party P, then the law imposing such a duty could coexist with a law that makes it legally permissible for P not to φ. However, given that the upshot of legal obligatoriness is indeed produced by a legal duty-to-φ even when the duty is unenforceable, the two laws just mentioned cannot coexist as valid legal norms. Only one of them can be in effect at a given time, since it can never be the case that some mode of conduct or some state of affairs is both legally impermissible and legally permissible for any party simultaneously within a single system of law.

Second, as a result of generating the deontic upshot that has been summarized here, a law that imposes unenforceable duties can be of considerable significance on an everyday level in its guiding and influencing of the behavior of the parties to whom its duties are applicable. At that level, the difference between the existence of a law that imposes unenforceable duties-to-φ and the absence of any law that imposes duties-to-φ can be far from inconsequential. When a law that imposes unenforceable duties-to-φ has been brought into existence, the prevailing system

of governance has deemed φ-ing to be legally mandatory and has thereby set a standard of conduct for the parties to whom the law is addressed. For any such party, not φ-ing is legally impermissible. That deontic upshot will not inevitably yield significant consequences at the level of everyday guidance and influence, but the occurrence of such consequences is always possible and is far from outlandish. In some contexts, the occurrence of such consequences can be highly likely. For instance, although the schools in J will not incur any sanctions if they fail to comply with the law which requires them to have inner doors that are all made entirely of wood, the administrators who run the schools in J may well be inclined to bring their institutions into compliance with that law (or to keep their institutions in compliance with it). Especially if the system of governance that presides in J is a liberal democracy, the status of some mode of conduct as legally mandatory can be a powerful stimulus for the adoption of that mode of conduct. Duty-imposing legal norms and the formulations that denote them can serve to channel and direct the behavior of people even when the duties established by the norms are unenforceable. When those effects of channeling and directing occur, they are of course not due to any prospect of sanctions for contraventions of unenforceable obligations (since there is no such prospect). Instead, they are due both to the prestige of the law in fixing upon authoritative standards and to the closely related role of the law in furnishing people with focal points that can overcome coordination problems. At least in societies with systems of governance that are robustly liberal-democratic, those features of the law are often operative. At least in such societies, then, some unenforceable legal requirements can significantly influence the conduct of people in the matters to which those requirements pertain. For example, if J is a society over which a liberal-democratic system of governance presides, the administrators of schools in J may well be inclined to comply with the construction-safety law pertaining to the inner doors of their buildings. They may well wish to avoid the classifiability of their schools as lawbreakers. Such an effect is not inevitable, of course, but it is far from fanciful.

Are unenforceable legal requirements, with their channeling and directing effects, essentially the same as the aspirations specified in a set of voluntary guidelines issued by a system of governance? If this question is construed as asking about the ways in which (or the extent to which) the behavior of people is influenced by the unenforceable requirements and by the voluntary guidelines respectively, then it is broaching a complex matter of individual and social psychology that cannot be explored here. That empirical matter is better tackled in a work of social science than in a work of philosophy. Alternatively, however, the question above can be construed as asking about the requirements and guidelines themselves—rather than about their effects. So interpreted, the question is broaching a philosophical matter. Is the hortatory tenor of the guidelines assimilable to the deontic tenor of the requirements? As should be manifest from what has been said already, the answer to this question is negative. Whether a duty-imposing law is enforceable

or unenforceable, certain modes of conduct or certain states of affairs are made legally mandatory by the obligations which that law establishes. Those obligations legally disallow any contrary modes of conduct or any contrary states of affairs. By contrast, the specifications of guidelines in a voluntary code implicitly or explicitly disclaim the mandatoriness of what they prescribe. Though the exhortative force of the specifications may be strong, it does not render anything legally obligatory. Deviations from the guidelines are not legal wrongs.

Exactly because the guidelines in a voluntary code do not establish any legal requirements, they can coexist with laws which permit modes of conduct or states of affairs that are contrary to what the guidelines prescribe. Whereas the legal norm in J that imposes on each school an unenforceable legal duty pertaining to the composition of inner doors will be negated or suspended as a valid norm by the introduction of another law which permits each school not to have inner doors that are all made entirely of wood, a law of the latter kind would not negate or suspend a voluntary guideline in J that recommends against the use of substances other than wood for the inner doors of schools. Such a guideline would be entirely consistent with the permission-conferring law, since it would not legally disallow anything which the permission-conferring law allows. Indeed, the recommendation in the guideline would not legally disallow anything, period. Devoid of any duty-imposing upshot, the voluntary guideline would not clash with the deontic upshot of any permission-bestowing law. By contrast, the law that imposes the unenforceable duty on each school in J would be inconsistent with a law in J that confers upon each school a legal liberty not to have inner doors that are all composed entirely of wood. Those two laws cannot simultaneously be valid, for the deontic upshot of each is logically inconsistent with the deontic upshot of the other. That logical inconsistency obtains irrespective of the unenforceability of the duties that are incumbent on the schools with regard to their inner doors. What matters for the deontic upshot of a law is whether that law makes some mode of conduct legally mandatory, rather than whether the mandatoriness is materially backed up by measures of enforcement and prevention. Accordingly, even if the conformity-eliciting effects of an unenforceable duty-imposing law are broadly similar to those of a voluntary guideline, the general character of that law is unassimilable to the general character of the guideline.

2.5 Liberties and No-Rights

Much more remains to be said about claim-rights and duties, and much more will be said in this book. For one thing, as has already been stated, Chapter 3 will defend the Correlativity Axiom—the proposition that every claim-right entails a duty with the same content and that every duty entails a claim-right with the same content—in response to various objections and queries that have been leveled

against it. My defense of the Correlativity Axiom will bring to bear some of the quantificational apparatus that is crucial for a sound analysis of the positions in Hohfeld's table of deontic and normative relationships. Furthermore, even as we move on for the moment to examine the liberty/no-right column in Hohfeld's table, the roles of claim-rights and duties will continue to figure saliently. Some of the matters to be contemplated in one's probing of the complexities of liberties and no-rights are centered on the interplay between the claim-right/duty axis and the liberty/no-right axis in Hohfeld's schema. While now proceeding to come to grips with the second of those axes, we will not have left the first of them behind.

A Hohfeldian liberty is a permission. When somebody is legally or morally at liberty to φ, the applicable laws or the applicable moral principles permit her to φ. Either in the realm of law or in the realm of morality (or in each realm), she is not under any duty to refrain from φ-ing. A Hohfeldian liberty is an instance of freedom, but the freedom is deontic rather than modal; it consists in someone's being allowed to φ, rather than in her being able to φ. Of course, very often somebody is able to do what she is permitted to do. In many other cases, however, her Hohfeldian liberty to φ is not accompanied by any ability of hers to φ. Conversely, very often someone is capable of doing things which she is not legally or morally at liberty to do. The concept of deontic freedom as Hohfeldian liberties and the concept of modal freedom as abilities are extensionally as well as intensionally non-equivalent. Permissions and abilities frequently coincide but likewise frequently diverge.

As is indicated by my assertion in the preceding paragraph that a Hohfeldian liberty to φ involves the absence of a duty not to φ, and as I have already explained in §2.3 above, duties and liberties are logical duals rather than logical contradictories. "Leah owes Ethan a moral duty not to punch him in the face" is equivalent to "It is not the case that Leah is morally at liberty vis-à-vis Ethan to punch him in the face," because "Leah owes Ethan a moral duty not to punch him in the face" and "Leah is morally at liberty vis-à-vis Ethan to punch him in the face" are logical duals. Each of the propositions in the latter pair is the negation of the other, and the content of the deontic predicate in each of those two propositions is the negation of the content of the deontic predicate in the other proposition. Disastrous confusion can ensue when theorists do not take account of the negation at the level of the predicated content as well as the negation at the level of the proposition. Unlike "Leah owes Ethan a moral duty not to punch him in the face" and "Leah is morally at liberty vis-à-vis Ethan to punch him in the face," "Leah owes Ethan a moral duty not to punch him in the face" and "Leah is morally at liberty vis-à-vis Ethan not to punch him in the face" are perfectly consistent propositions. Though this point about the twofold levels of the negation in the relationship between any logical duals may seem obvious when it is highlighted, quite a few philosophers in the past have overlooked it or have baselessly accused Hohfeld of overlooking it.[11] For

[11] For various references, see Kramer 1998, 13 n 4.

example, when ruminating on the Hohfeldian analysis, Richard Flathman wrote that "the [negation] of *A*'s having a liberty to do *X* is for him to have a duty to do *X*" (Flathman 1976, 39). Much earlier, only a few years after Hohfeld's death, Albert Kocourek misguidedly complained that under the Hohfeldian analysis a person "may have a [Hohfeldian liberty] and a Duty as to the same act.... In other words, Duty and *No*duty are the same thing—a rather unusual result even for an unusual system of terminology" (Kocourek 1922, 239, emphasis in original). Albeit Hohfeld himself did not employ the technical language of "logical duality," he not only avoided Flathman's and Kocourek's blunders but also in fact emphasized the twofold levels of the negation in the relationship between duties and liberties (Hohfeld 1923, 39).

2.5.1 Unpaired Liberties and Paired Liberties

One's Hohfeldian liberty to φ consists in one's being legally or morally permitted to φ. In itself, an ascription of a liberty-to-φ to a person P leaves open the question whether P is also at liberty not to φ. P might of course hold both a liberty to φ and a liberty not to φ, but alternatively she might hold only a liberty to φ and might lack any liberty not to φ (or vice versa). If P does hold only a liberty to φ and does lack any liberty not to φ, she is both duty-bound to φ and at liberty to φ. As a matter of logic—rather than as a matter of jurisdiction-specific constraints that might be in place—a liberty to φ and a duty to φ can be combined just as readily as can a liberty to φ and a liberty not to φ. When a liberty to φ is coupled with a duty to φ, it is an unpaired liberty; contrariwise, when a liberty to φ is coupled with a liberty not to φ, each of them is a paired liberty. Any Hohfeldian liberty can be either paired or unpaired. (As is evident from my reflections on deontic conflicts in §2.4.2 above, P can lack a liberty-to-φ while also lacking a liberty-not-to-φ. In that event, P is under a duty not to φ and is simultaneously under a duty to φ.)

Joab might hold a liberty to φ and a liberty not to φ vis-à-vis Absalom, while holding only a liberty to φ or only a liberty not to φ vis-à-vis Zebulun. For example, suppose that Joab and Zebulun have entered into a contract whereby Joab has undertaken to deliver a certain package to Zebulun's home by 5:00pm on a specified day. Under the terms of the contract, Joab vis-à-vis Zebulun still holds a liberty to deliver the package but no longer holds a liberty not to deliver it. Joab vis-à-vis Zebulun is now legally and morally obligated to deliver the package. Vis-à-vis Zebulun, then, Joab's liberty to deliver the package is unpaired rather than paired. Vis-à-vis Absalom, however, Joab continues to hold both a liberty to deliver the package and a liberty not to deliver it. His legal duty to deliver the package is owed to Zebulun (and to the prevailing system of governance) rather than to Absalom. Thus, vis-à-vis Absalom, Joab's liberty to deliver the package is paired with his liberty not to deliver it.

In sum, whenever we ask whether somebody's liberty to φ is unpaired or paired, we need to specify the party (or parties) vis-à-vis whom the liberty to φ is held. Joab's liberty vis-à-vis Zebulun to deliver the package to Zebulun's home is an unpaired liberty, whereas Joab's liberty vis-à-vis Absalom to deliver the package to Zebulun's home is a paired liberty. Vis-à-vis Zebulun, the liberty of Joab to deliver the package is coupled with a duty to deliver it; vis-à-vis Absalom, the liberty of Joab to deliver the package is coupled with a liberty not to deliver it. Of course, someone might not owe to anybody at all a legal or moral duty to φ. If so, vis-à-vis everyone, she holds a legal or moral liberty not to φ. We can then ask whether that legal or moral liberty-not-to-φ held vis-à-vis everyone is paired with a legal or moral liberty-to-φ that is also held vis-à-vis everyone. Even here, however, we are quantificationally specifying the parties vis-à-vis whom each liberty is held. Ascriptions of liberties (whether paired or unpaired) that involve quantification over the parties in the correlative positions are something to which we shall return shortly in this chapter.

Some philosophers have rather curiously maintained that the noun "liberty" is inapposite for an unpaired permission. As I have mentioned in Chapter 1, Hohfeld himself more often employed the term "privilege" than the term "liberty" for the entitlement in the second column of his table. Strangely, some philosophers have felt that the former term is better for an unpaired permission and that the term "liberty" should be reserved for paired permissions. For example, David Adams has opined as follows (1985, 87–8):

> [T]he widespread propensity on the part of Hohfeld's critics to substitute "liberty" for "privilege" [is] certainly a chief source of confusion. Simply put, the problem here is that it does not seem to follow from the assertion that I am "privileged" to do p that I am "at liberty" to do p: the latter seems to make a stronger claim. To say that I am at liberty to do something suggests … that I am permitted to do it and permitted not to do it.…Thus it appears that on any reasonable theory of liberty the expressions "having a liberty" or "being at liberty" will say something stronger than "having a privilege" or "being privileged."

Contrary to what Adams submits, the substitution of "liberty" for "privilege" is salutary and is not in any way a source of confusion. Moreover, the reason for the salutariness of that substitution is unrelated to the paired/unpaired distinction. Most modern commentators on Hohfeld (including me) prefer the word "liberty" because the word "privilege" conveys the impression that an entitlement denoted by it is a prerogative vested distinctively in one person or in each member of some special class of people. That person or each member in that class of people is privileged by dint of being singled out to hold the entitlement in question. Because the noun "privilege" so strongly carries this connotation of someone's having been set apart from all or most other people through the holding of a special prerogative

not enjoyed by those others, it is inapt as a label for the entitlement in the second axis of Hohfeld's schema.[12]

Some Hohfeldian liberties (whether paired or unpaired) are privileges in the sense just outlined, of course, but countless other Hohfeldian liberties are not privileges in that sense. Let us quickly ponder a couple of examples. First, Mabel is like everyone else in any ordinary circumstances in that she is legally and morally *at liberty* to refrain from punching Edward in the face. She is of course also like everyone else in any non-pugilistic circumstances in that she is legally and morally *obligated* to refrain from punching Edward in the face. Her liberty to refrain from punching Edward in the face is therefore not paired with a liberty to punch him in the face, but her liberty to refrain from punching him in the face is decidedly not a privilege in the sense limned by my preceding paragraph. It is scarcely a prerogative that sets Mabel apart from her fellow citizens. Second, every motorist in any ordinary circumstances is legally and morally *at liberty* to refrain from proceeding through a red light at any intersection, and every motorist in any ordinary circumstances is also legally and morally *obligated* to refrain from proceeding through a red light at any intersection. Hence, the holding of that unpaired liberty by each motorist does not distinguish him or her from anybody else. One's designation of that liberty as a privilege would thus be highly misleading.

Conversely, some paired liberties are indeed privileges in the sense specified by the penultimate paragraph above. For instance, the law of a given jurisdiction might invest a particular person or company with a liberty to charge a toll for the use of a certain road by motorists. That person or company is also legally at liberty to refrain from charging a toll to motorists. Although everybody else in the jurisdiction is likewise legally at liberty to refrain from charging any toll to motorists for the use of the specified road, nobody else there is legally at liberty to charge a toll. Hence, the liberty of the chosen person or company to charge a fee is a paired liberty and is nonetheless a privilege in the sense summarized above.

In short, Adams's terminological quibbling is baseless. The unpairedness of many Hohfeldian liberties is not a consideration that tells in favor of the highly misleading term "privileges" as a label for those liberties. Still, pointless misgivings about the terminology of "liberties" as applied to unpaired permissions are not unique to Adams. One of the earliest critics of Hohfeld, Kocourek, not only failed to grasp that duties and liberties are logical duals—for which I have criticized him already—but also failed to grasp that unpaired permissions are indeed liberties. Kocourek wrote as follows: "If an owner is under a *duty* to stay off his own land how can it be said, if we are talking of law, that he has a *liberty* to stay off the

[12] In a related sense, the term "privilege" in everyday discourse denotes something that is a source of particular honor or gratification for the person who is endowed with it. For example, a politician upon his retirement might declare that his service as an elected legislator has been a great privilege for him. The unpaired Hohfeldian liberties recounted by my next paragraph are not privileges in this latter sense any more than in the sense sketched above.

land? … If one is under a duty to perform or omit an act, freedom of action is superseded."[13] To this travesty of an argument by Kocourek, the obvious riposte is that a duty to stay off some land and a liberty to stay off that same land are patently compatible. Somebody vested with the specified liberty is legally permitted to fulfill the specified duty. In the second sentence of this quotation, Kocourek seems again to be fundamentally confused about the logical duality of duties and liberties. One's legal duty to φ does supersede one's legal liberty not to φ, but it scarcely supersedes one's legal liberty to φ. Of course, that latter liberty will itself not exist if the person under a legal duty to φ is simultaneously under a legal duty not to φ. A deontic conflict of that kind is of course possible, but its occurrence is decidedly not preordained by the sheer fact that the person is under a legal duty to φ. *Pace* Kocourek, one's bearing of a duty to φ does not entail one's bearing of a duty to abstain from φ-ing.

A far more sophisticated commentator on Hohfeld, Luis Duarte d'Almeida, does not harbor any of the pointless terminological anxiety displayed by these other writers. However, a comment by Duarte d'Almeida can help to reveal why such anxiety is so misplaced (2016, 557):

> Hohfeldian liberties, in other words, are "single" liberties; a liberty to φ is compatible either with a liberty not to φ or with a duty to φ. The ordinary, non-technical notion of being at liberty to φ, with its implicature of freedom to either φ or not φ, is analysable as a conjunction—a "pair"—of Hohfeldian liberties.

Perhaps Duarte d'Almeida is correct when he suggests that a pre-theoretical understanding of one's possession of a liberty to φ carries a defeasible presupposition that one is both at liberty to φ and at liberty not to φ. However, even if such a suggestion is correct, the defeasibility or cancelability of the presupposition is crucial. Unless that presupposition is indeed defeasible or cancelable, an ordinary conception of the nature of a legal liberty to φ would be committed to the proposition that every set of circumstances within the ambit of any system of governance is either a situation of paired liberties or a situation of deontic conflict. After all, if the pre-theoretical understanding of a legal liberty-to-φ is that no such liberty exists unless it is paired with a legal liberty not to φ, then the pre-theoretical understanding presumes that everyone at any time *either* is legally at liberty to φ and legally at liberty not to φ *or else* is both under a legal duty not to φ and under a legal duty to φ. Now, there are ample reasons for thinking that any ordinary conception of one's possession of a liberty to φ does not preposterously carry such a commitment to a stark dichotomy between paired liberties and deontic conflicts. There are thus

[13] Kocourek 1922, 238, emphases in original. For a couple of much more recent articles that express some broadly similar terminological reservations, see Nascimento 2019; Oliveira Lima et al. 2021, 21–3.

ample reasons for insisting that, if Duarte d'Almeida is correct in suggesting that an ordinary conception of one's possession of a liberty to φ does carry an implicature about the pairing of that liberty with a liberty not to φ, the implicature is readily defeasible or cancelable.

2.5.2 The Contents of Liberties

In §2.4.1 above, I have argued against the notion that the content of every duty perforce makes reference to the conduct of the duty-bearer. Because duties and liberties are logical duals, that point about the contents of duties is applicable *mutatis mutandis* to the contents of liberties. Though the contents of countless liberties do refer to actions or omissions by the liberty-holders, the contents of countless other liberties do not so refer. Let us consider again the scenario from the opening paragraph of §2.4.1. Phineas in that scenario has come to owe a legal or moral duty to Hephzibah, where the content of the duty pertains to the sunniness of the weather on the following afternoon. Notwithstanding that the conduct of Phineas (specifically, his provision of assurances about the weather) has played an indispensable role in giving rise to the duty that is incumbent on him, the content of that duty does not make any reference to his conduct. Now, given that every duty is the dual of a liberty with a content that is the negation of the content of the duty, the dual of the duty owed by Phineas to Hephzibah is a liberty pertaining to the occurrence of inclement weather on the following afternoon. Phineas owes his duty to Hephzibah if and only if, vis-à-vis her, he does not hold a liberty with the content just specified. That content, of course, does not make any reference to his conduct.

Liberties with contents that do not refer to any actions or omissions by the people who hold the liberties, then, are innumerable. Whenever somebody has not come to be under a duty with the same content as that of the duty owed by Phineas to Hephzibah, he or she holds a liberty—vis-à-vis everyone else—with regard to the occurrence of inclement weather on the following afternoon. In other words, liberties of that kind are pervasive. So too are myriads of other liberties with contents that do not refer to any actions or omissions by the holders of those liberties. Insofar as somebody has not undergone the imposition of a duty vis-à-vis someone else with regard to the occurrence of some natural event (or with regard to the occurrence of some humanly caused event in which he is not a participant), he holds a liberty with a content that is the negation of the content of any such duty. Ubiquitous, therefore, are liberty/no-right relationships between people with contents that are not focused at all on any actions or omissions by the holders of the liberties.

Of course, there very seldom arise any contexts in which people need to advert to any of the liberty/no-right relationships that have just been broached. In almost all circumstances, those relationships can safely be taken for granted instead of

being invoked or pondered. However, the fact that those relationships can suitably go unmentioned in nearly all contexts is not an indication that they are unimportant. On the contrary, they are of enormous importance—for, without them, people would be under crushingly onerous legal or moral duties at all times. In being at once hugely important and very safely taken for granted and left unspoken on nearly all occasions, the existence of these multitudinous liberty/no-right relationships is somewhat like the continued presence of oxygen in the atmosphere of the planet Earth. In the vast majority of contexts where human beings are pursuing their projects and planning their activities, they do not have to pay any attention explicitly to the fact that oxygen will continue to be present in the atmosphere of Earth. They can safely take that fact for granted, instead of adverting to it directly. Still, the continuation of the presence of oxygen in the atmosphere of Earth is manifestly vital for all those projects and activities. In a roughly parallel fashion, the liberty/no-right relationships adumbrated here are essential for keeping each person's deontic burdens to manageable levels, yet there is hardly ever an occasion for invoking any of those relationships. In nearly all circumstances they can safely remain in the background, tacitly but pervasively.

In the respect just noted, the liberties with contents that do not refer to actions or omissions by the holders of those liberties are not fundamentally different from most liberties with contents that do refer to such actions or omissions. Though some liberties of the latter kind will be invoked in quite a few credible contexts, countless other such liberties can and do remain tacitly in the background. Suppose that Sharon is a resident of the United Kingdom and that she is legally at liberty vis-à-vis everyone else in the United Kingdom to hold her left arm above her head for the next twenty minutes. She is furthermore legally at liberty, vis-à-vis everyone else in the United Kingdom, to rotate that arm either clockwise or counter-clockwise. She is likewise legally at liberty, vis-à-vis everyone else in the United Kingdom, to keep her arm lowered on her desk for the next twenty minutes. There will not arise any occasion for Sharon to invoke any of these liberties or even to reflect fleetingly on the fact that she is endowed with them. In that regard, those liberties are akin to her sundry liberties with contents that do not refer to her own conduct. In virtually every context, they can remain unnoticed in the backdrop of her life.

Moreover, as will become apparent when this chapter arrives at the right-hand half of Hohfeld's schema, countless immunities are also akin to the liberties that have been touched upon here. Multitudes of Hohfeldian immunities remain unglimpsed, even though they are vital components of the moral fabric and legal fabric of people's lives. Indeed, as will be seen, some immunities are partly constitutive of all other Hohfeldian legal and moral positions. Nevertheless, despite the crucial roles of these vast arrays of immunities in the moral and legal dimensions of people's lives—or perhaps precisely because of the ubiquity of those roles—the immunities are almost all taken for granted. Seldom if ever are there any occasions

for people to advert to them directly. Thus, although liberties with contents that do not refer to any actions or omissions by the liberty-holders are almost always taken for granted instead of being invoked or directly discerned, they do not thereby differ from numerous other Hohfeldian entitlements. Their existence and importance and pervasiveness are not at all placed in doubt by their remaining unmentioned and unnoticed nearly everywhere.

2.5.3 Exercises Protected by Claim-Rights

Although claim-rights and liberties are obviously quite different from each other as first-order Hohfeldian entitlements, and although their disjoinability will be highlighted in my next subsection, they can and frequently do combine in ways that have been remarked upon—though not always accurately characterized—in the philosophy of rights. A Hohfeldian liberty to φ does not in itself provide any deontic protection for the ability of its holder to exercise the specified liberty by φ-ing. As a permission to φ, where the permission consists in the absence of a duty not to φ, a liberty to φ can exist in a situation where its holder is permissibly thwarted from exercising it. For example, Ithamar can be legally at liberty to win a two-mile race against Hermione, and Hermione can be legally at liberty to win that race against Ithamar. If Ithamar succeeds in exercising his liberty to win the race by outrunning Hermione without contravening any of the rules of the event, he will permissibly have precluded Hermione from exercising her cognate liberty to win the race. Conversely, if Hermione succeeds in exercising her liberty to win the race by outrunning Ithamar without contravening any of the rules, she will permissibly have stymied Ithamar from exercising his homologous liberty. Any number of further examples could be adduced to illustrate this point, of course.

Nonetheless, although a liberty to φ does not in itself provide any deontic protection for the ability of its holder to φ, a liberty to φ will always be accompanied by some claim-rights that do supply such deontic protection. Indeed, the scenario in the preceding paragraph exemplifies the ways in which claim-rights that accompany liberties can serve to furnish deontic protection for the exercising of those liberties. I have talked there about outrunning a rival without contravening any of the rules of the event. Under the rules of virtually any race, each competitor will be endowed with sundry claim-rights vis-à-vis any other competitor(s). Each competitor will hold claim-rights against being shot or stabbed or thrown to the ground or deliberately tripped, and each competitor will have claim-rights against the wielding of various other techniques through which any rival(s) might cheat. Many of those institutional claim-rights coincide in their contents with certain legal claim-rights held by each competitor vis-à-vis any other competitor(s), and all of those institutional claim-rights coincide in their contents with moral claim-rights held by each competitor. Ithamar holds such claim-rights vis-à-vis Hermione, and Hermione holds

such claim-rights vis-à-vis Ithamar. What is deontically protected by those claim-rights is not the liberty of Ithamar or of Hermione to win the race, but instead the ability or effort of each of them to win the race. In other words, the exercise of that liberty—rather than the liberty itself—is what receives deontic protection from the claim-rights vested in each competitor against the use of unfair tactics by the other competitor(s). Because of the existence of those claim-rights, the only permissible way for each competitor to win the race lies in outrunning the other competitor(s).

As has been underscored, claim-rights of the sort contemplated at this juncture do not deontically protect the liberties which they accompany. Instead, they deontically protect the exercising of those liberties by the holders thereof. (The liberties themselves are protected chiefly by immunities, as we shall see later.) This distinction is surprisingly often overlooked in the philosophical literature on rights and right-holding. Let us glance at just a few examples. Rowan Cruft, a highly perceptive contributor to that literature, has written as follows (2019, 83–4):

> [B]are Hohfeldian [liberties] are constituted simply by the absence of directed duties, and hence are not violable or infringeable. Insofar as we talk of the violation or infringement of a [liberty] right (such as my right to walk on a beach), we are referring to violation or infringement of the Hohfeld[ian] claims protecting it.

Siegfried van Duffel twice commits a similar misstep in the following passage (2017, 194, emphases in original, footnote omitted):

> When we recognize liberties as rights, we do so because they are protected by a collection of more general duties that are not correlative to the liberty, but that constitute—in Hart's terminology—a protective perimeter that protects us from *certain kinds of* interference. Call these "protected liberties." The normative constraints thesis would then hold that liberties which are not *vested* must be *protected* by such general duties if they are to be recognized as rights.

James Penner, another theorist who has contributed insightfully to the philosophical literature on rights and right-holding, is equally guilty of carelessness on this point. He writes that "having the right to [some garden gnomes] is normally regarded as comprising not only the right to non-interference by others, but that this claim-right both protects and to some extent goes hand in hand with the liberty-right to destroy the gnomes" (Penner 2017, 101). Peter Westen likewise declares that a person's "claim-right vis-à-vis all [other] persons—including the state—to defend himself means that no one may interfere with his liberty-right to defend himself."[14]

[14] Westen 2018, 461 (italics removed). For two quite recent articles that repeatedly fail to mark the distinction between deontically protecting a liberty and deontically protecting the exercise of a liberty, see Halpin 2019 and Spena 2012.

Sometimes a person's liberty to φ is accompanied by a claim-right or a set of claim-rights against all ways of preventing the person from φ-ing, but more frequently a person's liberty to φ is accompanied by claim-rights against various ways of preventing the person's φ-ing rather than against all ways. As has been widely recognized in the philosophical literature on these matters (Kramer 1998, 12 n. 3), the abilities of people to exercise any number of liberties are deontically protected to considerable degrees by the basic claim-rights with which people are endowed under any functional system of governance: claim-rights against being subjected to murder, assault and battery, arson, theft, serious fraud, and so forth. In the scenario of the two-mile race between Ithamar and Hermione, for example, the elementary legal claim-rights of each competitor provide a substantial degree of deontic protection for the ability of each competitor to exercise his or her liberty to win the race. Very likely, some further deontic protection is supplied by the rules of the competition. On the one hand, the deontic protection is not comprehensive. It does not disallow every means of preventing the rival runner from exercising his or her liberty to win the race, since each runner remains legally and morally at liberty to outpace the other competitor. On the other hand, although the deontic protection falls short of being comprehensive, it is very wide-ranging. As has already been suggested, outrunning the other competitor is probably the only way of exercising the aforementioned liberty that is legally and morally permissible for each participant in the race, and it is therefore probably the only way of permissibly thwarting the exercise of the cognate liberty held by the rival participant.

This chapter has already observed that there are no relationships of logical entailment between one's liberty to φ and one's claim-rights against being prevented from φ-ing. Nevertheless, although there are no logical entailments between those entitlements, the accompaniment of legal liberties by legal claim-rights against specific ways of preventing the exercise of those liberties is not a mere contingency. While committing the error which I have criticized in the penultimate paragraph above, Alessandro Spena further stumbles when he attributes to Hohfeldians the following view: "Even though a liberty is normally 'supported' by claim-rights that 'protect' it, this 'protection' should be regarded as a mere empirical accident, a coincidence" (Spena 2012, 162). The claim-rights which Spena has in mind are protective not of liberties themselves but instead of acts of exercising those liberties, and the accompaniment of legal liberties by such legal claim-rights is scarcely coincidental or accidental. It is not a matter of logical necessity, but it is a matter of metaphysical necessity.

After all, as has been recounted in the penultimate paragraph above, the abilities of people to exercise their legal liberties are deontically protected to quite considerable degrees by their elementary legal claim-rights against being subjected to major

modes of mistreatment. The fact that people hold those elementary claim-rights is hardly a coincidence or an accident. Rather, as Hart contended in a line of argument to which I have already briefly referred in §2.4.4 above, all or most people within the jurisdiction of any functional system of governance will hold those legal claim-rights (Hart 1994, 193–200; Kramer 2018, 164–72). No such system could endure more than fleetingly if it failed to impose and effectuate the legal duties that are the correlates of those claim-rights, since the effectuation of such duties is essential for the very cohesiveness of any society. As Hart submitted, the indispensability of those duties and their correlative claim-rights for the sustainability of any system of governance is due to some fundamental features of human beings and of the world in which they live. In other words, it is due to the nature of human beings or to the nature of the human condition. Hart himself characterized the indispensability of those elementary duties and their correlative claim-rights as a matter of "natural necessity," but in the parlance of contemporary philosophy it is best characterized as a matter of metaphysical necessity. It is something that follows from the fact that human beings are as they everywhere are. As a matter of metaphysical necessity, then, all or most people within the jurisdiction of any functional system of governance hold legal claim-rights that are conferred upon them by the laws of the system which proscribe major forms of misconduct. Now, given that those claim-rights deontically protect the abilities of people to exercise their legal liberties, and given that the universal or very widespread holding of those claim-rights under any functional system of governance is a matter of metaphysical necessity, the fact that people's abilities to exercise their legal liberties are deontically protected by accompanying legal claim-rights is itself a matter of metaphysical necessity. Legal liberties exist as such only when a functional system of governance is in existence, and as a matter of metaphysical necessity a functional system of governance is in existence only when the legal liberties of people are accompanied by legal claim-rights that serve to protect the abilities of the holders of those liberties to exercise them. Hence, far from being coincidental or accidental, the accompaniment of legal liberties by legal claim-rights in every jurisdiction is intrinsic to the human condition.

Lest the reflections in the foregoing paragraph be misunderstood, a caveat should be attached. Although the nature of human beings is such that every functional system of governance has to proscribe the perpetration of major types of misconduct, the specifics of the legal prohibitions can vary to some degree from one system to another. Even in regard to the most serious types of misconduct, such as homicide, the specifics of the prohibitions can vary to some degree. For example, systems of governance can obviously differ in their specifications of the circumstances (such as situations of self-defense) in which the killing of a person by another is legally permissible, and they can likewise differ over the question whether an absence of culpability is itself sufficient to exclude an instance of homicide from the scope of a prohibition on such misconduct. These variations and

numerous other relatively minor variations are manifestly possible among systems of governance that are all robustly durable. Thus, when I maintain that the accompaniment of legal liberties by legal claim-rights is a matter of metaphysical necessity, I am not suggesting that a precisely delimited set of legal claim-rights must obtain uniformly across jurisdictions. Nor am I contending that the details of the throngs of legal claim-rights in any particular jurisdiction are a matter of metaphysical necessity. Those details are always shaped in part by contingencies. Instead my assertions about metaphysical necessity are focused on the fact that, in every jurisdiction, people's legal liberties—which exist only when a functional system of governance is in existence—are accompanied by some legal claim-rights against major modes of misconduct that would prevent the exercising of those liberties. Such assertions are fully consistent with the fact that there are variations across jurisdictions in the assemblages of basic legal claim-rights with which people are endowed.

2.5.4 Claim-Rights without Liberties

As has been remarked, there are no relationships of logical entailment between any Hohfeldian liberty to φ and any Hohfeldian claim-right(s) against being prevented from exercising that liberty. Similarly, there are no relationships of logical entailment in the opposite direction. Indeed, a party X can owe another party Y a legal duty not to φ and can simultaneously hold vis-à-vis Y a broad legal claim-right to Y's abstention from preventing X's φ-ing. Such situations are not common, but there are no logical barriers to their occurrence. Let us ponder here a somewhat modified version of a scenario which I introduced a quarter of a century ago (Kramer 1998, 15–17).

Before we mull over that scenario directly, a few preliminary comments on it are advisable. It involves a pair of lawsuits, but nothing hinges on the sequence in which those lawsuits are pursued. Though I will of course specify a sequence in which one lawsuit follows the other, the ordering of them could have been reversed without detracting at all from the message of my vignette. Likewise inessential to that message is the nature of the remedies granted in the respective lawsuits. I shall proceed here on the assumption that the remedy in each case is an award of damages, but that assumption is dispensable. Even if the remedy in each case were injunctive relief or something else, the point made by my thought-experiment would remain sound. Immaterial as well, for my purposes, is the question whether the damages are to be paid recurrently or instead as a lump sum. Similarly dispensable is any assumption about which of the parties in my thought-experiment arrived first at the lake where they eventually come into conflict. Indeed, I shall not need to take a position on that aspect of the situation at all. Finally, although my specifications of the contents of the two chief claim-right/duty relationships in the

scenario are accurate, neither of those specifications is uniquely accurate. The content of each claim-right/duty relationship could be specified in alternative ways, and a court that handles each of the lawsuits might well be inclined to adopt one or more of those alternative formulations. Still, as has been stated, my formulation of the content of each such relationship is accurate and is therefore entirely consistent with any accurate formulation that would be adopted by a court.

Consider, then, a factory that has long been operating on the shore of a large lake. Vital to the factory's processes of manufacturing is the discharge of effluents into the lake. Without the continual discharges, those processes would very quickly grind to a halt. Also availing themselves of the lake, albeit at quite a distance and for a very different set of purposes, are some fishermen who have plied their trade for many years on its waters. Over a lengthy period of time, the emissions of noxious substances into those waters from the factory are cumulatively sufficient to reduce sharply the number and diversity of the fish in the lake. As a consequence of that steep decline, the fishermen are no longer able to earn their livelihoods from their trawling. After expostulations with the owner of the factory have proved to be fruitless, the fishermen pursue a lawsuit against the owner to seek damages for the losses which they have undergone. Their litigation is successful, as the court holds that the factory owner is under a legal duty vis-à-vis the fishermen to abstain from releasing the toxic pollutants into the lake. Hence, the factory owner vis-à-vis the fishermen does not have a legal liberty to discharge those substances into the lake.

Perhaps because the fishermen are dissatisfied with the amount of the damages awarded to them by the court, or perhaps simply because of their anger about the loss of their trade, they subsequently take matters into their own hands by occluding the outlet pipes of the factory at night. Because the emissions of the effluents from the pipes have been obstructed so effectively, the operations of the factory have to cease for several weeks. A new instance of litigation arises, with the factory owner as the plaintiff and with the fishermen as the defendants. Like the lawsuit brought by the fishermen against the factory owner, the lawsuit brought by the factory owner against the fishermen eventuates in an award of damages. Noting that discharges of noxious substances generated by the factory's processes of production are essential for the continuation of those processes, the court holds that the factory owner vis-à-vis the fishermen has a claim-right to their not preventing the discharges. Because the fishermen have contravened the factory owner's claim-right through their actions of obstruction, they are now legally obligated to compensate the owner for the losses which those actions have occasioned.

In sum, the upshot of the situation is (1) that the factory owner vis-à-vis the fishermen is not legally at liberty to emit the toxic contaminants into the lake, and (2) that the factory owner vis-à-vis the fishermen has a legal claim-right against their preventing him from emitting the contaminants into the lake. Vis-à-vis the

fishermen, the factory owner lacks a legal liberty to φ but holds a legal claim-right against their prevention of his φ-ing. Whether or not a configuration of legal positions along these lines is desirable, it is plainly possible as a matter of the logic of Hohfeldian entitlements. Of course, in a jurisdiction-specific manner, a particular system of governance could rule out the occurrence of any such configurations of legal positions. However, quite apart from the fact that I am unaware of any system of governance that does rule out such configurations, a jurisdiction-specific restriction of that sort would scarcely be something that follows inexorably from the logic of Hohfeldian legal positions.

As I have remarked in "Rights without Trimmings" (1998, 16), a scenario like that of the factory owner and the fishermen is sometimes very loosely characterized as depicting a party who has "a right to commit a wrong." Such phrasing is best eschewed, notwithstanding its piquancy, for it is both inapposite and sloppily imprecise. It is inapposite because, as I have already explained in §2.4.1 above, the content of a claim-right/duty relationship does not refer primarily to an action or omission on the part of the holder of the claim-right.[15] Such a content can of course refer to the duty-bearer's not preventing some action by the holder of the claim-right, but the primary reference therein is to the bearer's non-prevention rather than to the holder's action; it is the former rather than the latter that is made mandatory by the existence of the specified claim-right/duty relationship. What is more, the "right to commit a wrong" wording is sloppily imprecise and misleading. Because the general term "right" is frequently employed in everyday discourse and philosophical discourse to refer to Hohfeldian liberties or indeed to any of the Hohfeldian entitlements, the "right to commit a wrong" phraseology can all too readily incline readers to infer oxymoronically that the factory owner vis-à-vis the fishermen is legally at liberty to commit a legal wrong. To avoid such tomfoolery and to specify precisely the Hohfeldian legal positions that are occupied by somebody like the factory owner, we should abjure the "right to commit a wrong" formulation and should instead say that the factory owner vis-à-vis the fishermen holds a legal claim-right against their prevention of his recurrent breaches of a legal duty which he owes to them. Vis-à-vis them, he does not hold any legal liberty-to-φ that would accompany his legal claim-right to their not preventing his φ-ing. Hence, my vignette of the fishermen and the factory owner illustrates the point enunciated by Andrew Halpin when he asserts that "[t]here is a significant set of cases where the law prohibits interference by the aggrieved party with a forbidden activity" (2019, 248).

[15] I here leave aside any weird contract of the sort contemplated in the closing paragraph of §2.4.1.

2.5.5 Quantification over Parties

Quantification will be operative at several junctures in my exposition of the Hohfeldian analysis of legal and moral positions, and we have here reached the first of those junctures (though in fact quantification could equally well have been introduced during my discussions of the first column in the Hohfeldian schema). A quantifier is a function that determines how a given property or entity is assigned among the members of some domain. Here the term "domain" simply denotes the set of things over which a quantifier ranges. At this juncture in my exposition, the domain on which I shall chiefly concentrate is the set of beings who are potential parties to legal or moral relationships. Those beings are capable of holding Hohfeldian entitlements or of occupying the positions correlative to such entitlements.

Quite a number of quantifiers have been developed by logicians and other philosophers, but the most prominent are the universal quantifier and the existential quantifier. One of my principal concerns here is to disambiguate the universal quantifier, but we can begin with a glance at the existential quantifier. When a proposition is governed by an existential quantifier, the quantifier indicates that at least one member of the relevant domain possesses the property or satisfies the requirement articulated by the proposition. Let us consider, for example, the existentially quantified proposition "There are squirrels residing regularly in the United Kingdom." We can suppose that the relevant domain comprises all animals. In that event, the proposition asserts that there is at least one animal which possesses both the property of being a squirrel and the property of residing regularly in the United Kingdom. For an example more directly pertinent to a theory of rights and right-holding, we can ponder the existentially quantified proposition "Miranda is legally at liberty, vis-à-vis somebody else, to walk down Grange Road in Cambridge this evening." We can suppose that the relevant domain comprises every potential party to legal relationships, in which case the proposition asserts that there is at least one such party vis-à-vis whom Miranda is legally at liberty to walk down Grange Road this evening.

Even more important for my purposes in this book is the universal quantifier. As I have already suggested, we need to attend here to three distinct ways in which the universal quantifier can be construed. In ordinary English, the differences among those ways approximately correspond to the differences among "all," "each" or "every," and "any." Throughout this book I shall label these three distinct modes of universal quantification as "aggregative," "distributive," and "disjunctive." When a proposition is governed by an *aggregative* universal quantifier, it ascribes some property to all the members of the relevant domain as an overarching collectivity or assemblage. That property might not be accurately ascribable or even meaningfully ascribable to any member of the domain in isolation, but—if the proposition governed by an aggregative universal quantifier is true—the property is accurately

ascribable to all the members of the domain taken together. When a proposition is governed instead by a *distributive* universal quantifier, it ascribes some property to every member of the relevant domain taken individually. Here the ascribed property is possessed (or is said to be possessed) by each member of the domain rather than by all the members as an overarching collectivity or aggregate. Of course, the specified property might also be correctly ascribable to all the members of the domain taken together. However, even if it is correctly ascribable in that fashion through aggregative universal quantification, its being so is not a corollary of the sheer fact that it can correctly be ascribed to each member through distributive universal quantification. Finally, another possibility is that a proposition is governed by a *disjunctive* universal quantifier. If such a proposition is predictive or descriptive, the disjunctive universal quantifier is equivalent to the existential quantifier—since the proposition so quantified will be true if at least one member of the domain over which the quantifier ranges is possessed of the property which the proposition ascribes. However, if a proposition governed by a disjunctive universal quantifier is prescriptive, the quantifier is not equivalent to the existential quantifier. For such a proposition, the prescription asserted by it will be satisfied if at least one member of the domain over which the disjunctive universal quantifier ranges is treated in the manner specified by the proposition.

2.5.5.1 Some Clarification of Disjunctive Universal Quantification

Although this book will say considerably more about each of these types of universal quantification, and although my focus in a moment will be on the distributive variety, we should first briefly contemplate a couple of examples of propositions that are governed by disjunctive universal quantifiers. After all, whereas the distinction between aggregative universal quantification and distributive universal quantification will be familiar to most philosophers as largely similar to the medieval distinction between generality *in sensu composito* and generality *in sensu diviso*,[16] the disjunctive universal quantifier is probably less familiar. Moreover, given that the disjunctive universal quantifier is equivalent to the existential quantifier for predictive and empirical propositions, its role as a distinctive quantifier for deontic propositions is in need of clarification. A couple of examples, one involving a predictive proposition and the other involving a deontic proposition, will help to dispel any unclarity.

Let us consider the predictive proposition "On any day next week, the temperature in Cambridge (England) will rise above 30 degrees Celsius." In the domain over which the quantifier ranges are the days of next week. Here the disjunctive universal quantifier is clearly equivalent to the existential quantifier, as the

[16] For a well-known discussion of the distinction between generality *in sensu composito* and generality *in sensu diviso*, albeit with a focus quite different from my own, see Lewis 2002, 64–8. For some reflections on that distinction with a focus closer to my own, see Cohen 1983, 14 *et passim*.

proposition governed by the quantifier is true if and only if there is at least one day next week on which the temperature in Cambridge rises above 30 degrees Celsius. Perhaps because the disjunctive universal quantifier is equivalent to the existential quantifier when attached to a proposition that is predictive or empirical, the distinctiveness of disjunctive universal quantification has often been overlooked. We should therefore turn to an example involving a deontic proposition, where the distinctiveness of such quantification becomes manifest.

Suppose that the system of governance in some country has enacted a law that requires every adult with an annual income above the level of $30,000 to donate at least 10% of his or her after-tax earnings each year to any of the charities on the official register of such organizations. In that country, then, the following proposition is true: "Every adult in this jurisdiction with an annual income above the level of $30,000 is legally obligated to donate at least 10% of his or her after-tax earnings each year to any of the officially registered charities in this jurisdiction." I shall designate this proposition as the "Eleemosynary Obligation Proposition." As is evident, more than one universal quantifier is operative in that proposition. A distributive universal quantifier ranges over a domain comprising human adults in the jurisdiction, and another distributive universal quantifier ranges over a domain comprising the years during which the relevant law is in effect. However, my focus here is on the disjunctive universal quantifier that ranges over a domain comprising the charities that are listed in the official register. Incumbent on every adult in the jurisdiction with an income each year above the specified level is an eleemosynary duty. To whom is that duty owed? Let us leave aside for now the fact that every legal duty is owed at least to the system of governance that has imposed it. (I shall return to that fact in Chapters 3 and 4.) There is no overarching collectivity of the charities to which a duty would be owed, nor is the duty requiring the payment of at least 10% of one's after-tax income owed to each charity individually—as if each charity would be legally wronged whenever somebody chooses to donate the requisite amount to some other charity instead. Rather, the duty is owed to the charities disjunctively. In other words, it is owed not to an overarching collectivity nor to each charity discretely but instead to a disjunction of the charities. Precisely because the duty is so owed, it will be satisfied by any bearer of it who pays at least 10% of her after-tax earnings to any single charity; and the duty will likewise be satisfied by any bearer of it who spreads such a payment across two or more charities. If someone owes that duty, she will have fulfilled it if and only if she makes a payment in either of the two ways just mentioned.

A few quick observations about the Eleemosynary Obligation Proposition are germane here. First, the truth-value of that proposition obviously does not depend on anyone's fulfillment of the legal duty which it articulates. Its truth-value is determined instead by the accuracy or inaccuracy of its encapsulation of what has been imposed under the enactments that have issued from the presiding system of

governance. That encapsulation can be fully accurate even if the duty recounted in it is seldom satisfied by anybody.

Second, as can be inferred from the closing two sentences of the penultimate paragraph above, I am construing the disjunctive universal quantification in the Eleemosynary Obligation Proposition as inclusive rather than exclusive. That is, I am taking as given that one's choice of any particular charitable organization as a recipient of one's legally required largesse does not exclude one's also choosing some other such organization(s) to share in that largesse. The disjuncts in the disjunction are not mutually exclusive. As a consequence, the duty specified in the Eleemosynary Obligation Proposition can in principle be satisfied by everyone in the jurisdiction even if no donor has bestowed as much as 10% of her after-tax income upon any single charity. Of course, the disjunctive universal quantification in that proposition could alternatively have been construed as exclusive rather than inclusive. So interpreted, the Eleemosynary Obligation Proposition would be asserting that each adult with earnings above the specified level is legally required to bestow at least 10% of his or her after-tax income upon any one charity. Such an interpretation is perfectly coherent, but I have implicitly dismissed it because the disjunctive universal quantification in the Eleemosynary Obligation Proposition is much more plausibly construable as inclusive. Very likely, the duty articulated in that proposition is intended and understood to require each duty-bearer to choose between conferring the requisite payment on any single charity and spreading the requisite payment among any two or more charities. (There are undoubtedly some deontic propositions with disjunctive universal quantifiers that are aptly construable as exclusive, but I shall not explore any such propositions here.)

Third, and most important for my present purposes, the duty envisaged here reveals the unwisdom of Hohfeld's insistence that every legal duty borne by some party is correlated with a legal claim-right held by some other single party. Countless legal duties are so correlated, of course, but not every legal duty is. In particular, when a legal duty is imposed by a norm that universally quantifies in a disjunctive fashion over the parties to whom the duty is owed, that duty is not correlated with a legal claim-right held by any single party. (At present, I am continuing to prescind from the fact that every legal duty is owed at least to the system of governance that has imposed it. When that fact is taken into account, a version of Hohfeld's insistence can be salvaged. However, my prescinding from that point at present is not even slightly unfair to Hohfeld—because there is no basis for thinking that he agreed with me about the owing of every legal duty to the system of governance that has imposed it. Indeed, given that he denied that claim-rights are ever genuinely held by collectivities, he was committed to disagreeing with me. I shall return to the matter of collectivities as holders of claim-rights in my next few chapters.)

Disjunctive universal quantification is different from the aggregative and distributive varieties of universal quantification in its posing of difficulties for Hohfeld's

thesis about one-to-one correlations between claim-rights and duties and between holders of claim-rights and bearers of duties. When a legal duty is imposed by a norm that universally quantifies in an aggregative fashion over the parties to whom the duty is owed, the parties constitute a collectivity which holds the claim-right correlative to that duty. Although Hohfeld himself denied that claim-rights or other entitlements are ever genuinely held by collectivities, my next chapter will argue that he erred in so doing. Once his mistakes on that topic are rectified, his thesis about one-to-one correlations between claim-rights and duties and between holders of claim-rights and bearers of duties is unthreatened by the existence of a norm that contains an aggregative universal quantifier which ranges over a domain comprising the parties to whom any duty imposed by the norm is owed. A duty imposed by such a norm is correlated with a claim-right held by the parties as a collectivity.

Even more clearly, the Hohfeldian thesis about one-to-one correlations is unthreatened by the existence of a norm that contains a distributive universal quantifier which ranges over a domain comprising the parties to whom any duties imposed by the norm are owed. A duty imposed by such a norm is correlated with a claim-right held by each of those parties. Hohfeld himself maintained that every duty imposed by such a norm is owed in tandem with an indefinitely expansive array of cognate duties, each of which is correlated with a claim-right held by one of the parties in the domain over which the quantification has ranged.[17] He designated those homologous duties as "multital." As he affirmed, "instead of there being a single [duty] with a single correlative [claim-right] resting on all the persons against whom the [duty] avails, there are many separate and distinct [duties], actual and potential, each one of which has a correlative [claim-right] resting upon some one person" (Hohfeld 1923, 92). As I have submitted in "Rights without Trimmings" (1998, 9–10 n. 2), Hohfeld's approach to this matter is tenable. It is in keeping with my analysis of distributive universal quantification. However, as I also observe in "Rights without Trimmings," Hohfeld's approach is not uniquely tenable. In numerous contexts where a duty is imposed by a norm that contains a distributive universal quantifier which ranges over a domain comprising the parties to whom the duty is owed, the duty can best be construed as ramifyingly correlated with claim-rights that are held respectively by the members of that domain. In other words, in numerous contexts, the duty is best construed as a single duty that is directed to the parties distributively. Because the universal quantification over those parties is distributive, the duty directed to them through the quantification is correlated with an indefinite multiplicity of claim-rights where

[17] Hohfeld 1923, 72, 91–6. Hohfeld in fact wrote about multital claim-rights rather than about multital duties, but his analysis of the matter applies (*mutatis mutandis*) to the latter as much as to the former. Inversely, of course, my own analysis of distributive universal quantification applies (*mutatis mutandis*) to norms that universally quantify distributively over potential bearers of legal duties as much as to norms that universally quantify distributively over potential holders of legal claim-rights.

each such claim-right is held by a distinct party. Although Hohfeld vigorously resisted this way of understanding such a duty, and although it is inconsistent with his thesis about one-to-one correlations between duties and claim-rights—since it presents a single duty as correlated with multiple claim-rights—such an understanding is appropriate in a host of contexts. Nonetheless, given that Hohfeld's alternative understanding is also tenable (though less illuminating) even in those contexts, his thesis about one-to-one correlations is compatible with the existence of any duty that is imposed by a norm containing a distributive universal quantifier which ranges over a domain that comprises the parties to whom the duty is owed.

Quite different is the existence of a norm containing a *disjunctive* universal quantifier that ranges over a domain which comprises the parties to whom any duty imposed by the norm is owed. Quite different, in other words, is the existence of a norm like the one that is encapsulated in the Eleemosynary Obligation Proposition. Unlike distributive universal quantification, disjunctive universal quantification does not lend itself to any analysis that will square it with Hohfeld's thesis about one-to-one correlations between bearers of duties and holders of claim-rights. In regard to the eleemosynary duty owed by each adult whose income is above the specified level, there is no tenable analysis under which the owing of that duty is correlated uniquely with the holding of a claim-right by any particular charity. Each bearer of the eleemosynary duty owes it to the registered charities disjunctively, rather than to any particular charity or to each particular charity. If a bearer of the eleemosynary duty fails to comply with it, no single charity will have been legally wronged. No charity has a legal claim-right to be paid anything by any adult, for no adult owes a legal duty to pay anything to this or that particular charity. At the same time, no charity has a legal claim-right requiring each adult with an income above the specified level to pay the requisite amount to *some* registered charity or another. Although each such adult does bear a legal duty with that content, the duty is owed to the registered charities disjunctively rather than to any charitable organization(s) individually. There is claim-right/duty correlativity, but the position correlative to the eleemosynary duty of each adult is occupied by the registered charities disjunctively. It is not occupied by any charitable organization(s) individually.

At present, when I deny that the position correlative to the eleemosynary duty is occupied by any charitable organization(s) individually, and when I contend that it is instead occupied by the registered charities disjunctively, I might seem to be advancing a sheer assertion in lieu of marshaling an argument in support of that assertion. However, as will be seen in Chapter 4 when I unfurl my Interest Theory of right-holding, the assertion just mentioned is something that follows straightforwardly from the Interest Theory. Far from being an unsupported dogma, it is a conclusion entailed by the correct account of what constitutes the holding of a claim-right. That conclusion will be reaffirmed in this book when the Interest Theory of right-holding has been fully expounded.

Indeed, the current discussion looks ahead not only to my presentation of the Interest Theory in Chapter 4 but also to my defense of the Hohfeldian Correlativity Axiom in Chapter 3. My efforts to vindicate that axiom will proceed partly by rejecting some of the dubious contentions which Hohfeld attached to it. In keeping with what I have said earlier in this subsection about aggregative universal quantification, I shall impugn Hohfeld's insistence that collectively held entitlements are reducible to individually held entitlements. And in keeping with what I have maintained in the last few paragraphs above, I shall contest Hohfeld's thesis that every legal duty is correlated with a legal claim-right held by a discrete party. (Likewise unsustainable is the converse thesis that every legal claim-right is correlated with a legal duty borne by a discrete party.) As will be observed in Chapter 3, one of the most frequently invoked reasons for doubting the correctness of the Correlativity Axiom is that people are often under eleemosynary duties, whether legally or morally. To respond adequately to any objections along those lines, a defender of the Correlativity Axiom needs to recognize that sometimes a claim-right is not correctly ascribable to any discrete party and is instead correctly ascribable to an array of parties disjunctively. Not at all coincidental, then, is the fact that my ruminations on disjunctive universal quantification in this subsection have been concerned chiefly with duties requiring donations to charities. With such a focus, this subsection has not only helped to elucidate the nature of disjunctive universal quantification but has also prepared much of the ground for some of my arguments in Chapter 3.

2.5.5.2 Liberties and Distributive Universal Quantification

Whereas the preceding subsection has attended mainly to some claim-right/duty relationships and has devoted more scrutiny to disjunctive universal quantification than to distributive universal quantification, this subsection will concentrate on the latter type of quantification and will return my focus to Hohfeldian liberties. In particular, we should here contemplate propositions that universally quantify distributively over a domain comprising the potential occupants of the positions correlative to liberties. Those positions are of course Hohfeldian no-rights, which I have not yet expounded. Nevertheless, because the purpose of the present discussion is to shed light on the nature of liberties rather than on the nature of no-rights—and because, in any event, my exposition of no-rights will emerge quite soon in this chapter—we can aptly proceed to explore this matter now, in advance of my reflections on no-rights.

Every Hohfeldian liberty to φ is of course relational, in that it is held by some party vis-à-vis some other party. Consequently, Pedro can be legally at liberty vis-à-vis Martin to walk down Grange Road this afternoon, even while he is not legally at liberty vis-à-vis Jacqueline to walk down Grange Road this afternoon. Because the Hohfeldian schema does in this way take every liberty-to-φ to be a position held by a discrete party vis-à-vis another discrete party, it enables philosophers and jurists

to attain an admirable degree of fine-grained precision in their analyses of people's legal or moral statuses. However, philosophers and jurists and ordinary people frequently are concerned not only with the fine-grained analyses but also with deontic categories at a higher level of generality. Instead of asking solely whether Pedro is at liberty to φ vis-à-vis some other particular party, philosophers and jurists and ordinary people are often inclined to ask whether Pedro is at liberty to φ *tout court*. An inquiry of the latter sort is sometimes said to be about permissibility in a non-relational sense (Duarte d'Almeida 2016, 562), but such a characterization of the matter is inapposite. Permissibility *tout court* is also relational, but the relationality is channeled through distributive universal quantification. In any assertion that Pedro is at liberty to φ *tout court*, there is operative—implicitly or explicitly—a distributive universal quantifier that ranges over a domain comprising all potential bearers of no-rights. Given the truth of such an assertion about Pedro, everyone who can bear a no-right does bear a no-right with regard to Pedro's φ-ing. A person P is at liberty to φ *tout court* if and only if everyone who can bear a no-right does bear a no-right with regard to P's φ-ing.

This analysis of being at liberty to φ *tout court* can illuminatingly be contrasted with an analysis of being obligated to φ *tout court*.[18] In any assertion that Pedro is obligated to φ *tout court*, there is implicitly or explicitly operative a disjunctive universal quantifier that ranges over a domain comprising all potential holders of claim-rights. Such an assertion is true if and only if at least one member of that domain does hold a claim-right to Pedro's φ-ing. In other words, such an assertion is true if and only if someone who can hold a claim-right does hold a claim-right to Pedro's φ-ing. A person P is obligated to φ *tout court* if and only if someone who can hold a claim-right does hold a claim-right to P's φ-ing. (Here, of course, "someone" is to be construed as "at least one party.")

Because of the difference between the distributive universal quantification operative in assertions about one's being at liberty to φ *tout court* and the disjunctive universal quantification operative in assertions about one's being obligated to φ *tout court*, the connection between one's being at liberty to φ *tout court* and one's holding a Hohfeldian liberty to φ is the inverse of the connection between one's being obligated to φ *tout court* and one's bearing a Hohfeldian duty to φ. One's being at liberty to φ *tout court* entails one's holding a Hohfeldian liberty to φ vis-à-vis every particular party, whereas one's holding a Hohfeldian liberty to φ vis-à-vis this or that particular party does not entail one's being at liberty to φ *tout court*. By contrast, one's being obligated to φ *tout court* does not entail one's bearing a Hohfeldian duty to φ vis-à-vis this or that particular party, whereas one's bearing a Hohfeldian duty to φ vis-à-vis this or that particular party entails one's being obligated to φ *tout court*. One's being at liberty to φ *tout court* is sufficient but not

[18] The contrast to which I advert here is aptly recognized in Van Duffel 2012, 112–13, though his way of explicating the contrast is quite different from my own.

necessary for one's holding a Hohfeldian liberty to φ vis-à-vis this or that particular party, whereas one's holding a Hohfeldian liberty to φ vis-à-vis this or that particular party is necessary but not sufficient for one's being at liberty to φ *tout court*. By contrast, one's being obligated to φ *tout court* is necessary but not sufficient for one's bearing a Hohfeldian duty to φ vis-à-vis this or that particular party, whereas one's bearing a Hohfeldian duty to φ vis-à-vis this or that particular party is sufficient but not necessary for one's being obligated to φ *tout court*.

2.5.6 Limits on Duality

Although the limits recounted in this subsection are applicable to both halves of the Hohfeldian table—and to all eight positions therein—they are best broached now with reference to the logical duality of liberties and duties. As has been contended in §2.3, a person P is legally at liberty to φ vis-à-vis some other person Q if and only it is not the case that P owes Q a legal duty to refrain from φ-ing. That relationship of duality between liberties and duties or between claim-rights and no-rights does indeed obtain, but it does so within boundaries. Those boundaries are operative because they are limits to the very existence of Hohfeldian positions. Throughout the wide-ranging expanse inside those boundaries, the absence of a legal duty to φ constitutes the existence of a legal liberty not to φ. Beyond that expanse, however, the absence of a legal duty to φ is not equivalent to the existence of a legal liberty to abstain from φ-ing.[19] (The limits on the existence of Hohfeldian legal positions overlap with the limits on the existence of Hohfeldian moral positions, but they are not the same. Hence, to a greater extent than some other portions of this chapter, my cogitations in the current subsection will have to differentiate between the legal and the moral.)

One set of limits on the incidence of any Hohfeldian legal positions is that no such positions exist when there is no legal system in existence. This point applies to liberties and no-rights as much as to claim-rights and duties. Whenever no legal system is in existence in the world as a whole or in any portion of the world, legal liberties and no-rights do not exist there—just as legal claim-rights and duties do not exist there. In such a state of affairs, the absence there of any legal duty to φ is not constitutive of any legal liberty to abstain from φ-ing, and the absence there of any legal claim-right to someone's φ-ing is not constitutive of any legal no-right with regard to someone's abstention from φ-ing.

A second set of limits is related but broader, and it pertains to Hohfeldian moral positions as much as to Hohfeldian legal positions. No such Hohfeldian

[19] The limitedness of the expanse within which the logic of the Hohfeldian schema obtains is highlighted intermittently in Oliveira Lima et alia 2021. However, I mull over some limits beyond the ones which those scholars contemplate.

positions are ever occupied by any non-human entities that are inanimate or insentient. For example, the fact that the Milky Way Galaxy does not owe the Andromeda Galaxy any legal or moral duty to swirl in some specified direction is scarcely a ground for inferring that the Milky Way Galaxy holds a legal liberty and a moral liberty vis-à-vis the Andromeda Galaxy not to swirl in that specified direction. Because no Hohfeldian positions are ever held or borne by inanimate entities such as galaxies, the absence of any legal or moral duty incumbent on the Milky Way Galaxy is not constitutive of any legal or moral liberty held by that galaxy. Non-human inanimate entities on the planet Earth are likewise, of course, never the holders or bearers of Hohfeldian positions. A rock cannot ever hold a claim-right to be left undisturbed, for example. No duty is owed to the rock by anybody to leave it undisturbed, but the absence of any such duty does not mean that everybody holds a liberty vis-à-vis the rock to disturb it. Rocks are never parties to Hohfeldian relationships, whether those relationships be legal or moral. Similarly, no Hohfeldian positions are ever held or borne by insentient entities such as trees and grass. People do not ever owe any legal or moral duties to such entities, but the absence of any duties owed to them is not constitutive of any legal or moral liberties held vis-à-vis them. Like inanimate non-human entities, insentient non-human organisms are outside all Hohfeldian relationships. They are never parties to liberty/no-right relationships any more than to claim-right/duty relationships. (Three short caveats should be attached to this paragraph. First, I shall say much more in the latter half of this book about the class of potential occupants of Hohfeldian positions. Chapter 5 will present arguments to support my assertions here that inanimate and insentient non-human entities do not belong to that class. Second, as will readily be acknowledged in the latter half of this book, countless legal and moral relationships pertain to inanimate and insentient entities. For instance, people are frequently under legal and moral duties to refrain from defacing works of art or to refrain from cutting down grand trees. Nonetheless, although such Hohfeldian relationships pertain to inanimate or insentient entities, those entities are not parties to the relationships. Third, when the present chapter moves on to the power/liability column in Hohfeld's table, I will discuss some of the ways in which the workings of inanimate entities and forces can alter people's legal and moral relationships. Still, as will be argued there, the abilities of such entities and forces to bring about changes in legal and moral relationships are not Hohfeldian powers. They are instead quasi-powers which affect legal and moral relationships from the outside.)

Another set of limits on the existence of Hohfeldian legal and moral positions is that some matters within the scope of the law of a jurisdiction or within the scope of the correct principles of morality are not determinately settled by the current laws or by the applicable principles. Although the incidence of indeterminacy in the realm of law or in the realm of morality has been overestimated by some

philosophers, there is inevitably some indeterminacy in each of those realms.[20] Whenever some question about the existence of a legal or moral duty to φ is not determinately answerable, neither an affirmative answer nor a negative answer to that question is determinately correct. In such circumstances, the proposition "It is not determinately the case that the specified duty to φ exists" does not entail "The specified duty to φ does not exist" and therefore does not entail "A liberty to refrain from φ-ing exists." Conversely, of course, in such circumstances there is no entailment between "It is not determinately the case that the specified duty to φ does not exist" and "The specified duty to φ exists." Accordingly, in such circumstances, there is no entailment between "It is not determinately the case that the specified duty to φ does not exist" and "A liberty to refrain from φ-ing does not exist." In regard to any matters that are indeterminate, the usual diagonal relations of logical duality on the left-hand side of Hohfeld's schema—and the usual diagonal relations of logical contradictoriness on the right-hand side of the schema—do not obtain. Consequently, any Hohfeldian positions that would determinately exist if those matters were determinately resolved are not determinately existent. Nor, of course, are they determinately inexistent! (The factors that can lead to indeterminacy in the realm of law or in the realm of morality are multiple. In the past books of mine which I have just cited in note 20 of this chapter, I explore all the main such factors.)

A final source of limits on the existence of Hohfeldian legal or moral positions is that any ascription of such a position presupposes the past or present or future existence of the party to whom the position is ascribed. As has been stated at the outset of the discussion in this subsection, the relationship of duality between duties and liberties is such that a person P is legally or morally at liberty to φ vis-à-vis some other person Q if and only if it is not the case that P owes Q a legal or moral duty to refrain from φ-ing. However, suppose that the domain covered by the "Q" variable were to include leprechauns or the god Apollo or the mythical lumberjack Paul Bunyan. Each person P would not bear a legal or moral duty to φ vis-à-vis any of those imaginary beings, but would likewise not hold a legal or moral liberty to refrain from φ-ing vis-à-vis any of them. Given the chimericalness of any being such as Paul Bunyan, there is no entailment between "I do not owe Paul Bunyan any legal or moral duty to φ" and "I am legally or morally at liberty vis-à-vis Paul Bunyan to refrain from φ-ing." Just as the chimericalness of Paul Bunyan precludes him from holding a claim-right that would be correlative to someone's duty to φ, so too it precludes him from bearing a no-right that would be correlative to someone's liberty not to φ. Hence, the domain of parties over which the relevant quantifiers

[20] In a few of my previous books, I have written at length about indeterminacy in the legal realm and the moral realm: Kramer 2007, 14–38, 201–30; 2009a, 86–128; 2018, 112–17, 128–30, 133–47. In the ruminations of Alchourrón and Bulygin 1971 and Oliveira Lima et alia 2021, indeterminacy is the principal source of limits on the existence of Hohfeldian positions.

and variables range in ascriptions of Hohfeldian positions does not include any mythical or imaginary parties. Only within a domain marked by such an exclusion, will "P is legally or morally at liberty to φ vis-à-vis Q" be inferable from "It is not the case that P owes Q a legal or moral duty to refrain from φ-ing." As has already been mentioned, Chapter 5 of this book will say far more about the class of potential holders of claim-rights. Though future generations and some dead people are within that class, no mythical or imaginary beings are within it.

These limits on the existence of Hohfeldian positions and relationships are of direct relevance to some contemporary debates about the reality of Hohfeldian liberties and no-rights as positions constituted by the absence of other Hohfeldian positions. Some philosophers, such as Heidi Hurd and Michael Moore, have submitted that liberties and no-rights as sheer absences are purely negative and are thus too phantasmal to be genuine deontic positions in any way.[21] As they declare, Hohfeldian "liberties are no things at all—no more than an absent elephant is a ghostly kind of elephant, or an absence of two elephants is a ghostly herd of ghostly elephants" (Hurd and Moore 2018, 339). I shall engage more sustainedly with Hurd and Moore in my reflections on no-rights shortly, but for the moment we should simply note that their dismissal of the reality of Hohfeldian liberties is thoroughly heedless of the points which I have just been making about the limited domains within which the logical duality of duties and liberties is operative. To contend that Hohfeldian liberties are unreal as sheer absences is to ignore the difference between the following two situations: a situation in which I do not owe Shirley a legal duty to φ, because the prevailing system of governance does not impose any such duty on me vis-à-vis her; and a situation in which I do not owe Shirley a legal duty to φ, because the prevailing system of governance has completely disintegrated and has not been replaced by any new system. In the former situation the absence of a legal duty to φ is constitutive of a legal liberty not to φ, whereas in the latter situation the absence of a legal duty to φ is not constitutive of any such legal liberty. Likewise, Hurd and Moore ride roughshod over the difference between my not owing Miranda Fricker a duty to pay her $100 and my not owing Paul Bunyan a duty to pay him $100. Whereas the absence of the former duty is constitutive of a liberty held by me vis-à-vis Miranda Fricker not to pay her $100, the absence of the latter duty is not constitutive of any liberty held by me vis-à-vis Paul Bunyan. In other words, what Hurd and Moore overlook is that the absence of a duty is constitutive of a liberty only within a deontic relationship. When no relevant deontic relationship is in existence—for any of the reasons distilled in this subsection—the absence of a duty to φ is a sheer absence rather than a deontic position. By contrast, when none of the considerations delineated in this subsection is applicable, the absence of a duty to φ is not a sheer absence

[21] This theme is prominent both in Hurd and Moore 2018 and in Hurd and Moore 2019. See also Halpin 1997, 34, 41; Husik 1924, 267–8. For ripostes, see Green 2021; Kramer 2019.

and is instead constitutive of a liberty to abstain from φ-ing. That absence is not a sheer absence in such circumstances, because it is itself a position within a deontic relationship between parties. Tiresome quips by Hurd and Moore about elephants obfuscate the difference between the existence and the inexistence of any such relationship, and they therefore obfuscate the difference between situations within the boundaries of Hohfeldian logic and situations beyond those boundaries.

2.5.7 No-Rights

No-rights, the correlates of liberties, are more often neglected than are any of the other entries in Hohfeld's table. Doubtless, one reason for the relative dearth of attention accorded to the no-right is that Hohfeld devised a hyphenated neologism to designate it. Each of the other positions in the Hohfeldian schema is designated by a term with a solid grounding in everyday discourse and juristic discourse—though Hohfeld greatly precisified and regimented each of those terms for his analysis, by attaching a univocal or nearly univocal meaning to each of them—whereas the hyphenated term "no-right," in contrast with the unhyphenated phrase "no right," does not have any comparable grounding either in ordinary discourse or in juristic discourse. That neologism is almost never employed by anyone outside the confines of discussions of Hohfeld's categories, and it is often not employed even within those confines. Notwithstanding the abundance of philosophical and juristic lucubrations devoted to Hohfeld's analytical framework since its elaboration in the second decade of the twentieth century, the term "no-right" has found little favor in philosophical or juristic circles. Moreover, on the rather rare occasions when the term is used rather than merely mentioned, it is almost always misused.

The persistent misuse of the term "no-right" is directly connected to the differences between that term and the phrase "no right." Whereas "right" is a word within the phrase "no right," it is only a component of a word (a free morpheme, but not itself a word) within the term "no-right." Consequently, the morphological differences between the phrase and the term are accompanied by logical differences; the phrase and the term cannot correctly be used interchangeably. We can have inferred as much from the closing paragraph in §2.5.6 above—for the phrase "no right" can denote a sheer absence, whereas the term "no-right" always denotes a deontic position.

More specifically, as has already been stated, the term "no-right" designates a legal or moral position that is correlated with a legal or moral liberty. Any two such correlated positions make up a liberty/no-right nexus that obtains between some specified parties with a specified content. That is, if a liberty and a no-right are indeed correlated, the content of each of them is the same as the content of the other (and the parties between whom either of them obtains are transposedly the same as the parties between whom the other one of them obtains). If the content of a

liberty is not the same as that of a no-right, then the liberty and the no-right are not correlated with each other, and they therefore do not form a single relationship.

2.5.7.1 Hohfeld's Misstep

The foregoing terse reflections are sufficient to enable us to discern that Hohfeld and many eminent proponents of the Hohfeldian analysis have failed to use the term "no-right" correctly. Having elsewhere drawn attention to some of the stumbles by various expositors of the Hohfeldian analysis (Kramer 2019, 217–19), I shall here concentrate on a misstep by Hohfeld himself. In his only relevant remark about no-rights, Hohfeld wrote as follows (1923, 39):

> [T]he correlative of [a liberty] is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's [liberty to enter the land] is manifestly Y's "no-right" that X shall not enter.

Hohfeld here went astray in more than one respect. In the first place, he erred in asserting that there is "no single term available" to designate the correlate of a liberty. Unlike the phrase "no right," the hyphenated term "no-right" is indeed a single term. Its having been coined as a technical neologism is fully consistent with its status as a single term. Also consistent with that latter status, of course, is the hyphenatedness of "no-right."

Hohfeld committed an even worse mistake in the second sentence of this quotation, where he employed the word "no-right" as if it were the phrase "no right." Had he employed that phrase, the expression "X shall not enter" would correctly have encapsulated the content of the claim-right that is the dual of the relevant no-right. Hohfeld would have been asserting, correctly, that Y does not have any claim-right with that content. However, having used the term "no-right" rather than the phrase "no right," Hohfeld specified the content incorrectly. Just as the content of any liberty is the negation of the content of the duty that is the dual of that liberty, so too the content of any no-right is the negation of the content of the claim-right that is the dual of that no-right. X's liberty to enter the land is the dual of X's duty not to enter the land, and Y's no-right concerning X's entering the land is the dual of Y's claim-right to X's not entering the land. Whereas the content of Y's no-right is the same as the content of X's liberty, the content of Y's no-right is the negation of the content of the claim-right which Y would possess if he didn't bear the no-right which he bears.

As is evident from the penultimate sentence in the preceding paragraph, the term "no-right" does not connect very elegantly to a specification of the content of the position which that term denotes. In this regard, "no-right" differs from "liberty" or "duty" or "claim-right." Each of those last three words is readily joinable to a specification of the content of the position which each word respectively

designates. Consider for example X's liberty to enter the land, held vis-à-vis Y. Here the term "liberty" is smoothly linked to a specification of the content of the position which that term designates, through the use of an infinitive verb phrase: "to enter the land." Much the same is true, *mutatis mutandis*, when we contemplate the duty of Mary to pay John $10. As for the claim-right of John to be paid $10 by Mary, the term "claim-right" can be connected in several ways to a specification of the content of the position which the term designates. One such way is illustrated in the opening clause of the preceding sentence, where I have used a passive infinitive verb phrase ("to be paid $10 by Mary"). Another such way is illustrated in the statement that John has a claim-right to Mary's paying him $10. In this latter formulation, a nominalized verb phrase is connected to "claim-right" through the preposition "to." Yet another possibility is exemplified in the statement that John has a claim-right that Mary pay him $10. Here the specification of the content of the claim-right is a subordinate clause that is joined to "claim-right" through the subordinate conjunction "that."

All of the foregoing ways of linking the designations of Hohfeldian legal or moral positions to formulations of the contents of those positions are familiar from quotidian contexts. By contrast, largely because the term "no-right" is itself alien to such contexts, there is no really smooth way of connecting it to a specification of the content of the position which it denotes. Hohfeld's conflation of "no-right" with "no right" stemmed in part from his failure to recognize this very point. In the second sentence of the passage from Hohfeld quoted above, the content of Y's no-right is formulated as a subordinate clause connected to "no-right" through the subordinate conjunction "that"; such a construction would be appropriate for the phrase "no right" but is inapposite for the term "no-right." For the hyphenated term, the link to the content of its designated position has to be formulated slightly more ponderously through words such as "concerning" or "regarding" or through phrases such as "in relation to" or "pertaining to" or "in respect of." Thus, instead of writing that the correlate of X's liberty to enter the land is Y's no-right that X shall not enter, Hohfeld should have written that the correlate is Y's no-right concerning X's entering the land (or Y's no-right in respect of X's entering the land, and so forth). When the link to the content is formulated suitably, the content itself can then be specified straightforwardly and accurately.

2.5.7.2 The Reality of No-Rights

As we have beheld in §2.5.6, Hurd and Moore seek to cast doubt upon the reality of Hohfeldian liberties. Wholly unsurprising, then, is that they also strive to cast doubt upon the reality of no-rights as the correlates of Hohfeldian liberties. Their first line of thought is as follows: "Hohfeld uses the phrase 'no-right,' as if the term labelled some thing. But it is plain from his usage that what he means to designate is the *absence* of some thing, namely, the absence of a claim right" (Hurd and Moore 2018, 307, emphasis in original). Both sentences in this quotation are

deeply problematic. Contrary to what the opening clause of the first sentence presupposes, "no-right" is a word rather than a phrase, and it does label something. That is, it labels a position within a deontic relationship. Constituted by the absence of a claim-right, something correctly classifiable as a "no-right" is a position of rightlessness within a deontic relationship that situates it as the correlate of a liberty—and so the second sentence quoted here relies on a false dichotomy. When the absence of a claim-right is constitutive of a no-right, the absence is not a sheer absence. It is occurrent within the boundaries of the logic of Hohfeldian relationships rather than beyond those boundaries.

Hurd and Moore try to bolster their stance in a lengthy footnote. Let us examine only two sentences from that note:

> Kramer distinguishes a "no right" (which does indeed designate an absence of a claim-right by one person that a [liberty-holder] not do the act he is [at liberty] to do, as we say in the text) from a "no-right" which supposedly designates an actual [position], one that Kramer calls a ["position of rightlessness"].… So construed, Kramer's "no-right" would still designate an absence of a status in the "no-right" holder, not a status itself.[22]

Hurd and Moore stumble by using the indefinite article "a" before "no right," for my chief point in distinguishing between the term "no-right" and the phrase "no right" is to indicate that the term denotes a position in a deontic relationship whereas the phrase does not. That point is missed again by Hurd and Moore when they assert that "no-right" designates "an absence of a status …, not a status itself." Although the status or position designated by "no-right" is constituted by the absence of a claim-right, it is indeed a status or position within a deontic relationship. The insistence of Hurd and Moore to the contrary appears to derive from a concern which they express slightly later, when they declare that a no-right "is not a special, ghostly kind of claim right that someone can possess; rather, it is the absence of there being any such right" (2018, 313). A no-right is of course not a special kind of claim-right. Rather, it is a position in a deontic relationship—a position of rightlessness—constituted by the absence of any claim-right and correlated with the presence of a liberty. Worries about ghostliness or mysteriousness would be apposite if no-rights were being presented here as somehow akin to claim-rights. However, given that claim-rights and no-rights are correctly presented here as logical duals with no formal features or substantive features in common,[23] worries

[22] Hurd and Moore 2018, 307 n. 29. The first two bracketed insertions are alterations of terminology for the sake of clarity. The other two bracketed insertions are my corrections of some egregious typographical errors committed by Hurd and Moore.

[23] Between a claim-right and the no-right that is its dual, there is only one thing in common (apart from the fact that each of them is a deontic position): the person who holds the claim-right is the person who bears the no-right, and the person who bears the duty correlative to the claim-right is the person who holds the liberty correlative to the no-right.

about the ghostliness or mysteriousness of no-rights are themselves mysterious and wearisome.

Because the effort by Hurd and Moore to dismiss the genuineness of no-rights is so closely bound up with their effort to dismiss the genuineness of liberties, we should here glance again at that latter endeavor. On the one hand, they assert that "[i]t is no part of our thesis to deny that [Hohfeldian] liberties can exist." On the other hand, especially since their article is focused predominantly on moral positions, their treatment of liberties amounts to a retraction of this initial disavowal. Quite remarkably, they declare that a Hohfeldian liberty "is naked in the sense that renders it devoid of any moral significance." They then deny the very reality of Hohfeldian liberties, in a passage which I have partly quoted in §2.5.6 above: "[A Hohfeldian liberty is] only the absence of obligation on the part of the option holder, and the absence of rights on the part of everyone else. Unlike double negation in logic, two absences do not make for a presence. Morally speaking, naked liberties are no things at all—no more than an absent elephant is a ghostly kind of elephant, or an absence of two elephants is a ghostly herd of ghostly elephants" (Hurd and Moore 2018, 339). Hurd's and Moore's worries about the ghostliness of liberties are no less peculiar than their worries about the ghostliness of no-rights. Nobody has ever suggested that a Hohfeldian liberty is a kind of duty—a ghostly kind. Rather, a Hohfeldian liberty is a deontic position constituted by the absence of the duty that is the logical dual of the liberty.

Having proclaimed that Hohfeldian liberties are "devoid of any moral significance," Hurd and Moore concede in a footnote that such a proclamation is false (2018, 339 n. 110):

> Granted, [Hohfeldian] liberties can have other kinds of moral significance. For example, one owes no duties of corrective or of retributive justice with respect to some harm caused to another by one's doing of some act if one did no wrong in doing such [an] act, i.e., if one violated no obligation not to do the act causing that harm. That one was nakedly at liberty to act as one did can have this kind of moral significance).

Quite bewildering is the fact that Hurd and Moore treat this immense moral significance of any Hohfeldian liberty as a trifling matter or an afterthought that is to be consigned to a footnote. At any rate, their footnote reveals why their dismissal of the reality of Hohfeldian liberties—their dismissal of the reality of such liberties, "[m]orally speaking"—should itself be discountenanced.

As I have remarked, the insistence by Hurd and Moore on the unreality of Hohfeldian liberties is directly connected to their insistence on the unreality of Hohfeldian no-rights. Given that the relationship between a Hohfeldian liberty and its correlative no-right is a relationship of biconditional entailment, philosophers who reject the reality of no-rights are obliged to reject the reality of

liberties. In each case, the rejection stems from a failure to differentiate between the reality of a no-right or a liberty as a deontic position and the unreality of a no-right or a liberty as (respectively) a ghostly claim-right or a ghostly duty. A no-right is not a claim-right of any kind, and a liberty is not a duty of any kind, but each of them is a perfectly genuine deontic position. A no-right is a position that consists in being rightless within the scope of its content, and a liberty is a position that consists in being obligation-free within the scope of its content.

Hence, my seemingly pedantic distinction throughout §2.5.7 between "no-rights" and "no rights" (a distinction between a term that is a label for deontic positions of a certain type and a phrase that is not such a label) is crucial for a vindication of the reality of liberties as well as for a vindication of the reality of no-rights. Moreover, the import of that distinction goes even further—for the Hurd/Moore approach, if correct, would undermine the reality of every Hohfeldian position. Consider a counterfactual world in which Wesley Schmofeld has propounded an analysis of normative positions where the first of the four axes in his table is the claim-right/no-liberty relation. Schmofeld knows that a no-liberty could be labeled as a "duty" or an "obligation," but he prefers the symmetry with "no-right." His analytical table is otherwise the same as Hohfeld's in the actual world. Suppose that the counterparts of Hurd and Moore in this counterfactual world contemplate the first axis in the Schmofeldian analysis. While so doing, they persistently conflate "no liberty" with "no-liberty." Believing correctly that the phrase "no liberty" does not designate any deontic position, they conclude that the same is true of "no-liberty." *Mutatis mutandis*, they say the same things about no-liberties that have been said in the actual world by Hurd and Moore about no-rights and liberties. They assert that, although "no-liberty" might seem to designate some thing, it in fact designates only the absence of some thing: namely, the absence of a liberty. They assure their readers that a no-liberty is not a special ghostly kind of liberty, and they proclaim that no-liberties are devoid of moral significance. The immense moral significance of no-liberties is fleetingly mentioned by them as an afterthought in a footnote, but it surfaces only there and not in their main analyses at all. Having emphatically denied the reality of no-liberties, they proceed to deny the reality of claim-rights as positions that are correlated with no-liberties. They assert that a claim-right is simply the absence of a no-right borne by the holder of the claim-right and that it is simply the absence of a liberty held by the person vis-à-vis whom the claim-right is directed. They inform their readers that two absences do not make up a presence, and they contend that a claim-right is no more a ghostly no-right than an absent elephant is a ghostly elephant. They conclude that claim-rights are akin to no-liberties in not being genuine deontic positions. After all, one's claim-right not to be prevented from φ-ing is consistent with one's not being at liberty to φ.

We could mull over some additional counterfactual worlds in which the counterparts of Hurd and Moore deny the reality of each of the four normative

positions on the right-hand side of the Hohfeldian table. And so Hurd and Moore and their counterparts end up with the conclusion that none of the eight positions in the Hohfeldian framework is genuinely a normative position. Hurd and Moore have committed themselves to such an unpalatable conclusion because they have sought to derive metaphysical inferences from some premises about purely logical relations among Hohfeldian positions. Although the logical relations in the two halves of the Hohfeldian framework are not entirely symmetrical—in that the diagonals are duals on the left-hand side and contradictories on the right-hand side—there is sufficient symmetry between them to render the reasoning of Hurd and Moore applicable to each of the four axes in the Hohfeldian table alike. If that reasoning were correct in application to any of the four axes, it would be correct in application to every one of them.

What pretty clearly impels Hurd and Moore to concentrate on the liberty/no-right axis—while not applying their reasoning to any other axis in the Hohfeldian table—is their adherence to certain metaphysical assumptions which are never expounded and defended in their long article on Hohfeld's schema.[24] Having argued elsewhere at length that those metaphysical assumptions are unfounded in any explorations of deontic and normative phenomena (Kramer 2009a, 190–212, 270–1; 2018, 23–31), I shall not here recapitulate my reflections on that point. Rather, the message of this discussion is that Hurd and Moore cannot vindicate their metaphysical preconceptions about deontic positions by appealing to logical relations among those positions. Their attempt to do so has committed them to the proposition that none of the eight Hohfeldian positions is real. That proposition can be avoided by anyone who properly attends to the distinction between "no-rights" and "no rights." Somebody who marks that distinction will recognize that there is nothing ghostly about no-rights, which are deontic positions just as solidly as are claim-rights and duties and liberties.

What should be re-emphasized at the close of these remarks is that, when Hurd and Moore dismiss no-rights as ghostly, they are blinding themselves to the difference between absences of deontic positions occasioned by the limits recounted in §2.5.6 and absences of deontic positions that occur within the realm of deontic relationships. When the absence of a specified Hohfeldian claim-right in some situation is attributable to any of the aforementioned limits, the absence is not constitutive of any Hohfeldian no-right. It is a sheer absence that reflects the constraints on the domains over which the quantifiers and variables range in the logic of Hohfeldian relationships. By contrast, when the absence of a Hohfeldian claim-right is situated within the boundaries of that logic, it is constitutive of a

[24] I will not conjecturally endeavor here to identify the assumptions, but I presume that they are redolent of the naturalistic outlook to which Hurd and Moore adhere (that is, an outlook in which the only entities recognized as real are those which are causally efficacious). Naturalistic dogmas pervade Moore's work in moral philosophy and the philosophy of causation. See, for example, Moore 1982; 1992; 2009.

Hohfeldian no-right. It is a perfectly genuine deontic position, whether moral or legal or institutional. It carries deontic significance—precisely the inverse of the deontic significance that would be carried by the claim-right of which it is the dual. With irksomely unfunny jests about ghosts and elephants, Hurd and Moore obscure the crucial difference between the import of absences within the bounds of Hohfeldian duality and the import of absences outside those bounds.

2.6 Powers and Liabilities

We can now examine the higher-order legal and moral positions on the right-hand half of Hohfeld's table. While these positions are of course normative, they are not deontic, and—as has already been explained—the logical structure of the right-hand side of the table is subtly different from that of the left-hand side. Although the relationship of biconditional entailment between the two positions in each column on the right-hand half is the same as the relationship of biconditional entailment between the two positions in each column on the left-hand half, the diagonal relationships between the columns on the right-hand half are of logical contradictoriness rather than of logical duality. These general points will become further apparent as we move through the specifics of the higher-order positions.

A legal power in the Hohfeldian sense is an ability to effect changes, through one's actions, in one's own legal positions or in the legal positions of other people. Hohfeld himself provided quite a detailed formulation of the nature of a legal power (1923, 50–1):

> A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem.

Though Hohfeld left his first class of cases unexplored, we shall investigate them in due course. At present, however, we should concentrate on the second class of cases. As is evident from Hohfeld's formulation, legal powers are abilities of people to bring about changes in legal relationships. Not fully explicit in that formulation is whether the abilities in question are exercisable only through actions or also through omissions, but the reference to "some superadded fact or group of facts" strongly suggests that powers are exercisable only through actions. In any event, whatever Hohfeld thought on that point, the philosophically correct understanding of Hohfeldian powers is that they are indeed abilities to effect changes

in legal or moral relationships through one's actions. We shall see that changes in such relationships which occur through omissions are to be analyzed differently. Of course, an understanding of legal and moral powers along these lines has to rely on a demarcation between actions and omissions. Having elsewhere supplied at length some expositions of a rigorous criterion for that demarcation (Kramer 2003, 324–42; 2014, 77–97), I do not need to rehash those expositions here. For the purposes of this book, a pre-theoretical grasp of the distinction between actions and omissions is adequate. If a more sophisticated grasp of that distinction is needed in any other contexts in the philosophy of rights and right-holding, my previous expositions of the distinction can be drawn upon.

One notable feature of the Hohfeldian conception of legal and moral powers is its expansiveness. Under that conception, every ability to alter legal or moral relationships through one's actions is a legal or moral power. Whether or not the possession of some specific ability of that kind is typically beneficial for a party who possesses it (or is typically desired by a party who possesses it), the ability counts as a Hohfeldian power. Thus, for example, somebody whose actions contravene a legal requirement has thereby exercised some legal powers to alter her own legal positions and the legal positions of certain other people such as law-enforcement officers; she has made herself liable to undergo arrest or other measures of enforcement, and she has invested certain people with legal powers and legal liberties to resort to such measures. Scenarios of this sort have led many philosophers to adopt narrower conceptions of legal powers within their own theories. Perhaps the most famous example is Hart, who was admiringly acquainted with Hohfeld's work but who propounded his own conception of legal powers that was more circumscribed than the Hohfeldian understanding of them. Hart did not delimit the contours of his conception with any precision in *The Concept of Law*, but he appeared to confine the category of powers to Hohfeldian powers that are normally beneficial for the people who are endowed with them. In other words, being vested with a legal power (in the relevant sense) is normally better for a holder of the power than is not being vested with it.[25] When the class of legal powers is restricted in this fashion, it obviously does not encompass the ability of a criminal or a tortfeasor to alter her legal positions in the detrimental ways mentioned above.

Some other philosophers of law have similarly felt a need to come up with analyses of legal powers that are less wide-ranging than Hohfeld's analysis. For example, Joseph Raz was worried not just about the ability of a lawbreaker to alter her own legal positions through contraventions of the law, but also about the ability of someone to alter her own legal positions by shifting her residence from

[25] See Kramer 2018, 36–7. For a different (though compatible) construal of Hart's conception of legal powers in *The Concept of Law*, see MacCormick 2008, 97–8. Of course, I am not suggesting that Hart assumed that the *justification* for a power-conferring law will always reside in the fact that the powers conferred are typically beneficial for the people who hold them. Any such justificatory assumption would be particularly outlandish in connection with laws that confer public powers.

one location to another. As Raz proclaimed: "By changing my residence from one town to another, or from one country to another, I change my rights and duties, but I do not have a legal power to effect these changes by such action" (1972, 80). Though the scenario of the person who moves from one dwelling to another is not nearly as straightforward as the scenario of the criminal or tortfeasor, the abilities of a person to alter her legal relations through such a relocation might not fall under the concept of legal powers as Hart construed it. Although those normative abilities exercised in moving to a new abode are not typically detrimental for the person who possesses them, they might likewise not typically be beneficial for such a person. Instead, as a general matter, they might be evaluatively neutral.

In a sophisticated recent discussion of these complexities, Visa Kurki (2017) has for some purposes endorsed Hohfeld's understanding of legal powers and has for other purposes favored a narrower conception. Although the specifics of my analyses are different from those in the ruminations by Kurki, I concur with him about the advisability of embracing a bifurcated approach. Throughout the first half of this book and in some portions of the second half, I adhere to a broad Hohfeldian understanding of legal and moral powers. One of the virtues of such an understanding is that it helps to accentuate the distinction between the left-hand side and the right-hand side of Hohfeld's schema. Whereas the categories on the left-hand side are deontic, those on the right-hand side are modal. Given the modal character of Hohfeldian powers and immunities, Hohfeld's broad conception of powers is pertinent in that it tends to highlight the affinities between them and other abilities. Although normative abilities are obviously different from physical and psychological abilities in some salient respects, one of the major similarities between them is that exertions of them can frequently lead to typically detrimental results as well as to typically beneficial results. That feature of normative abilities is kept in view when the category of legal and moral powers is not confined to the powers that are typically beneficial for the people who possess them.

All the same, the more restrictive Hartian conception of legal and moral powers will figure in the second half of this book when I contemplate why some powers and immunities are generally classified as "rights" in the overarching sense. As will become apparent there, a version of the Interest Theory of right-holding that extends to all four Hohfeldian entitlements rather than only to claim-rights is in need of Hart's cabined conception of powers—and a similarly cabined conception of immunities. Although many Hohfeldian powers are typically detrimental for the people who hold them, and although many other Hohfeldian powers are typically beneficial for the people who hold them, only the latter powers are aptly designated as "rights" in the overarching sense. Even in the most capacious sense of that term, a criminal or a tortfeasor does not exercise a right when he renders himself liable to the imposition of punitive or compensatory sanctions. Hence, although there are solid grounds for my retention of the wide-ranging Hohfeldian category of powers

in most parts of this book, the more constricted Hartian category will also play an important role.

A legal liability in the Hohfeldian sense is a position of susceptibility to the occurrence of changes in one's legal positions brought about through the exercise of a legal power by oneself or by somebody else. Just as a claim-right/duty relationship can exist between a party as the holder of the claim-right and that same party as the bearer of the duty, so too a power/liability relationship can obtain between a party as the holder of the power and that same party as the bearer of the liability. In keeping with what has just been said about Hohfeldian powers—some of which are typically beneficial for their holders and some of which are typically detrimental for their holders—some Hohfeldian liabilities are typically detrimental for their bearers whereas other Hohfeldian liabilities are typically beneficial for their bearers. Hohfeld himself underscored this point: "We are apt to think of liability as exclusively an onerous relation of one party to another. But, in its broad technical significance, this is not necessarily so." He offered the example of each person's liability to receive certain liberties and certain powers-to-acquire-ownership through the abandonment of a wristwatch or some other valuable item by somebody else (Hohfeld 1923, 60 n. 90, italics omitted):

> But such a liability instead of being onerous or unwelcome, is quite the opposite. As regards another person, M, for example, it is a liability to have created in his favor … a [liberty] and a power relating to the watch—that is, the [liberty] of taking possession and the power, by doing so, to vest a title in himself.

In this regard, the term "liability" as an element of Hohfeld's parlance is different from that term in everyday discourse and in much of juristic discourse. Both in quotidian settings and in juristic settings, the term "liability" usually signals something that is unwelcome or deleterious. For example, if I remark that the presence of some specified player on a basketball team is a liability for the team, I am thereby indicating that the overall effect of the inclusion of the player as a member of the team is detrimental. Similarly, if a judge rules that one party P is liable to pay damages to another party Q, the term "liability"—as a designation for what is imposed on P—refers to something that is highly unwelcome (from the perspective of P). A Hohfeldian liability is quite different. In Hohfeld's vocabulary, the term "liability" is evaluatively neutral. Some positions of susceptibility to changes in one's legal relationships are typically inimical to the interests of the people who occupy those positions of susceptibility, but other such positions of susceptibility are typically promotive of the interests of the people in those positions. Everything depends on the specifics of the changes that would be brought about through the exertions of the powers that are correlative to the liabilities.

2.6.1 More on Evaluative Neutrality

Let us probe a bit further into the feature of Hohfeldian powers and liabilities that has just been highlighted: their evaluative neutrality. Although many specific types and particular instances of powers and liabilities are of course not evaluatively neutral—in that those specific types and particular instances are either typically beneficial or typically detrimental for the people who hold or bear them—the broad categories of Hohfeldian powers and liabilities are evaluatively neutral. Merely from the fact that someone holds a power or bears a liability, we cannot know whether the person's situation is thereby affected in a way that is typically beneficial or typically adverse. Only when we know the content of the power or of the liability can we safely draw any inference about its typically beneficial or typically adverse character. Why are the categories of Hohfeldian powers and liabilities evaluatively neutral in this fashion?

The key to answering this question lies in attending to the difference between the right-hand side and the left-hand side of the Hohfeldian schema. On the right-hand half of the schema, as has been emphasized, the positions are modal rather than deontic. Legal power/liability relationships pertain to changes in legal positions that are possible through the performance of certain actions, while legal immunity/disability relationships pertain to changes in legal positions that are not possible through the performance of certain actions. To ascertain whether some person P holds a specified legal power vis-à-vis somebody else, we do not need to rely on any evaluative assumptions concerning the typically beneficial or typically detrimental upshot of holding such a power. Instead, we simply need to ascertain whether P can bring about the specified changes in legal positions through his performing of the specified action(s). Because the distinctive functioning of legal powers consists in exercises of abilities, the presence or absence of such a power is detectable independently of any propositions about its agreeableness or disagreeableness for a party who holds it.

As Chapter 4 of this book will explore, legal claim-right/duty relationships are importantly different from legal power/liability relationships in the respect that has been outlined here. Though this matter will be fully investigated hereafter, a preview of it now will help to clarify and accentuate the relevant divergence between the left-hand side and the right-hand side of Hohfeld's schema. Consider, then, the following pair of legal duties imposed by the system of governance in some country. First, every adult in the jurisdiction below the age of sixty-five with an income above a specified level is legally obligated to pay at least $5,000 per annum to each parent who is still alive. Second, every adult in the jurisdiction is legally obligated to inform upon his or her parents to a domestic surveillance agency whenever the parents utter any sentiments of dissatisfaction with the prevailing system of governance. John, a citizen of the country in question, is thus under a legal duty to pay at least $5,000 every year to each of his parents and is also under

a legal duty to inform upon either of his parents if either of them evinces any sense of unhappiness about the presiding system of governance. Given that each of these duties incumbent on John is a legal obligation, and given that Chapters 3 and 4 will argue that every legal obligation is owed at least to the system of governance that has imposed it, we can here take for granted that each of John's duties is owed to that system (or to some unit of the system). Does anyone else hold a claim-right correlative to either of John's duties? In particular, do his parents hold claim-rights correlative to those duties? With regard to the first of John's duties, the answer to each of these questions is affirmative. John owes each of his parents a legal duty to pay each of them at least $5,000 per annum. Each parent holds a legal claim-right, vis-à-vis John, to be paid at least $5,000 by him. In regard to the second of John's legal duties, however, the answer to each of the foregoing questions is negative. Neither parent holds a legal claim-right to be informed upon by John to a domestic surveillance agency. John's duty to inform upon the parents is owed to the prevailing system of governance and more specifically to the surveillance agency, but it is not owed to either of the parents or to anyone else.

Chapter 4, with its elaboration of the Interest Theory of right-holding, will present a full explanation of the difference between the upshots of these situations. An explanation is needed, for in each case John owes a legal duty with a content that pertains squarely to his parents. Without yet venturing into the intricacies of the Interest Theory, we can simply note here that the best way of accounting for the difference between the aforementioned upshots is to observe that being paid at least $5,000 per annum is typically beneficial for the recipient whereas being informed upon to a domestic surveillance agency is typically detrimental for the person who has been betrayed. Such an observation is not a moral judgment, but it is an evaluative judgment. Here the judgment has been stated explicitly, but often the evaluative judgments that inform one's ascriptions of legal claim-rights are left implicit. Still, such judgments are always operative when somebody is identifying the holders of any legal claim-rights that are correlated with specified legal duties. In that regard, the matter of identifying the holders of legal claim-rights is in contrast with the matter of identifying the holders of legal powers. No evaluative judgments are needed when we are posing the question whether some party P is able to effect certain changes in specified legal relationships by performing some specified actions. If the answer to such a question is affirmative, then we can correctly maintain that P is endowed with a legal power to bring about such changes through those actions. If instead the answer to such a question is negative, then we can correctly maintain that P lacks the specified legal power. We can reach either of those answers without further asking whether the ability to induce the envisioned changes will typically be beneficial or typically be detrimental for someone who possesses that ability.

Thus, with reference to the broad category of Hohfeldian legal powers, we cannot correctly say that such powers are typically beneficial on balance for the

people who hold them—nor, of course, can we correctly say that such powers are typically detrimental on balance for the people who hold them. All that can accurately be said is that many Hohfeldian legal powers are typically beneficial on balance for the people who hold them and that many Hohfeldian legal powers are typically detrimental on balance for the people who hold them. Similarly, all that can accurately be said about the evaluative bearings of Hohfeldian legal liabilities is that many such liabilities are typically beneficial on balance for the people who bear them and that many other such liabilities are typically detrimental on balance for the people who bear them. By contrast, all claim-rights as deontic protections are typically beneficial on balance for the people who hold them, and liberties as permissions are likewise typically beneficial on balance for the people who hold them. When we undertake the transition from the deontic properties of the positions delineated on the left-hand side of Hohfeld's schema to the modal properties of the positions delineated on the right-hand side, we thereby undertake a transition from evaluative definiteness to evaluative open-endedness.

2.6.2 Quasi-Powers and Quasi-Liabilities

In §2.5.6, I have referred *en passant* to quasi-powers and quasi-liabilities. We should probe two main types of quasi-powers, the first of which was recognized but left unexplored by Hohfeld.[26] Together, these two categories of quasi-powers cover the main ways in which sundry alterations of people's legal or moral relationships can be brought about through routes other than exertions of legal or moral powers. A quasi-liability is, of course, a position of susceptibility to the transformative effects of the workings of a quasi-power. Such a position of susceptibility can be occupied by everyone who is a potential occupant of any of the standard Hohfeldian legal positions.

2.6.2.1 Insentient Forces and Entities

First, as has been mentioned in §2.5.6, the alterations in people's legal or moral relationships can be brought about through the workings of insentient forces or through the actions of insentient organisms. For example, if Penelope is struck and injured quite badly by a bolt of lightning while she is standing outdoors, her legal and moral positions will have been changed by that force of nature. For one thing, she now has a moral claim-right and perhaps also a legal claim-right to be assisted by anyone in her proximity who is able to help. In addition, her legal and moral relationship with her insurer or with the public health-care system in her locality will have altered. If Penelope has been killed by the bolt of lightning, her

[26] I have explored the first category of quasi-powers in Kramer 2009a, 78–82; 2022, 366–8. I also advert to it quite briefly in Kramer 1998, 102–3.

legal and moral positions will have been transformed even more sweepingly. Her entitlements as an owner of any assets will have been transferred to her estate for distribution to her heirs, or will have been transferred to public coffers. In most jurisdictions, her death will have deprived her of her legal claim-rights not to be defamed. In these ways, and in a host of other ways, an event involving natural forces or entities can change the legal and moral relationships among people. These alterations are effected not by exercises of powers but instead by exercises of quasi-powers. Although the parties who occupy the quasi-liabilities correlative to those quasi-powers are within the vast matrices of legal and moral relationships that join people (and many non-human animals) to one another, the exertions of the quasi-powers impinge on those matrices—often far-reachingly—from the outside.

Exertions of quasi-powers occur not only through dramatic events such as bolts of lightning and earthquakes and monsoons. They occur also, multitudinously, in more mundane forms. For example, if Helena dies of natural causes through some illness, the microorganisms in her body that kill her will have transformed her legal and moral relationships in much the same ways as a lethal bolt of lightning. Vis-à-vis those microorganisms, she bears quasi-liabilities to undergo the changes in her legal and moral positions which the microorganisms can induce through the termination of her life.

In many cases, the workings of quasi-powers operate independently of the designs pursued by human beings. For example, if Penelope has been reasonably cautious and has not sought to be struck by lightning while she is walking or standing outdoors, her mishap that involves her being felled by a bolt of lightning is not something sought or arranged by anybody. Nor is it due to culpability—negligence or recklessness or malice—on the part of Penelope or on the part of anyone else. In some other cases, by contrast, the existence or efficacy of a quasi-power as such is due to the designs or culpability of somebody. Especially in a case of the latter kind, but also in most cases of the former kind, the placing of some person or class of persons under a quasi-liability is due to an exercise of a Hohfeldian power. Such an exercise of a Hohfeldian power has resulted not in the creation of any Hohfeldian legal or moral positions but instead in the creation of a quasi-liability vis-à-vis some insentient force or entity.

Let us glance at a few examples. Suppose that, even though Penelope has been reasonably cautious and has not sought to be struck by lightning, her going outside has made a decisive difference between a situation in which she is vulnerable to a flash of lightning and a situation in which she is not vulnerable to such an occurrence. In that event, her going outside is the exercise of a Hohfeldian power (held vis-à-vis herself) through which she has placed herself under a quasi-liability to undergo the changes in her legal and moral relationships that will be effected by a bolt of lightning which strikes her. *Ex hypothesi*, she has exercised that Hohfeldian power inadvertently rather than designedly. Nevertheless, a Hohfeldian power can

be exerted without any intention on the part of the power-holder to exert it. Even though Penelope has not been remiss and has not sought to place herself in harm's way, her action of going outside has played a key role in rendering the flash of lightning efficacious as a force endowed with a quasi-power. Her action of going outside has been the exercise of a power to impose on herself a quasi-liability correlative to the quasi-power of the bolt of lightning.

Of course, the action of Penelope in going outside will even more clearly be the exercise of a power (held vis-à-vis herself) if she has been foolhardy or if she has intentionally exposed herself to the perils of a fierce electrical storm. Through that action, she has deliberately or recklessly made herself vulnerable to the workings of a quasi-power—which is to say that she has deliberately or recklessly imposed on herself a quasi-liability to undergo the multiple changes in her legal relationships that will be induced by those workings insofar as they materialize. Not every quasi-power gains its efficacy as such from the exercise of a Hohfeldian power that leads into it, but many quasi-powers do indeed become efficacious in such a fashion. (For an example of some quasi-powers that are efficacious independently of any exercise of a Hohfeldian power, we can envisage anew the death of Helena through the workings of fatal microorganisms in her body. If the presence and operations of those microorganisms in her body are not due to her actions or to the actions of anybody else, the efficacy of those deadly operations in changing her legal and moral positions is not attributable to any exertions of Hohfeldian powers.)

Furthermore, in some other situations the very existence of quasi-powers as such is due to the actions of people who have thereby exercised Hohfeldian powers to subject themselves or other people to quasi-liabilities. Consider, for instance, the following observation by Laura Donohue (2022, 19): "Sophisticated algorithms, machine learning, and artificial intelligence are being used with legal effect. Criminal risk assessment algorithms, for example, are being employed to determine whether individuals are granted parole, altering their liberty rights." As is evident, the quasi-powers recounted here by Donohue—that is, the abilities of computerized machines to alter people's legal relationships by arriving at certain determinations—have been brought into existence deliberately by legal-governmental officials who, with the aid of technicians, have put into place the arrangements for the functioning of the machines. Hence, the actions of those officials in settling the arrangements are exercises of legal powers that impose on each person in the relevant jurisdiction some quasi-liabilities to undergo changes in his or her legal relationships through the determinations of the computerized machines. Any changes brought about through those determinations are not directly engendered by exercises of Hohfeldian powers, but the quasi-powers which (when exerted) do directly engender such changes are themselves the products of certain exercises of Hohfeldian powers. Exercises of those powers obviously do involve choices and actions by human beings, even though the quasi-powers established through those exercises of powers are exerted by non-human contraptions.

2.6.2.2 The Applicability of General Norms

Many further alterations in the legal and moral relationships of people take place not through exertions of Hohfeldian powers but instead through the applicability of general laws and moral principles. For example, when a statute of limitations has prescribed the span of time during which lawsuits can be pursued or prosecutions can be brought, the applicability of that statute to the situations of people will very frequently result in modifications of their legal positions. If somebody possesses a legal power (or a set of legal powers) to pursue successfully a lawsuit against a tort-feasor or against the breacher of a contractual duty, and if she declines to pursue any such lawsuit, she will cease to possess that power (or set of powers) when the time prescribed by the statute has elapsed. That change in her legal positions, and in the legal positions of anyone whom she could have sued successfully, is brought about not through any exercise of a Hohfeldian power but instead through the operation of the statute. Though the existence of the statute is of course due to exertions of legal powers by the members of a legislature, the effect of the statute in depriving the potential claimant of her power(s) to pursue a lawsuit successfully does not itself involve any such exertions. It has occurred through the inaction of the potential claimant, and—as has been stated—omissions are not exercises of Hohfeldian powers.

Many other changes in people's legal relationships likewise occur through the applicability of general norms rather than through exertions of legal powers. For example, a statute in some jurisdiction might prescribe that anyone who finds a lost item of property will gain entitlements of ownership over that item if it has not been claimed by its current owner within six months of the posting of advertisements (in specified publications) about its having been found. By discovering some lost chattel and by posting suitable advertisements about the discovery, John will have exercised some legal powers through which he has placed himself under quasi-liabilities to acquire entitlements over the chattel after six months have passed. *Pari passu*, John will have placed the current owner under quasi-liabilities to be deprived of those entitlements. John's acquisition of the entitlements after the elapsing of six months is not itself occasioned by any further exercise of a legal power. Instead, it is due to the operation of a general statute whose applicability is triggered by the sheer passing of time rather than by some further action on the part of John. (Of course, if the item of found property is valuable, John at the end of the six-month period might have to obtain some official document that attests to his newly acquired ownership. His action of obtaining such a document is the exercise of a legal power, but that very power will have been vested in him by the combination of the statute and the sheer passing of time.)

Like the workings of natural forces, then, the operations of general laws can produce changes in people's legal relationships that are not produced directly by exercises of legal powers. Now, Hohfeld himself did not discuss quasi-powers and quasi-liabilities at all, even though he briefly adverted to their existence. Should

we conclude, consequently, that there are gaps in the comprehensiveness of the Hohfeldian framework even within the boundaries delineated by §2.5.6 above? Neither an unequivocally negative answer nor an unequivocally affirmative answer to this question is apposite. On the one hand, the comprehensiveness of Hohfeld's framework of legal and moral relationships pertains to the multifarious such relationships that exist among the potential holders of legal and moral entitlements. Although some quasi-powers originate from exercises of legal powers held by human beings, the quasi-powers themselves are not possessed by human beings; *ex hypothesi*, they are possessed by insentient entities and forces or by general laws and moral principles. Those entities and forces and laws and principles do not belong to the class of potential holders of Hohfeldian entitlements. Accordingly, although any quasi-liability as the correlate of a quasi-power is borne by a member of that class, it is not borne vis-à-vis some other member thereof. Hence, unlike a power/liability relationship, a quasi-power/quasi-liability relationship does not obtain between potential holders of Hohfeldian entitlements. Rather, it obtains between a potential holder of Hohfeldian entitlements and some insentient thing(s) or force(s) or some general law(s) or moral principle(s). Hence, any quasi-power/quasi-liability relationship is not among the countless relationships which Hohfeld sought to encompass within his schema.

On the other hand, I readily avow that Hohfeld's failure to discuss quasi-powers and quasi-liabilities is a lacuna in his overall theorizing about jural relationships. Given that exertions of quasi-powers induce changes in the legal or moral relationships that obtain among the occupants of Hohfeldian legal or moral positions, and given that many quasi-powers have arisen through actions that constitute exercises of legal powers, a general theory of legal and moral relationships should take the roles of quasi-powers carefully into account. Still, one's acceptance of that point is perfectly consistent with one's affirmation that Hohfeld's analytical framework is indeed comprehensive as a distillation of the types of legal and moral relationships that can link people to one another and to many non-human animals.

2.6.3 Quantification Afresh

Quantification is crucial for analyses of some major aspects of the positions in all four columns of Hohfeld's table, and its importance specifically for analyses of powers and liabilities has to some degree been recognized within the philosophical literature that has been generated by Hohfeld's work. Kevin Saunders in particular, during a flawed but sophisticated effort to formalize the Hohfeldian analysis, has drawn attention to one aspect of powers and liabilities that is in need of quantification (1990, 483 n. 98). Here I will elaborate on Saunders's insight, and I will also broach some other respects in which quantification is needed for analyses of power/liability relationships. We should here keep in mind the distinctions which

I have drawn in §2.5.5, especially the distinction between disjunctive universal quantification and distributive universal quantification.

2.6.3.1 Quantification over Sets of Conditions for Changes in Legal Relationships

Saunders recognizes that some statements which ascribe legal powers to people do not specify the types of actions through which the powers can be exercised. Implicit if not explicit in any such statement is an existential quantifier. As a first approximation, we can say that the domain under the quantifier comprises the act-types that can be performed by the party to whom the legal power is ascribed. So construed, the statement affirms or presupposes that there is at least one type of action which the party can perform that will bring about a specified change in certain legal positions. Such a construal of the statement is only a first approximation, however, for the existential quantification is really over sets of propositions where each set if true will be minimally sufficient for enabling the exercise of the power in question. Every set of propositions in the domain will include the proposition that an action of some type can be performed by the party who holds the power. Construed in this more precise fashion, the power-ascribing statement affirms or presupposes that there is at least one set of true propositions minimally sufficient for enabling the occurrence of a specified change in legal positions where at least one such set includes the proposition that an action of some type can be performed by the party to whom the legal power is ascribed.

Two main elements of the remarks in the foregoing paragraph should be elucidated here. First, the notion of minimal sufficiency—which will figure conspicuously in Chapter 4 of this book—is to be understood as follows. A set of actually occurrent facts S is minimally sufficient for some effect E if and only if (1) S is sufficient for E and (2) S does not comprise any facts that are unnecessary to make S sufficient for E. In other words, there are no redundant elements in a minimally sufficient set of facts; every element is necessary to make the overall set of facts sufficient for the occurrence of E. Every set of propositions within the domain covered by the existential quantifier in a power-ascribing statement is (if true) minimally sufficient for enabling the exercise of the specified power, and every such set within the domain includes the proposition that an action of some type can be performed by the power-holder. Hence, the fact that an action of some type has been performed by the power-holder is indispensable for her *exercise* of a legal power, and the fact that the power-holder can bring about a change in legal relationships through the performance of such an action is indispensable for her *possession* of a legal power.

Second, some readers may wonder why existentially quantifying over the types of actions that can be performed by the power-holder is not fully suitable. Why is the fully suitable quantification instead over sets of conditions minimally sufficient for enabling the exercise of the specified power, where each such set includes the

proposition that the power-holder can perform an action of some type? The reason is that an attempt to exercise a power can be thwarted if defeating conditions materialize, which have the effect of suspending or terminating the existence of the power. Hence, every set of facts minimally sufficient for enabling the exercise of a power will include the fact that no such defeating conditions have materialized.[27] Within the domain covered by the existential quantifier in a power-ascribing statement, every set of minimally sufficient propositions includes a proposition about the absence of defeating conditions.

In short, whenever a power-ascribing statement does not specify the types of actions through which the ascribed power can be exercised, the existential quantifier operative in the statement ranges over a domain comprising every set of propositions which if true will be minimally sufficient for the possession of that power. Every such set includes both (1) the proposition that the holder of the power can perform an action of some type and (2) the proposition that any conditions which would defeat every attempt by the holder to exercise the power are not present. Were the quantification instead only over the types of actions that can be performed by the power-holder, the ascription of the specified legal power would leave open the possibility that the power is possessed by the holder in circumstances where it cannot be exercised by her. Yet the notion of an ability that cannot be exercised is nonsensical. In any circumstances where a legal power cannot be exercised by the person who supposedly holds it, its existence has been either suspended or terminated. Hence, whether an existential quantifier in a power-ascribing statement of the sort envisaged here is implicit or explicit, it covers a domain comprising every set of propositions which if true will be minimally sufficient for enabling the exercise of the specified power by the party to whom the power is ascribed. Such a statement affirms or presupposes that at least one such set of propositions is true.

2.6.3.2 Quantification over Sets of Changes

In the preceding subsection, I have assumed that the element left unspecified in a power-ascribing statement is the action or set of actions through which the ascribed power can be exercised. As is evident, however, that element is not the only thing that might be left unspecified in such a statement. Especially when the legal power ascribed is a broad power to enact statutes or ordinances or other legislation, the changes that can be brought about through the exercise of the power will have to be left largely or wholly unspecified. Implicit or perhaps explicit in a law which establishes such a wide-ranging legal power is a universal quantifier that ranges disjunctively over a domain comprising the multitudinous possible sets of jointly consistent changes that can be effected through exertions of the

[27] Though the analyses in Holton 2002 and 2010 are propounded in response to other philosophical controversies, they shed light on the point articulated here.

power. The disjunctive universal quantification is exclusive rather than inclusive. On any given occasion, only one of the possible sets of jointly consistent changes will be actualized through the exertion of some particular legislative power(s) in a jurisdiction.

Manifold possible changes in legal relationships, though of course not *all* such changes, can be brought about simultaneously. A myriad of distinct sets of jointly consistent possible changes will be the elements of the domain over which the disjunctive universal quantifier ranges. Each such set comprises a unique array of jointly consistent possible changes, albeit of course many of the sets are proper subsets of others. Some sets each comprise only one pair of changes in the positions of a single legal relationship, whereas countless others each comprise multiple changes in multiple legal relationships.

Disjunctive universal quantification over possible sets of jointly consistent changes in legal relationships is likewise operative, implicitly if not explicitly, in laws that endow individuals and organizations with powers to enter into contracts. Although the general character of the changes brought about through exercises of those powers might well be outlined in the relevant laws and doctrines of a jurisdiction, the specifics of the changes are spelled out instead by the contractual parties whenever they exercise those powers. Operative in the relevant laws and doctrines of a jurisdiction, then, are disjunctive universal quantifiers over domains comprising the myriad distinct sets of jointly consistent changes in legal relationships that can be sought by parties who enter into contracts. Again, some of the sets each comprise only one pair of changes in the positions of a single legal relationship, whereas countless other sets each comprise multiple changes in multiple legal relationships between the contractual parties. The nature of the institution of contract law makes inevitable, in the norms which establish and regulate that institution, the (usually implicit) presence of disjunctive universal quantifiers that range over the aforementioned sets.

Of course, the domains to which I have referred in the preceding two paragraphs do not typically comprehend all the sets of jointly consistent changes in legal relationships that could be actualized if the powers of legislators to enact laws and the powers of individuals and organizations to enter into contracts were unrestricted. In most if not all jurisdictions, the powers of legislators to enact laws are limited by constitutional provisions or by other basic constraints. Sometimes the limits take the form of legal duties, but much more often they are imposed through the exclusion of certain types of alterations from the range of alterations that can be brought about by exercises of the powers of legislators. As will be emphasized in §2.7.1 below, many of the guarantees in so-called bills of rights are implemented predominantly through legal immunities and disabilities rather than predominantly through legal duties and claim-rights. Similarly, in most if not all jurisdictions, limitations on the powers of individuals and organizations to enter into contracts are much more often in the form of legal disabilities than in the

form of legal duties. Hence, when a disjunctive universal quantifier is operative in a statement that ascribes law-making powers to legislators or contract-forming powers to individuals and organizations, the domain covered by the quantifier is reflective of the limits that have just been broached here.

2.6.3.3 Quantification over Potential Bearers of Liabilities

In my initial reflections on quantification in §2.5.5 above, I have concentrated chiefly on quantification over potential occupants of Hohfeldian positions (especially potential bearers of Hohfeldian no-rights). A comparable focus is pertinent here, for statements that ascribe legal or moral powers to people frequently leave unspecified the parties vis-à-vis whom the powers are held. Often the lack of any such specification indicates that a quantifier is operative. For example, if I ascribe to myself a legal power to vest myself with proprietary entitlements over a book by purchasing the book from a shop, my statement will probably leave unspecified the bearers of the legal liabilities that are correlative to the ascribed power. What is obvious is that the owner of the shop and I bear some of those liabilities, as my exercise of my power alters the owner's legal positions and my own legal positions. Somewhat less obvious, however, is that liabilities correlative to my power are also borne by everyone else in the jurisdiction. My gaining of proprietary entitlements over the book through my action of purchasing it will have altered the legal positions of everyone else in the jurisdiction, since everyone there now owes to me certain legal duties that have thitherto been owed to the bookseller. (Though I concentrate here on the modifications to people's legal duties, other legal positions of theirs will also have shifted. For example, whereas each person previously bore a legal power vis-à-vis the bookseller to acquire ownership of the book by purchasing it from her, each person now bears that power vis-à-vis me to acquire ownership of the book by purchasing it from me.) Thus, unless my power-ascribing statement is explicitly focused solely on the bookseller and myself as the bearers of liabilities correlative to my power, the statement is best construed as containing a distributive universal quantifier that covers a domain comprising everyone in the relevant jurisdiction. The universal quantification is distributive because the legal positions of everyone within the jurisdiction are liable to change in parallel ways through my exercise of the ascribed power.

While the preceding two subsections have focused on quantification in the contents of Hohfeldian power/liability relationships, the current subsection focuses on quantification in the directionality of the relationships. Still, because a full specification of the content of a legal or moral power will advert to the parties whose legal or moral positions would be altered through the exercise of the power, such a specification will have fixed the directionality of the power. Whereas a legal or moral duty can be owed to a party to whom no reference is made in a full specification of the content of the duty, any full specification of the content of a legal or moral power will advert to the parties vis-à-vis whom the power is held.

(The references to those parties will be at least *de dicto* if not *de re*.) Thus, although the distributive universal quantification discussed in the preceding paragraph does of course pertain to the directionality of power/liability relationships, it thereby also pertains to the contents of those relationships. For many a Hohfeldian power, a full specification of its content will incorporate a distributive universal quantifier that ranges over liability-bearers.

2.7 Immunities and Disabilities

We now arrive at the final column in Hohfeld's table, the immunity/disability axis. If some person P holds an immunity vis-à-vis some other person Q in relation to a certain modification of P's legal or moral positions through the performance of some action(s) by Q, then P is insusceptible to undergoing that modification through Q's performance of the specified action(s). As is evident, then, an immunity is the negation of a liability. P is immune from the bringing about of some modification in his legal or moral positions through Q's performance of some specified action(s) if and only if P is not liable to undergo that modification through the performance of the action(s) by Q. An immunity and the liability of which it is the negation are contradictories rather than duals; although each is the negation of the other, the content of each is the same as the content of the other.

Immunities of course vary along several different dimensions. An immunity can be held vis-à-vis only one party or vis-à-vis multiple parties. It can pertain to only a narrowly specified type of modification, or it can pertain to an array of modifications. Legal positions protected by it can be more numerous or less numerous in their extent. Unsurprisingly, given how important quantification is in analyses of power/liability relationships, quantification will often likewise be involved in analyses of immunity/disability relationships along any of the dimensions just broached.

A disability is a position of powerlessness within the scope of its correlative immunity. In the example sketched in the penultimate paragraph above, Q bears a disability vis-à-vis P with regard to Q's modifying of certain legal positions of P through Q's performance of any specified action(s). If Q attempts to modify those legal positions by performing the specified action(s), the attempt will be unavailing. Hence, just as an immunity is the negation of a liability with the same content, so too a disability is the negation of a power with the same content. The content of a disability is not only the same as the content of the power of which the disability is the negation; in addition, that content is of course the same as the content of the immunity of which the disability is the correlate. In that respect, the immunity/disability axis is like each of the other three columns in Hohfeld's schema. In each column, the two correlative positions are endowed with the same

content—and the party who occupies either position is the party vis-à-vis whom the other position is held or borne.

2.7.1 The Importance of Immunities: Bills of Rights

Most commentators on Hohfeld's analysis of legal positions tend to say rather little about immunities and disabilities, but immunity/disability relationships are in fact of immense importance. For one thing, many of the entitlements conferred by so-called bills of rights are immunities. For example, the bestowal of immunities on citizens is the prime effect of the First Amendment to the American Constitution with its guarantees of freedom of expression and other liberties. Although the wording of the First Amendment with reference to freedom of expression ("Congress shall make no law … abridging the freedom of speech, or of the press") could have been construed as principally duty-imposing, it has in fact been construed as preponderantly immunity-conferring. That is, instead of having been interpreted as imposing legal duties on the US Congress to refrain from enacting laws that abridge people's communicative liberties in certain ways, the First Amendment has been interpreted as bestowing legal immunities on Americans which shield them against Congressional legislation that would abridge such liberties in the disallowed ways.[28] Whereas the American courts do not levy sanctions on the Congress for enacting laws that are at odds with the First Amendment, they hold that those laws—or the relevant provisions of those laws—are invalid. In other words, the courts hold that the Congress by enacting such laws has gone beyond the scope of its legislative powers. Those laws are within the ambit of the disabilities imposed on the Congress by the First Amendment, and are therefore of no effect. In general, the free-speech guarantee under the American Constitution is implemented predominantly through immunity/disability relationships rather than predominantly through claim-right/duty relationships.

2.7.1.1 A Qualification: Wrongdoing in Law-Administration

Worth noting here is that what has just been said is applicable to contraventions of a constitutional free-speech guarantee which occur at the level of statutes or regulations or ordinances or other general laws. In situations where contraventions instead occur at the level of law-administration, the proper responses are different. When laws that are unobjectionable in themselves are given effect by officials in legally and morally objectionable ways, criminal-law proceedings or tort-law

[28] For nearly a century, the US Supreme Court has deemed the First Amendment's free-speech guarantee to be applicable not only to the Congress but also to state legislatures (through the Fourteenth Amendment). My reason for omitting any mention of the state legislatures in the brief discussion in the text is simply that I can thereby avoid cumbersome prose.

proceedings against the officials (and against the governmental agencies that employ them) can be legally and morally justifiable. For example, suppose that some constables in a municipality enforce a breach-of-the-peace statute in a discriminatory manner against certain speakers whose messages are not to the liking of the constables. Some instances of discriminatory enforcement of this kind notoriously occurred during the civil-rights campaigns in the southern half of the United States during the 1960s. Such instances of enforcement were morally wrongful partly because they invested hostile audiences with the authority to determine the range of communicative endeavors that would be legally tolerated, and partly because the overall pattern of enforcement was blatantly invidious. Hence, the wielding of criminal or civil sanctions against the individual constables—as well as against the police forces that employed them—could be morally justified both under the principle of freedom of expression and under a principle of equal protection.

In the contexts just mentioned, and in countless other relevantly similar cases, some administrative or adjudicative officials are giving effect to just laws but are doing so in ways that clash with the constraints of content-neutrality and speaker-neutrality established by the principle of freedom of expression. In contexts where such officials are deliberately deviating from the terms of just laws instead of implementing them selectively, the actions at variance with the aforementioned constraints of neutrality will be even graver; consequently, the remedies that are morally vital for rectifying the wrongs done by those actions will be more onerous. Situations of this kind reveal especially clearly the moral requisiteness of holding law-enforcement officials individually responsible for some transgressions of the principle of freedom of expression. Although the officials *qua* officials are always acting on behalf of their system of governance and more specifically on behalf of the governmental body (such as a police force) that employs them, and although the responsibility for their actions performed within their roles as officials is therefore always collective as well as individual, there are some cases in which the wrongs constituted by transgressions of the principle of freedom of expression will not have been fully rectified without the imposition of sanctions on the individuals who have committed those wrongs. Having violated some of their legal and moral duties, the officials as well as their employer should have to bear the burdens of remedying their misdeeds.

2.7.1.2 Disabilities Imposed on Lawmakers

Although constitutional guarantees (such as the First Amendment to the American Constitution) that correspond more or less closely to the moral principle of freedom of expression are contravened not uncommonly at the level of law-application, the contraventions most frequently under scrutiny in high-profile litigation are at the level of general laws. In a liberal democracy, any remedies suitable for rectifying the wrongs perpetrated at that latter level are almost always directed against collectivities rather than against individuals (where a collectivity targeted

by a remedy can be an entire system of governance or some organ of decision-making within that system). Moreover, very often the legal remedies pertinent for rectifying any contraventions of the principle of freedom of expression at the level of general laws are not sanctions.

As has been remarked already, the legal entitlements conferred on individuals and groups by constitutional free-speech guarantees such as the First Amendment are mostly immunities. Those immunities shield individuals and groups against being deprived of their communicative liberties by laws that purport to remove or curtail such liberties. Now, as has also been remarked, legal immunities are effectuated by administrative or adjudicative officials not through legal sanctions but instead through annulments of ostensible exercises of legal powers. Suppose for example that the US Congress were to enact a statute which professes to bar everybody in the United States from discussing the matter of abortion in any location outside a private residence. Such a law would of course be challenged successfully in the courts, but the upshot of the challenge would not be the imposition of any penalties on the Congress or on any members of Congress. Rather, the upshot would be the invalidation of the statute, as the courts would declare that the attempt by the Congress to exercise its law-making powers had been of no avail. Instead of giving effect to any legal duty incumbent on the Congress, the courts would be giving effect to a legal disability that limits the Congress's legislative powers. That Hohfeldian disability is correlated with the immunity of each citizen against being deprived of communicative liberties by laws that contravene the First Amendment.

As is manifest from my exposition of the Hohfeldian analytical framework in this chapter, claim-rights and immunities are not equivalent. Similarly, of course, the duties that correlate with claim-rights and the disabilities that correlate with immunities are not equivalent. Hence, as has been stated in the preceding paragraph, the legal remedy that is most often suitable in response to any contravention of the principle of freedom of expression that occurs at the level of a general law—namely, the invalidation of that law either as a whole or in part—is not a legal sanction levied for a breach of a legal duty. Indeed, such a conclusion follows not only from the Hohfeldian analysis but also from Hart's famous critique of John Austin's jurisprudential theory. In one strand of that critique, Hart cogently argued that the nullity ensuing from an unsuccessful attempt to exercise a legal power is not tantamount to a sanction imposed for a violation of a legal obligation (Hart 1994, 33–5; Kramer 2018, 39–41). Yet, given that disabilities are not equivalent to duties, and given that the nullity which ensues from the implementation of a legal disability is not equivalent to a sanction which ensues from the enforcement of a legal duty, the role of nullity as a remedy for contraventions of the principle of freedom of expression that occur at the level of general laws might seem problematic. After all, those contraventions are breaches of moral duties. How can the effectuation of a legal *disability* be a suitable remedy for a breach of a moral *duty*? Should not instead the suitable remedy be the enforcement of a legal duty?

Three replies to such a worry are apposite here. First, although Hart and Hohfeld were correct to highlight the logical differences between legal duties and legal disabilities, and although Hart was also correct to highlight the functional differences between them, there is a functional overlap between duties and disabilities in contexts where adjudicators are called upon to say whether the efforts of legislators to exercise law-making powers have been successful.[29] In any such context, the invalidation of a statute or an ordinance or some other law—though not equivalent to the levying of a sanction such as a fine—is quite a rebuke to the legislative body whose enactment has been annulled. Such a remedy undoes what the legislature has presumed to accomplish, and it in effect requires the members of that body to expend further time and effort if they wish to come up with some alternative to the enactment that has been nullified. A court that invalidates a law might forbear from using any reproachful language in its presentation of its judgment on the matter, but that judgment does function as a reproach implicitly if not explicitly.

Second, although a general law that clashes with a constitutional guarantee such as the First Amendment should normally be invalidated by the courts without the imposition of legal sanctions, there can be exceptional circumstances in which the imposition of sanctions on a legislative body would be morally suitable and indeed morally requisite. Suppose for example that a local government enacts a succession of nearly identical ordinances, each of which is glaringly in contravention of the principle of freedom of expression (and glaringly in contravention of a constitutional guarantee which corresponds to that principle). After constitutional challenges to several of the successive editions of the ordinance have resulted in the invalidation of all of them, a court will be morally warranted in issuing an injunction that forbids the local government to continue to enact versions of the ordinance that are nearly identical to those which have already been annulled. Such an injunction will place the local government under a legal duty to desist from its cynical pattern of behavior. Under the terms of the injunction, any subsequent enactments must differ from the invalidated versions of the ordinance in ways that duly take account of the unconstitutionality of those previous versions. An enactment by the local government that defies the terms of the injunction will trigger the levying of a sanction such as a fine. In the circumstances envisaged here, where the local government has displayed flagrantly bad faith by declining to heed its constitutional limitations and its moral obligations, the placing of it under a legal duty through the issuance of an injunction can be morally justified. Likewise, of

[29] My references to legislators and legislative bodies are to be understood expansively here and elsewhere. Such references encompass any organs of governance that establish general laws, including not only any straightforwardly legislative institutions such as the US Congress and the UK Parliament but also—among others—any administrative agencies that promulgate regulations and any local authorities that enact ordinances or by-laws.

course, the plying of sanctions against the local authorities in the event of their non-compliance with that legal duty can be morally justified.

Third, in the absence of circumstances in which a legislative body has exhibited arrantly bad faith or gross remissness, the effectuation of a legal disability through the nullification of an enactment is the fitting remedy when a transgression of a constitutional guarantee is at the level of a general law. As has been argued, although such a remedy is not a sanction, its function in the context of its occurrence is partly that of a sanction. Moreover, in the absence of egregiously bad faith or gross remissness on the part of a legislative body, the employment of such a remedy avoids both excessive confrontationality and excessive deference. Measures suitable for rectifying any transgressions of constitutional guarantees have to be responsive to the requirements of other major moral precepts such as the principle of democratic legitimacy. Although that latter principle obviously cannot be expounded in depth here, its requirement of respect for the operations of a democratically elected legislative body is binding as a constraint on any remedial response to a violation of a constitutional guarantee. In the absence of strikingly bad faith or blatant remissness in those operations, the respect due is not shown if a legislative body is subjected to legal sanctions when its enactments collide with a constitutional safeguard. In the event of a clash between an enactment and such a safeguard, the invalidation of the enactment upholds the civil liberties protected through the constitutional provision while also serving the ideal of democratic legitimacy by keeping a legislative body within the ambit of its authority.

2.7.2 The Importance of Immunities: Securing Other Entitlements

Apart from the role of legal immunities and disabilities in the effectuation of guarantees of civil liberties—such as the guarantees enshrined in the First Amendment to the American Constitution—legal immunities are crucial for securing the existence and continuity of other legal positions. For example, if Melanie has a legal claim-right against being punched in the face by Luke, and if she does not hold any legal immunities against being divested of that claim-right by Luke through countless elementary means (such as his looking at her or waving at her or smiling at her or uttering some mundane phrase), then her claim-right is almost entirely hollow. Indeed, if she does not hold any legal immunity against being divested of that claim-right through Luke's clenching of his fist or through his movement of his arm toward her face, we shall have to conclude that she does not really hold such a claim-right at all. Given that in those circumstances Melanie can be deprived of her legal claim-right by precisely the sorts of movements of Luke's body that would be involved in his contravening the claim-right, her legal protection against being punched in the face by Luke would be indistinguishable from

her not having any legal protection against such misconduct by him. Consequently, the very existence of her claim-right is dependent on its being accompanied by sundry immunities against the extinguishing of that claim-right.

This role of immunities in securing the existence and continuity of other entitlements is pervasive and vital, yet it is almost always taken for granted rather than made explicit. Still, like the presence of oxygen in the atmosphere of Earth—which, as I have observed in §2.5.2 above, is necessary for the continued existence of human beings but is mostly taken for granted in everyday life—the aforementioned role of immunities is no less important for going so often unnoticed. Immunities are central not only to freedom of expression but also to the sway of legal and moral positions more generally.

This role of immunities in securing the existence and continuity of other entitlements is what accounts for my contention (in my opening chapter and near the outset of this chapter) that the noun "right" in its strict sense is properly limited to any claim-right combined with immunities against the discontinuation of that claim-right. Although Hohfeld took "right" in its strict sense to be interchangeable with "claim" or "claim-right," his doing so was very likely attributable to what I have described in the last paragraph above. That is, he was very likely taking for granted that any claim-right will be accompanied by sundry immunities which serve to secure it against being extinguished by routine modes of behavior and especially against being extinguished by the very modes of behavior that would constitute violations of the claim-right. He was of course safe in making such an assumption, but it should not be left implicit. What should be recognized explicitly is that any Hohfeldian claim-right properly designated as a "right" is accompanied by multiple immunities that secure its very existence and its continuity. To be sure, the immunities that accompany any particular claim-right might not be comprehensive in the protection which they bestow. Though some claim-rights are inextirpable—at least during the lifetime of anyone who holds them—other claim-rights can be terminated through a number of routes. Nonetheless, every claim-right appropriately classifiable as a "right" is accompanied by an array of immunities that keep it existent in countless circumstances of a person's life. Unless a claim-right is normatively protected in that manner, it itself does not furnish any meaningful deontic protection and is therefore only an ostensible claim-right.