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Peter Westen

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Poor Wesley Hohfeld

PETER WESTEN*

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I. INTRODUCTION

Wesley Newcomb Hohfeld has lost one audience and gained another in the one hundred years since he wrote *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.¹ Hohfeld intended his work principally

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1. Hohfeld published the work in two parts, the first of which appeared in the *Yale Law Journal* in 1913, and the second of which appeared in the *Yale Law Journal* in 1917. I shall cite the work in the way Yale University Press subsequently published it in 1919, when it combined the two parts and entitled them *Fundamental Legal Conceptions*. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Walter Wheeler Cook ed., 3d prtg. 1964).

for law-school students,² and his conceptual framework initially became an official part of law-school curricula.³ Over time, however, law professors have lost interest in Hohfeld, leaving law students knowing scarcely anything of Hohfeld.⁴ Meanwhile, Hohfeld has gained a new audience among moral theorists who increasingly take his conceptual apparatus as a touchstone for analysis, such that one can hardly read broadly in moral and legal theory of self-defense without coming across multiple references to Hohfeld.

Unfortunately, too much of what theorists say of Hohfeld is incorrect. Theorists all too often misunderstand him, including writers who value analytical rigor. Poor Hohfeld; his mission was to promote “clear thinking and exact expression.”⁵ Yet, if he were alive today, he would see himself invoked for propositions he explicitly disavowed.

Hohfeld endeavored to establish at least seven propositions:

1. His conceptions are analytic in nature.
2. His conceptions address after-the-fact legal relations that arise from antecedent mental and physical events.
3. Generic entitlements—such as rights—should be replaced with more perspicuous conceptions, namely, claim-rights, liberties, powers, and immunities, and their respective correlatives—duties, no-rights, liabilities, and disabilities.
4. His conceptions are comprehensive and thus capable of encompassing any jural relation in law.
5. The correlative of a liberty is a no-right, while its opposite is a duty;
6. His conceptions are directed, specifying precisely whom they are among; and,
7. He intends his conceptions for legal relations, not moral relationships—hence his title, *Fundamental Legal Conceptions*.⁶

Criminal law theorists commonly invoke Hohfeld as authority for assertions that are contrary to propositions 1–7. To illustrate, I shall focus on Uwe Steinhoff’s justifications for the use of force, while making occasional references to other commentators who write about self-defense.⁷

2. *Id.* at 27.

3. For Hohfeld’s application in the classroom, see Arthur L. Corbin, *Foreword to WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS*, at vii, xi (Walter Wheeler Cook ed., 3d prt. 1964) [hereinafter Corbin].

4. Curtis Nyquist, *Teaching Wesley Hohfeld’s Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 238 (2002).

5. Corbin, *supra* note 3, at 75 (2d prt. 1920).

6. *See id.* at 3–11.

7. *See generally* Uwe Steinhoff, *Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts* (2016) (unpublished manuscript) (on file with author).

II. HOHFELD'S CONCEPTIONS ARE *ANALYTIC* IN NATURE

Hohfeld emphasizes that his conceptions are analytic in nature.⁸ They are tools to characterize such normative relations as jurisdictions may wish to establish through law. Stated differently, the relations Hohfeld discusses are logical in nature, not normative. Thus, Hohfeldian liberties are defined by reference to claim-rights; powers are defined by reference to claim-rights, liberties, and immunities; immunities are defined by reference to powers; and the “correlatives” and “opposites” of claim-rights—liberties, powers, and immunities—are defined by reference to one or another of the four aforementioned conceptions.⁹ As such, Hohfeld's conceptions come into play *after* jurisdictions establish normative relations and, then, only for the purpose of describing them, not for the purpose of constraining them.

Steinhoff runs afoul of Hohfeld in attempting to explain when an actor, A, owes *compensation* to a person, B, who possesses a claim-right vis-à-vis A not to be harmed.¹⁰ The answer, Steinhoff argues, depends upon whether B has *forfeited* his claim-right not to be harmed, thereby leaving A with a Hohfeldian liberty to harm B—in which case A does not owe B compensation—or whether B retains a claim-right not to be harmed but A is justified in “*overriding*” it—in which case A escapes punishment for harming B but owes B compensation for harming him.¹¹ To illustrate the difference, Steinhoff contrasts a culpable aggressor, who has forfeited his claim-right not to be harmed, with a pharmacist who has not:

*A Culpable Aggressor Who Forfeits Claim-Rights:
No Compensation Owed*

The basic idea of [forfeiture to explain self-defense] is that the aggressor through his aggression forfeits his own right not to be attacked, that is, he becomes liable to counter-attack: he can now be attacked without wronging him, without violating his rights. This view, at least as far as culpable attackers are concerned, seems to be a very popular one at least in philosophical discussions of self- and other-defense, and many subscribe to it even in the case of innocent attackers. The advantage of this view is that it can straightforwardly explain why the defender does not owe the aggressor compensation for the harm the former inflicted on the latter in justified self-defense: by harming him he did not *wrong* him, did not violate his *rights*, and therefore no compensation is due. Accounts, on the other hand, that in one way or

8. See HOHFELD, *supra* note 1, at 1–6, 25–27; Corbin, *supra* note 3, at x–xi.

9. HOHFELD, *supra* note 1, at 36, 38–39, 50, 60.

10. See Steinhoff, *supra* note 7, at 36–37.

11. *Id.*

another construct the self-defense justification as some kind of necessity justification (that is, as a justification that justifies *overriding rights* of others) cannot really explain this, at least not in any straightforward manner. After all, if one harms an aggressor, in particular a culpable aggressor, in necessary and proportionate self-defense one does not owe him any compensation.¹²

*A Pharmacist Whose Claim-Rights Are Overridden:
Compensation Owed*

From so-called “necessity justifications” or “choice of evil justifications” it is well known that sometimes it can be justified to infringe a person’s rights for the sake of a much greater good. For example, if someone has a heart attack in front of the window of a closed pharmacy at night, and the only way Pauline can save him is to smash the window and give him the life-saving drug, then morally, and legally in many jurisdictions, Pauline is justified in doing so *although* she thereby infringes the property rights of the pharmacy owner. This is shown in the fact that legally (and morally) Pauline would owe him compensation for the smashed window; yet, while she owes him compensation, she is not punishable. In fact, she is . . . fully justified. Thus, we are dealing here with a justified rights infringement: you can *justifiably* do something to someone (for example damage his or her property) although she or he has a *right* against you doing it.¹³

. . . .

[I]f one harms another person in the course of overriding a right of this person, one would normally owe him compensation. . . . He has a *right* to [compensation].¹⁴

The first thing to note about Steinhoff’s discussion of forfeiture is that neither *forfeiture* nor *forfeit* figure anywhere in Hohfeld’s *Fundamental Legal Conceptions*.¹⁵ Instead, Hohfeld propounds alternative conceptions to account for changes in jural relations of the kind that occur in *A Culpable Aggressor*, namely, *powers* and *liabilities*.¹⁶ If Hohfeld were confronted with a case like *A Culpable Aggressor*—that is, a case in which A’s jural relation to B changes from B’s having a claim-right against A to B’s not having it—Hohfeld would invoke the language of powers and liabilities. He would say that (i) the culpable aggressor’s claim-right against the defender not to be harmed has always been subject to a liability on the aggressor’s part, a liability to his claim-right being negated; (ii) the defender’s duty to the culpable aggressor, in turn, has always been subject to the defender’s power to negate the aggressor’s claim-right; and (iii) the liability and power

12. *Id.* at 36 (footnotes omitted).

13. *Id.* at 33 (footnotes omitted).

14. *Id.* at 36. Steinhoff cites no legal authority that Pauline owes the pharmacist compensation; and I am not aware of any. However, because a jurisdiction could, in theory, require compensation, I shall assume that Pauline’s jurisdiction does.

15. *See generally* HOHFELD, *supra* note 1.

16. *See id.* at 36.

both became operative when the culpable aggressor wrongly attacked the defender and the defender chose to respond.¹⁷ By virtue of the liability/power becoming operative, the culpable aggressor ceased to have a claim-right vis-à-vis the defender not to be harmed and, consequently—and logically—the defender possessed a liberty-right to harm the aggressor.

There is no “alchemy”¹⁸ involved those changes in jural relations. Nor, if the underlying changes are normatively appropriate, does a commentator need “knock-down argument[s]” to “prove”¹⁹ that one set of jural entitlements have been replaced with their opposites. On the contrary, if, in a jurisdiction’s judgment, events render it normatively appropriate that existing jural entitlements be replaced with their oppositions, Hohfeld’s conceptions of *powers* and *liabilities* function to conceptualize the normative events that produce the changes in jural relations.²⁰

The second thing to note is that Hohfeld nowhere refers to a person who “justifiably infringe[s]”²¹—or, synonymously, *overrides*—the claim-right of another.²² Indeed, conceptions of *justifiable infringements* of claim-rights are foreign to Hohfeld. This does not mean that Hohfeld believes Pauline should be punished for harming the pharmacist by appropriating his drugs. Nor does it mean that Hohfeld believes Pauline should be allowed to harm the pharmacist without compensating him; Hohfeld has no views on the matter one way or another. If a jurisdiction believes Pauline may appropriate the pharmacist’s drugs but must compensate him, Hohfeld would have no objection. Rather, instead of saying Pauline may *infringe* the pharmacist’s claim-right, Hohfeld would say the pharmacist’s claim-right has always been subject to Pauline’s power to change the pharmacist’s relation to her in the event of a life-threatening emergency. Further, Pauline’s power to negate the pharmacist’s claim-right not to be harmed has always been subject to the pharmacist’s conditional power to change Pauline’s relations to him by creating in her a duty to compensate him for harm inflicted.²³

17. See *id.* at 58.

18. Steinhoff, *supra* note 7, at 163 n.472.

19. *Id.* at 164, n.473.

20. See HOHFELD, *supra* note 1, at 50–51.

21. Steinhoff, *supra* note 7, at 31, 54, 98, 169, 224.

22. See generally HOHFELD, *supra* note 1. Hohfeld’s conceptions are analytic in nature, not normative.

23. See HOHFELD, *supra* note 1, at 38.

More importantly, Steinhoff makes the same mistake that Judith Jarvis Thomson and other commentators make.²⁴ He mistakenly assumes that Hohfeld conceptions are normative constraints on the normative relations that jurisdictions may wish to establish through law.²⁵ Steinhoff assumes that *if* a culpable aggressor forfeits—or, within Hohfeld’s framework, no longer possesses—a claim-right not to be harmed, then Hohfeld’s conceptual scheme *precludes* the state from requiring a defender to compensate the aggressor for harm the defender inflicts, even if the state wishes to do so.²⁶ Thus, recall what Steinhoff says about a culpable aggressor who, by virtue of his culpable aggression, loses his Hohfeldian claim-right not to be harmed:²⁷ Steinhoff says that, absent a concept of justifiable overriding of a subsisting claim-right, Hohfeld’s framework would bar a jurisdiction from requiring a defender to compensate the aggressor in the event that a jurisdiction wished to do so.²⁸ Hohfeld would bar compensation, Steinhoff states, because by virtue of the culpable aggressor’s losing a Hohfeldian claim-right that the defender not harm him, the defender possesses a liberty to harm him, and, by virtue of possessing a liberty-right to harm the aggressor, the defender cannot be required to compensate the aggressor.²⁹

Hohfeld’s conceptions do not preclude jurisdictions from establishing such normative relations as they may choose, any more than Hohfeld’s conceptions normatively justify such relations as jurisdictions may choose.³⁰ Hohfeld’s framework is a structure for conceptualizing such normative relations as jurisdictions may choose to establish. Thus, Hohfeld does not bar a jurisdiction from empowering A to exercise a *liberty-right to harm* B while simultaneously conditioning A’s liberty-right on a *power in B to exercise a claim-right that A compensate him for the harm*. On the contrary, A’s liberty to harm B is compatible with A’s having a duty to compensate B for harmed inflicted—just as B’s no-right that A refrain from harming him is compatible with B’s claim-right that A compensate him.

24. See JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK 40–42, 54, 53, 66 (William Parent ed., 1986).

25. See Steinhoff, *supra* note 7, at 31.

26. See *id.* at 33; THOMSON, *supra* note 24, at 41 (“The fact that compensation *is* owing shows (and it seems to me, shows conclusively) that I did do something that you had a right that I not do.”).

27. See Steinhoff, *supra* note 7, at 30.

28. *Id.* at 36

29. *Id.*

30. For a commentator who assumes Hohfeld’s conceptions can justify normative relations rather than merely conceptualize them, see, for example, Yitzhak Benbaji, *Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense*, 35 CAN. J. PHIL. 585, 606 (2005).

To illustrate, consider a classic subject of Hohfeldian analysis, that is, the government power of eminent domain.³¹ Property owners typically have a claim-right vis-à-vis all persons—including the government—that title to their property not be transferred without their consent.³² However, an owner's claim-right is always subject to a power in the government to change that relation by means of eminent domain.³³ When the government exercises the power of eminent domain, the government does not infringe or override claim rights to property.³⁴ Rather, claim-rights to property are subject to a power in the government that the government is free to exercise when doing so serves a “public purpose[.]”³⁵ The government has a power to negate a property owner's claim-right that title to his property not be transferred without his consent, subject to conditional power of the owner to exercise a claim-right that the government justly compensate him for appropriating title without his consent.³⁶

I have thus far addressed one instance of Steinhoff's taking Hohfeld to be a normative constraint. Now consider another: Steinhoff's discussion of the relationship between Robert Nozick's *Falling Man* and the *Fallen-Upon Man* who is threatened by the former's fall.³⁷

Steinhoff assumes that, prior to the fall, Falling Man and Fallen-Upon Man both possess claim-rights to life vis-à-vis one another.³⁸ Steinhoff also believes that, once Falling Man falls toward the Fallen-Upon Man, two relations exist: (1) Fallen-Upon Man has a liberty-right to “vaporize” Falling Man in order to protect himself, and (2) Falling Man, in turn, has a liberty-right to prevent Fallen-Upon Man from vaporizing him by vaporizing him beforehand.³⁹ I take no position on whether Steinhoff is right about 1 and 2, though I am inclined to believe he is. I want to focus on how Steinhoff conceptualizes what he believes to be Fallen-Upon Man's justification for vaporizing Falling Man whose threatening fall toward him is not the

31. See, e.g., Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 221 (1931).

32. *Id.* at 221, 239 n.95.

33. *Id.* at 228–31.

34. See *id.* at 231 n.54.

35. *Id.* at 232 (quoting *Crenshaw & Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828)).

36. Cormack, *supra* note 31; U.S. CONST. amend. V.

37. Steinhoff, *supra* note 7, at 160.

38. *Id.* at 163.

39. *Id.* at 164.

product of agency on Falling Man's part.⁴⁰ Steinhoff says that because Falling Man lacks agency, it is "too strong" to say that Falling Man threatens to violate Fallen-Upon Man's claim-right to life.⁴¹ Yet, because Steinhoff wishes to justify Fallen-Upon Man's permission to vaporize Falling Man, Steinhoff concludes that Falling Man must have a "duty" not to crush Fallen-Upon Man:

Even though it seems too strong to say that the falling man is *violating* the right of the other person (perhaps precisely because we associate violations with agency), he is nevertheless posing an unjust threat. People . . . have a duty towards others not to pose unjust threats to them [T]he falling man is not discharging his duties towards the man standing below⁴²

For Hohfeld, a statement like Steinhoff's is a contradiction in terms. For Hohfeld, it is *conceptually impossible* for A to fail to fulfill a duty to B unless A also violates B's claim-right because claim-rights and duties are "correlatives."⁴³ To say Falling Man has a duty not to crush Fallen-Upon Man *means* that Fallen-Upon Man has a claim-right that Falling Man not crush him.

The more interesting question is why Steinhoff balks at stating that Falling Man threatens to *violate* Fallen-Upon Man's right to life. Steinhoff does so, I believe, because he assumes Hohfeld's conceptions—and, specifically, Hohfeld's conception of claim-rights—constrain the normative relations that Steinhoff believes ought to obtain among persons: Steinhoff assumes Hohfeld's claim-rights are not capacious enough to obtain vis-à-vis *non-agents*. But if Steinhoff is correct that Falling Man wrongs Fallen-Upon Man by crushing him, Steinhoff is mistaken in thinking that Hohfeld would deny Fallen-Upon Man a claim-right against Falling Man. Within Hohfeld's framework, to say that a person, A, violates a duty toward B—or that A wrongs B⁴⁴—means that B has a claim-right that A has violated.

40. *Id.*

41. *Id.*

42. *Id.* (footnote omitted).

43. See HOHFELD, *supra* note 1, at 30, 32–33.

44. See HOHFELD, *supra* note 1, at 32. For Hohfeld, to *wrong* a person is to do or omit to do what one has a duty *not* to do or omit to do. See *id.* at 26.

III. HOHFELD'S CONCEPTIONS ADDRESS AFTER-THE-FACT LEGAL RELATIONS THAT OBTAIN BY VIRTUE OF ANTECEDENT MENTAL AND PHYSICAL EVENTS

Hohfeld emphasizes that his framework applies to legal relations that otherwise arise from antecedent mental and physical events, *not* to the antecedent mental and physical events themselves:

At the very outset it seems necessary to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being.

. . . .

Passing to the field of contracts, we soon discover a similar inveterate tendency to confuse and blur legal discussions by failing to discriminate between the mental and physical facts involved in the so-called "agreement" of the parties, and the legal "contractual obligation" to which those facts give rise. . . . [One must distinguish] between the agreement of the parties on the one hand, and, on the other, the legal obligation (or aggregate of present and potential legal rights, privileges, powers and immunities, etc.)⁴⁵

Steinhoff overlooks this point in the course of discussing whether Hohfeld implicitly takes a position on whether justification is *subjective* rather than *objective* in nature. Steinhoff himself is a mixed subjectivist/objectivist: Steinhoff believes that an actor is not morally justified in harming another unless the actor is subjectively aware of justifying conditions that in fact obtain.⁴⁶ However, Steinhoff fears Hohfeld might preclude a jurisdiction from embracing a subjective element because Steinhoff believes most Hohfeldian rights and duties to be wholly *objective* in nature:

In this section I argue that the self-defense justification contains a subjective, mental element. One cannot justifiably engage in self-defense without being in a certain mental state. Given that some authors argue that *all* morality is purely objectivist and does not require of agents certain states of mind, I tried to show that these objectivist authors are mistaken. Yes, whether Hohfeldian rights are violated or Hohfeldian duties are discharged is an *objective* matter (for most rights or duties)⁴⁷

Steinhoff's fears are misplaced. We have already seen that Hohfeld does not constrain such jural relations as jurisdictions may wish to establish. And this is why: Hohfeld, in his own words, is not concerned with the

45. *Id.* at 27, 31.

46. Steinhoff, *supra* note 7, at 159.

47. *Id.* (second emphasis added).

“physical and mental” events that “give rise” to legal relations.⁴⁸ He is only concerned with conceptualizing those relations once they obtain.⁴⁹ Thus, Hohfeld is not occupied with whether jurisdictions define justification solely in terms of objective physical events or whether they also define justification subjectively; he cares only about conceptualizing existing relations of justification given such antecedent events as jurisdictions take to be normatively determinative.⁵⁰

IV. GENERIC ENTITLEMENTS, FOR EXAMPLE, *RIGHTS*, SHOULD BE REPLACED WITH MORE PERSPICUOUS CONCEPTIONS

Hohfeld famously urged that generic entitlements such as “rights” and “property,” be replaced with more perspicuous concepts, namely, claim-rights, liberties, powers, and immunities, and their correlatives, that is, duties, no rights, liabilities, and disabilities.⁵¹ And, of course, Steinhoff knows that. Nonetheless, Steinhoff overlooks the point by invoking the term *property right* in a way that gets him into trouble. Consider, for example, the following statement by Steinhoff:

A painting of Van Gogh does not lose its value only because its owner waives his property right over it, and the fact that it is unowned therefore does not provide someone else with a justification for destroying it. If someone does try to destroy it for the mere fun of it, the former owner seems to be justified in defending the painting within the limits of necessity and proportionality.⁵²

The accuracy of Steinhoff’s statement depends upon what the owner’s property right consists of. Typically, a *property right* is what Hohfeld calls an “aggregate” of entitlements, consisting of multiple claim-rights, liberties, powers, and immunities vis-à-vis multiple parties, including the public at large, subject to a variety of duties, no-rights, liabilities and disabilities.⁵³ An owner who possesses the requisite Hohfeldian powers may waive some of those interests without waiving others.⁵⁴ Let us assume that (1) the owner has claim-rights vis-à-vis members of the public at large that they not (a) seize his painting, (b) exploit its economic value for their personal gain, and (c) destroy the painting; (2) the owner has a further liberty-right to prevent others from destroying his painting; and (3) the state also possesses

48. HOHFELD, *supra* note 1, at 27, 31.

49. *Id.* at 32, 63.

50. *See id.*

51. *See id.* at 35–36. For a commentator who, despite citing Hohfeld, uses “rights” to refer interchangeably to privileges and claim-rights, see Judith Jarvis Thomson, *Self Defense*, 20 PHIL. & PUB. AFF. 283, 300–03 (1991).

52. Steinhoff, *supra* note 7, at 26 (emphasis added) (footnote omitted).

53. HOHFELD, *supra* note 1, at 28.

54. *See id.* at 38–39, 53.

a claim-right against all persons, including the owner, that the painting not be destroyed—that is, a claim-right in the state analogous to an author’s *droit d’auteur*. Let us further assume that the owner has powers to waive all his claim-rights and liberty-rights and that he selectively exercises his powers to waive claim-rights 1(a), 1(b), and 1(c), but not liberty-right 2. In that event, Steinhoff’s statement is accurate: the owner’s waiver of his property rights in the form of his claim-rights does not negate either his liberty-right 2 or the state’s claim-right 3. His waiver does not negate his liberty-right to prevent others from destroying the painting and does not negate the state’s claim-right that no one, including the owner, destroy the painting.

Now assume, in contrast, that (1) the state does *not* have a claim-right against all persons that the painting not be destroyed, and (2) the owner waives *all* his property rights, including both his claim-rights and his liberty-right to defend the painting. In that event, Steinhoff’s statement regarding the owner’s property rights is false: by virtue of the waiver, the owner ceases to have a liberty-right to defend the painting against destruction and, ceasing to have it, has its Hohfeldian opposite, namely, a duty to refrain from preventing others from destroying the painting.⁵⁵

V. HOHFELD’S PROPOSED CONCEPTIONS ARE *COMPREHENSIVE*

Hohfeld asserts that his conceptual framework is comprehensive, that is, capable of encompassing any and all jural relations among persons, regardless of their normative content.⁵⁶ In contrast, Steinhoff claims that Hohfeld fails to account for certain relations that are essential to just norms of self-defense.⁵⁷

Consider, for example, what Steinhoff says about a person who—in addition to having a liberty-right to defend himself against persons who culpably attack him—also has a claim-right to defend himself against them, that is, a claim-right that they not interfere with his self-defense.⁵⁸ Steinhoff says, “Hohfeld himself does not really consider a claim-right of this form” because it consists of a duty on the attacker’s part to *refrain* from conduct

55. Compare Steinhoff, *supra* note 7, at 25, with HOHFELD, *supra* note 1, at 26.

56. See HOHFELD, *supra* note 1, at 27, 63–64.

57. See Steinhoff, *supra* note 7, at 31.

58. *Id.* at 22, 24.

rather than a duty to *engage* in conduct.⁵⁹ Steinhoff is mistaken. Hohfeld explicitly states that Hohfeldian *duties*—which are correlative of claim-rights—can be either “affirmative” in nature or “negative.”⁶⁰

Furthermore, consider Steinhoff’s claims that (i) Hohfeld’s conceptions of claim-rights and liberties cannot accommodate the particularly strong interest a person has in defending himself against attack, and (ii) Hohfeld’s conceptions must be supplanted by an *additional* conception, namely, that of “*Act-Specific Agent-Relative Prerogative*”⁶¹:

Conceiving of self-defense as both a claim-right and a liberty-right is necessary to explain certain important features of self-defense. However, neither a claim-right nor a liberty right nor a combination of them can . . . account for the particular strength and weight of the self-defense justification. To wit, the fact that a defender may defend himself and others even if this prevents many others from being saved calls for an explanation, and the only viable explanation seems to be one in terms of an act-specific, agent-relative prerogative.⁶²

Samuel Scheffler has postulated what could be called a *general* personal prerogative. . . . However, there might be prerogatives tied to specific *kinds* of acts, so that a person engaging in *those* acts might be permitted to give even greater weight to “projects” in the form of such acts than to most of her other projects, and she might hence be permitted to impose *even more* costs on others than the general personal prerogative would allow.

. . . .

Thus, if there can be act-specific rights . . . there can also be act-specific prerogatives It seems to me that self-defense is just such a kind of act.

. . . .

It is this distinction between acts that come with a prerogative and acts that do not that explains the normative difference between acts of killing or harming in self-defense and acts of non-defensively killing This difference cannot be satisfactorily explained by a liberty or a claim-right to self-defense.⁶³

With due respect, Steinhoff confuses the nature and strength of the normative interests that jurisdictions consider *prior* to establishing jural relations with Hohfeld’s framework for conceptualizing those relations *after* jurisdictions establish them. Jurisdictions may, of course, take act-specific and agent-relative considerations into account in establishing jural relations. Any interests in self-defense that a jurisdiction chooses to establish as

59. *Id.* at 22 n.50. True, Hohfeld does not propose a single conception to encompass the combination of a person’s liberty-right to defend himself and a claim-right to prevent others from interfering with his self-defense. See Luis Duarte d’Almeida, *Fundamental Legal Concepts: The Hohfeldian Framework*, 11 PHIL. COMPASS 554, 556 (2016). But Hohfeld does not need one; the combination of liberty-right and claim-right suffice entirely.

60. HOHFELD, *supra* note 1, at 73–74 (emphasis omitted).

61. Steinhoff, *supra* note 7, at 29.

62. *Id.* at 31–32.

63. *Id.* at 31–32.

controlling, including agent-relative interests, can be captured by combining a liberty-right with a claim-right: A's liberty-right vis-à-vis all persons—including the state—to defend himself means that no one can rightly claim he is *wrong* to defend himself; and A's a claim-right vis-à-vis all persons—including the state—to defend himself means that no one may *interfere* with his liberty-right to defend himself. Together, they are everything that A needs to defend himself.

VI. THE CORRELATIVE OF A LIBERTY IS A NO-RIGHT; THE OPPOSITE OF A LIBERTY IS A DUTY

Claim-rights and liberties are the most popular of Hohfeld's conceptions, at least among moral theorists.⁶⁴ But, they are also the conceptions that are most often misunderstood.⁶⁵

Steinhoff's discussion of claim-rights and liberties is generally accurate. Yet he stumbles from time to time. Consider, for example, Steinhoff's discussion of why the concept of "forfeiture"—and, specifically, forfeiture by a culpable aggressor A of his claim-right to life—cannot fully account for what most people believe A's potential victim B should be allowed to do to defend himself.⁶⁶ Steinhoff says two things about A's relation to B that are correct: (1) by virtue of his culpable aggression, A no longer possesses a Hohfeldian claim-right to life vis-à-vis B, leaving B with a liberty-right to harm A in self-defense; and (2) B's Hohfeldian liberty-right to defend himself, is nevertheless logically consistent with something

64. See generally, e.g., Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501 (1924).

65. For example, Herbert Hart assumes claim-rights must necessarily subsume liberties. See H. L. A. Hart, *Bentham on Legal Rights*, reprinted in OXFORD ESSAYS IN JURISPRUDENCE 173–74 (A. W. B. Simpson ed., Oxford University Press 1973). Yet an actor A's well-known *right to do wrong* consists precisely in his possessing claim-right to not being interfered with in doing X without possessing an accompanying privilege *to do X*. See Mathew H. Kramer, *Rights Without Trimmings*, in A DEBATE OVER RIGHTS 13 (1998). Judith Thomson argues that Hohfeld's equating of *liberties* with *privileges* is "surely wrong." JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 53 (1990). Yet it should be plain that (i) Hohfeld *defines* "liberty" as a synonym of "privilege," and (ii) what Thomson calls a "liberty" is merely a combination of a Hohfeldian privilege and a claim-right. HOHFELD, *supra* note 1, at 42 (emphasis omitted). Larry Alexander writes that if A has a right vis-à-vis B not to be killed, A must also have a liberty to prevent B from killing him. Larry Alexander, *Self-Defense, Justification and Excuse*, 22 PHIL. & PUB. AFF. 53, 55 (1993). Yet Alexander's position is belied by the fact that citizens have a right not to be wrongly arrested by the police and, yet, they lack a privilege to use force against the police to prevent such wrongful arrests.

66. Steinhoff, *supra* note 7, at 22.

that most people believe to be contrary to B's just entitlements to defend himself, namely, a liberty-right in others, including A, to thwart B's use of self-defensive force by interfering with it.⁶⁷

Unfortunately, in trying to clinch his rightful critique of forfeiture as being sufficient to encompass just entitlements to self defense, Steinhoff invokes a flawed argument by Sanford Kadish. Steinhoff writes:

The defender's Hohfeldian liberty to defensively kill an aggressor, after all, is by definition perfectly compatible with the liberty of others to keep him from killing the aggressor in self-defense. Thus, as Sanford Kadish already pointed out a long while ago, appeal to rights-forfeiture cannot explain why the state would *wrong* us (as we certainly intuitively and quite rightly think it would) if it prohibited us from defending ourselves.⁶⁸

Steinhoff repeats a mistake that Kadish and others make about the nature of liberties—and, in this case, about B's liberty-right to defend himself.⁶⁹ A liberty is a permission to do something, for example, defend oneself, without violating a contrary legal obligation by doing so.⁷⁰ The *opposite* of a Hohfeldian liberty is a duty.⁷¹ Thus, the opposite of B's liberty to defend himself would be B's duty *not* to defend himself. B would have precisely such a negative duty—and, hence, B would lack a liberty of self-defense—if, as Kadish says, the state prohibited him from defending himself.⁷² In short, Kadish and Steinhoff cannot criticize a Hohfeldian liberty as a ground for B's self-defense by reflecting upon how one would feel if the state prohibited B from defending himself because, if the state prohibited B from defending himself, B would *lack* rather than *possess* such a liberty.

Why, then, do Kadish and Steinhoff think otherwise? Why do they think B's liberty to defend himself against A is compatible with the state's prohibiting him from defending himself against A? The answer, I believe, is that they overlook different normative roles that the state has toward B, depending upon whether B's liberty-right is directed toward *other individuals* or whether it is directed toward *the state itself*. When B's liberty of self-defense against A is directed toward other individuals—say, toward A himself

67. *Id.* Steinhoff is correct that A's forfeiture of his claim-right that B not attack him—and, hence, B's possession of a liberty-right to attack A—is insufficient to account for what most people regard as B's just entitlements to defend himself against A. The latter entitlements entail that B have not only a liberty-right to attack A but also a claim-right that A and others not resist him. *See supra* Part V.

68. Steinhoff, *supra* note 7, at 24 (footnotes omitted).

69. *See, e.g.,* Kimberly Ferzan, *Self Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 470–71 (2008).

70. I assume that by “liberty-right,” Steinhoff and Kadish mean a *multital* liberty-right rather than one directed solely against A alone. *See infra* Part VII.

71. *See* HOHFELD, *supra* note 1, at 38–39.

72. Steinhoff, *supra* note 7, at 24 (footnote omitted).

and toward C and D—the state’s only role is to enforce what A, C, D, and B may and may not do vis-à-vis one another as a result. Thus, as Kadish and Steinhoff recognize, when B’s liberty of self-defense against A is directed toward individuals such as A, C, and D—and when B *lacks* a claim-right against A, C, and D that they not to interfere—B’s liberty-right may coexist with A, C, and D possessing liberties to interfere with and thwart B’s self-defense against A.⁷³ If so, the state’s sole role is to ensure (i) B may defend against himself A without being deemed to have wronged A, C, and D, and (ii) A, C, and D, in turn, may interfere with B’s self-defense without being deemed to have wronged B.

In contrast, when B’s liberty of self-defense against A is directed toward the state, the state’s role is different: the state must not only enforce the norm that B may defend himself against A without being deemed to have wronged the state, it must also *restrain itself and its officers* from interfering with B’s liberty. It must do so because, if the state, which is a norm-creator and norm-enforcer, directs its officers to interfere with B’s self-defense, it is necessarily representing that B’s self-defense is something that he is *not* at liberty to do—something that it is *wrong* for him to do. To be sure, a police officer who is off-duty, out of uniform, and not representing himself as a state official may be able to act in a private capacity and interfere with B. However, a state official who acts on behalf of the state does not act as a private individual. The difference is significant because, in contrast to an individual who, in interfering with B, implicitly declares, “You *cannot* do this,” a state official who interferes with B implicitly declares, “You *may not* do this.” Yet for the state to declare that B may not defend himself is to for the state to declare that B, does *not* have a liberty-right to defend himself.

Steinhoff makes a further error about liberties in this case regarding *consent*. Consent is a Hohfeldian power.⁷⁴ A person, A, exercises a power of consent in criminal law by performing an act or possessing a state of mind that changes her jural relation to B, foregoing a claim-right against B and leaving B with a liberty-right vis-à-vis A.⁷⁵ Thus, A’s consent to sex is a power by which A foregoes a claim-right that B not have sexual

73. *Id.*

74. DERYCK BEYLEVELD & ROGER BROWNSWORD, CONSENT IN THE LAW 64–74 (2007).

75. Thomson appears to mistakenly assume that a person can exercise a power only by engaging in an *act*. See THOMSON, *supra* note 65, at 57. In reality, Hohfeld places no constraint on whether a power—such as the power to consent—is exercised by an act or a mental state. See generally HOHFELD, *supra* note 1.

contact with her, replacing it with a liberty-right in B to have sexual contact with A without wronging her.⁷⁶

Steinhoff argues that A's consent to B's doing something that B otherwise has a duty to refrain from doing does *not* mean that B may do it:

Consider also that waiving a right to life is not the same as consenting to be killed. . . . [S]uppose Norbert needed Catherine's kidney to survive, and in order to get it signed a contract in which he explicitly waives his moral right not to be killed under the circumstances described above [that is, future circumstances in which it may become necessary for Catherine to kill Norbert in order to save her own life and in which killing Norbert would be proportionate]. Yet, when the time comes, he says: "Don't kill me, don't kill me"—that is, he does *not* consent (which does not undermine his previous signing of the contract and thus his rights waiver). Is it really so clear that Catherine may kill him?⁷⁷

With due respect, Steinhoff confuses the *validity* of Norbert's putative power to consent to be killed—and, hence, the validity of Catherine's liberty-right to kill him—with the *logical relationship* between powers of consent and liberty-rights. Norbert's written consent to Catherine's killing him may in reality be invalid because the jurisdiction at issue may take the position that (1) individuals lack the power to consent to being killed, or (2) the power of individuals to consent to being killed does not include the power to give *prospective* consent that overrides their *contemporaneous objections* to being killed.⁷⁸ *If*, however, the state and others lack claim-rights that individuals not acquiesce in their own homicides, and *if* consent to be killed includes the right to give prospective consent in the face of contemporaneous objection, then, contrary to what Steinhoff implies, it *is* clear that Catherine has a liberty-right to kill Norbert because valid consent by A to B's doing X *means* that B may do X.

VII. HOHFELD'S ENTITLEMENTS ARE *DIRECTED*, SPECIFYING PRECISELY WHOM THEY ARE AMONG

Hohfeld emphasizes that the entitlements he conceptualizes consist of *directed* relations—that is, they consist of entitlements among specified persons.⁷⁹ This is not to say that Hohfeld's entitlements obtain only between

76. Needless to say, B's liberty to have sex with A without wronging her is consistent with A's possessing a liberty to thwart B's efforts.

77. Steinhoff, *supra* note 7, at 28.

78. Generally, jurisdictions do not accord persons powers to give prospective consent to X sufficient to override their subsequent and contemporaneous objections to X. See PETER WESTEN, *THE LOGIC OF CONSENT* 248–67 (2004).

79. See HOHFELD, *supra* note 1, at 60–61, 92–93. The term “directed” comes from Michael Thompson, *What is it to Wrong Someone? A Puzzle About Justice, Reason and Value*, in *REASON AND VALUE* 333, 344 (R. Jay Wallace, Phillip Pettit, Samuel Scheffler & Michael

binary individuals. On the contrary, they can also be what Hohfeld calls “*multital*” in nature—that is, they can obtain between an individual, on the one hand, and all persons on the other, or between all persons and all persons.⁸⁰ Regardless, however, an entitlement remains unconceptualized for Hohfeld unless it specifies the person or persons *toward whom* it is directed.⁸¹

Steinhoff appears to overlook this feature of Hohfeld in denying that Hohfeldian liberties suffice to permit a defender to use force against an attacker. Thus, Steinhoff makes the following statement:

[W]hile the rights-forfeiture and liberty-right approach to self-defense indeed explains certain normative features of self-defense, it nevertheless cannot explain the *permissibility* of self-defense: a person’s mere *lack* of a right not to be harmed provides by itself no . . . *permission* to harm her.

. . . .

. . . [A] Hohfeldian liberty to kill is and remains a mere liberty to kill. It cannot be magically transformed into a justification to kill, and nothing is able to change this, least of all a background presumption *against* killing: if we are to assume that we *are not permitted to kill*, then we should certainly not suddenly feel permitted to kill only because we have a *mere liberty* to do so.⁸²

There are two ways to account for this statement, one of which, as discussed below, is that Steinhoff mistakenly conflates law with morals.⁸³ The other, however, is that Steinhoff fails to specify the persons to whom the defender’s liberty applies and thereby conflates an *undirected* liberty with a supposed problem regarding liberties themselves.

Steinhoff starts by stating that the defender has a “liberty-right” to use force against his attacker.⁸⁴ Yet Steinhoff fails to specify the person toward

Smith eds., 2004) and Simon Cábula May, *Directed Duties*, 10 PHIL. COMPASS 523, 523 (2015).

80. See HOHFELD, *supra* note 1, at 73.

81. Simon May argues “non-directed” moral duties can exist—that is, duties that are possessed but not owed to any person or group of persons who are wronged by their violation, for example, a duty that a person possesses not to destroy a Chagall masterpiece in his possession. See May, *supra* note 79. I am skeptical that destroying a Chagall wrongs no one, past, present, or future. But, if destroying the painting wrongs no one, then either the person has no moral duty to refrain from destroying it or he has a moral duty to the thing of beauty itself. If the possessor does, indeed, have a moral duty toward the painting, for Hohfeld, the painting also has a moral claim on its possessor, because, for Hohfeld, *claims* and *duties* are alternative ways of referring to the same thing. See HOHFELD, *supra* note 1, at 73.

82. Steinhoff, *supra* note 7, at 22–23.

83. See *infra* Part VIII.

84. Steinhoff, *supra* note 7, at 21–22.

whom the liberty-right is directed.⁸⁵ If the defender's liberty-right is a "multital" liberty toward the world at large, including the state, then the defender *does* have "permission" to harm his attacker because that is what a "multital" liberty *is* in Hohfeld's taxonomy: it is a "permission" of a person that is binding on everyone else.⁸⁶

Alternatively, the defender's *liberty-right* may be directed *solely* toward his attacker and, hence, may consist solely of the fact that the attacker himself has no *personal* right to complain if the defender resorts to self defense.⁸⁷ If so, the defender's liberty-right to defend himself may simultaneously coexist with a claim-right on the state's part that the defender *not* harm his attacker.⁸⁸ In that event, far from having a liberty-right vis-à-vis the state to harm his attacker, the defender has a Hohfeldian duty *not* to.⁸⁹ That does not mean liberties are incapable of bestowing permission.⁹⁰ After all, a legal liberty *is* a legal permission, just as a moral liberty *is* a moral permission. Rather, it means, that one cannot fault Hohfeld's liberties for failing to function as permissions when one fails to specify the persons toward whom the liberties are directed.

85. See generally *id.* at 21–32.

86. HOHFELD, *supra* note 1, at 72 ("A multital right, or claim . . . is always *one* of a large *class* of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person . . . but availing *respectively* against persons constituting a very large and indefinite class of people.") (footnote omitted); *id.* at 50 ("A license is merely a *permission* to do an act which, *without such permission*, would amount to a trespass . . .") (quoting *Clifford v. O'Neill*, 42 N.Y.S. 607, 609 (1896)).

87. *Id.* at 73.

88. See *id.*

89. See *id.*

90. Jeremy Waldron argues that, although Hohfeld's conceptions readily apply to *legal* relations, they do not so readily apply to *moral* relations. See JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991* 67–68 (1993). Specifically, he argues that, although *claim-rights* and *duties* are correlative in law, they are not correlative in morals. See *id.* In law, he says, to have a liberty to do X means that (1) one does *not* violate another's claim-rights by doing X, and (2) one has *no* duty to refrain from doing X—propositions one and two being alternative ways of saying the same thing. See *id.* In contrast, Waldron says, although having a moral liberty to do X does, indeed, mean number one, it does not necessarily mean number two. See *id.* One can have a moral liberty to do X, he says—that is, a moral ability to do X without violating anyone's claim-rights—and, yet, have a moral duty not to do X—where, for example, doing X does not violate anyone's *rights*, and, yet, because doing X is "vicious," doing X is "wrong." *Id.* Ultimately, this is a disagreement over terminology in which only one party to the disagreement, Hohfeld, defines his terms. Hohfeld defines an actor's *duty* and another's *claim-right* as alternative references to the same thing, thereby making it impossible for a person to violate a duty without violating another's claim-rights. See HOHFELD, *supra* note 1, at 35–36. Waldron implicitly understands *duty* and *claim-rights* differently, but he does not clarify the difference or explain why it matters. See WALDRON, *supra* note 90.

VIII. HOHFELD ADDRESSES *LEGAL* RELATIONS NOT MORAL ONES

Hohfeld was a law professor who sought to conceptualize persons' legal relations to the state, regardless of whether such relations are morally just. However, that does not mean Hohfeld's framework cannot be applied to moral relationships.⁹¹ It means, rather, that when theorists invoke Hohfeld without specifying whether they are addressing law or morals, they risk causing confusion.

To illustrate, recall Steinhoff's previously-quoted statement to the effect a liberty-right to harm does not mean permissibility to harm.⁹² Steinhoff does not specify whether his references to *liberty* and *permissibility* are legal, moral, or a mixture of the two.⁹³ As a result, it is possible that, when Steinhoff states that a *liberty-right* does not mean *permissibility*, he may not be making a profound observation. He may instead be making what David Enoch calls the "trivial" observation that *legal* liberty-rights are not necessarily *moral* liberty-rights.⁹⁴

IX. CONCLUSION

Hohfeld has lost cachet over the past one hundred years. And that may not be a bad thing. With the possible exception of the distinction between claim-rights and liberties, Hohfeld's conceptions have tended to founder in the marketplace of ideas, at least among lawyers. To be sure, we criminal law theorists continue to invoke Hohfeld, and, when we do, our invocations function a bit like Latin maxims. Like Latin maxims, references to Hohfeld can illuminate. But like Latin maxims, references to Hohfeld can also obfuscate. It is incumbent upon all of us, including myself, to invoke Hohfeld with care and to scrutinize with skepticism how we and others invoke him.

91. For a commentator who mistakenly argues that Hohfeld cannot be adapted to morals, see Philip Montague, *War and Self-Defence: A Critique and a Proposal*, 23 *DIAMETROS* 69, 69–70 (2010). *But see* THOMSON, *supra* note 65, at 33. For a commentator who mistakenly conflates a legal liberty-right to do X with psychological or sociological liberty to do X, see generally J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 *U. MIAMI L. REV.* 1119 (1990).

92. *See supra* Part VII.

93. *See* Steinhoff, *supra* note 7, at 22.

94. David Enoch, *A Right to Violate One's Duty*, 21 *LAW & PHIL.* 355, 360 (2002).

