



# Rights Theory

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## Abstract

Both moral and legal theory feature prominent talk about rights. Yet there is very little agreement about what rights are, about why we use rights in our moral or legal theories, or about what to do when there is a conflict between rights. This article surveys many of the popular theory for analysing rights and explaining their scope.

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## *I. Hohfeld*

The traditional place to begin research on rights is with Hohfeld's *Fundamental Legal Conceptions* (2001). Hohfeld distinguished eight relations: claims, duties, liberties, no-claims, powers, liabilities, immunities and disabilities. He tried to show that his terms coincided with legal usage, but subsequent commentators have used them as stipulatively defined terms. The Hohfeldian terminology allows one to distinguish importantly different kinds of rights and so avoid needless confusions.

In typical legal systems, the owner of a truck has a *claim* against others that they not drive the truck and others have a *duty* to the owner not to drive the truck. Claims and duties, like all Hohfeldian relations, have three parts – two agents and a content. Consider the following example:

(a) Madeline has a claim with respect to Geoff that Geoff not drive Madeline's truck.

In this statement, Madeline and Geoff are the agents and “that Geoff not drive Madeline's truck” is the content. Claims and duties are correlatives. One relation is correlative to another when it is true that if both relations have the same content and the references to the two agents are exchanged, then the relations are logically equivalent. The following statement is logically equivalent to (a):

(b) Geoff has a duty with respect to Madeline that Geoff not drive Madeline's truck.

Suppose Madeline sells Geoff an unusual pass letting him drive her truck. This pass states merely that Geoff has no duty not to drive the truck. This

pass grants Geoff a *liberty*. Because of the pass, Madeline has a *no-claim* with respect to Geoff. Liberties and no-claims are correlatives. X has a liberty with respect to Y that X do A if and only if Y has a no-claim with respect to X that X do A.

Consider the phrase “You are at liberty to go to church.” As normally understood, this implies that (1) you have no duty with respect to others to go to church, (2) you have no duty with respect to others not to go to church and (3) you have claims with respect to others that they refrain from preventing you from going or not going to church. But if the phrase is understood in the Hohfeldian sense, it implies only (2). In the Hohfeldian terminology, (1) is a set of liberties distinct from (2) and (3) is a set of claims.

In typical legal systems, Madeline has the *power* to change Geoff’s duty to refrain from driving Madeline’s truck into a liberty to drive the truck. If Madeline says to Geoff, “You may drive my truck,” then Geoff no longer has a duty to refrain from driving the truck. Correlative to Madeline’s power is Geoff’s *liability*. Geoff has a liability to have his duty to refrain from driving Madeline’s truck changed into a liberty to drive the truck.

An *immunity* occurs when one cannot change some Hohfeldian relation. In typical legal systems, if Madeline and Geoff are strangers, then Madeline has an immunity to Geoff’s giving himself a liberty to drive her truck. If Geoff says, “I hereby give myself the liberty to drive Madeline’s truck,” his act has no legal effect. The correlative of an immunity is a *disability*. Another way to say that Madeline has an immunity to Geoff’s giving himself a liberty to drive her truck is to say that Geoff has a disability to give himself a liberty to drive her truck.

The Hohfeldian vocabulary allows one to distinguish claim-rights, immunity-rights, liberty-rights and power-rights (Wellman 1985). My right that Georgia State University pay me my salary is a claim-right. I have a claim to the money and Georgia State University has a duty to give it to me. My right to free speech is an immunity-right. I have a liberty to say that Richard Nixon was a poor President and an immunity to having the Governor of the California extinguish this liberty. There is nothing that the Governor of the California could do which would cause my liberty to say that Richard Nixon was a poor President to cease to exist. The right to look over one’s garden fence at the neighbor’s lawn is a liberty-right (Hart 1982). One has a liberty to look over the fence, a liberty not to look over the fence and a claim against interference with looking over the fence. Madeline has a power-right to change Geoff’s duty to refrain from driving Madeline’s truck into a liberty to drive the truck.

Hohfeldian analysis seems to be “cut off” from other normative concepts central to rights. In the Hohfeldian vocabulary, terms such as “forbidden” and “obligatory” are remarkable by their absence. What is the relationship between rights and obligations? What is the relationship between rights and what others are forbidden to do? One cannot answer

questions such as these in Hohfeldian terms. A number of scholars have attempted to provide an analysis which bridges the gap between Hohfeldian terms and more common concepts (Anderson 1971; Lindhal 1977).

## *II. Varieties of Rights*

Scholars have distinguished institutional rights from non-institutional rights. (This paragraph and the next are drawn from Feinberg 1973.) Institutional rights are created by institutions such as states, corporations, games and clubs. The law is the institution that has the most complex and subtle rights and it is with legal rights that most research on rights begins. Non-institutional rights are all those rights which exist independent of institutions. Non-institutional rights subdivide into several categories. Conventional rights are rights conferred by custom. The rules about forming a line at a ticket counter create conventional rights. The moral customs of a culture also create conventional rights. In some cultures, a man has a conventional right to have many wives. Moral rights are those rights created by moral rules and principles. Many believe that Jim Crow legislation was a violation of the moral rights of blacks. Human rights are an important kind of moral right. Many hold, for example, that imprisonment without a fair trial is a violation of human rights. Traditionally, human rights are defined as those moral rights held by all humans because they are human. Some scholars, however, define human rights so that at least some animals have them and at least some humans (e.g., those in a persistent vegetative state) do not. The term “natural rights,” while historically very important and common, is little used of late. (See, however, Finnis 1980.) The primary reason for its fall from favor seems to be that it was used in too many different ways and so ceased to be useful.

Active rights are rights to do something oneself. My right to drive my truck is an active right. Passive rights are rights that another person do or not do something. Passive rights are subdivided into positive and negative rights. A positive right is a right that another person do something. A negative right is a right that another person not do something. I have a positive right that Georgia State University give me my pay. My right that you not hit me is a negative right. The classification of complex rights is often a matter of dispute. Libertarians think that the right to life is a purely negative right. Others think that it is at least partly a positive right. Still others think that it includes some active component (such as the right to travel or work). There is also a debate over whether active rights can be analyzed as sets of passive rights.

## *III. What is a Right?*

The debate of over this question is framed by interest theories and choice theories. The interest theory was first proposed by Bentham (1987) and

has been defended by scholars such as Lyons (1994), MacCormick (1982) and Raz (1986). Defenders of interest theories argue that a person has a right when others have duties which protect one of that person's interests. One strength of interest theories is that they can account for the relational aspect of rights. There is an important difference between failing to respect someone's rights and failing to fulfill an obligation which is not part of a right. Consider the difference between failing to pay a debt and failing to give to charity. In failing to pay the debt, one wrongs the debt-holder. In failing to give to charity one does something wrong, but one does not wrong anyone. Rights are relational in the sense that the obligations implied by rights are owed *to* someone. According to interest theories, the obligation implied by a right is an obligation *to* the right-holder because it is the right-holder's interest which is protected by the right.

Perhaps the central objection to interest theories is that there seem to be rights which are not in the interest of the right-holder. One might inherit some property which is literally more trouble than it is worth. Suppose that the property in question is bound up in complex legal proceedings which prevent its sale but require a great deal of time and attention. The rights of public officials also pose a difficulty for interest theorists. A judge's right to impose sentence seems to be justified by the public's interest in a well-functioning criminal justice system, not by a judge's personal interests. In a particular case, it might well be in a judge's interest not to impose sentence. (The judge might be the target of an angry mob of the accused's defenders.)

The choice theory was first proposed by Hart (1982 and 1983) and has been defended by scholars such as Montague (1980) and Steiner (1994). Defenders of choice theories argue that a person has a right when others have duties which protect one of that person's choices. Choice theories have no problem accounting for the relational nature of rights. According to choice theories, the obligation implied by a right is an obligation *to* the right-holder because it is the right-holder's choice which is protected by the right.

A central problem for choice theories is that there seem to be rights which do not protect the right-holder's choices. Suppose that a police officer is ordered by a judge to arrest an individual. The police officer clearly has a right to arrest the individual. But she has no choice because she has a duty to perform the arrest. The rights of beings which cannot choose (e.g., animals and human newborns) pose another problem for choice theories. If rights necessarily protect an individual's choices then individuals who cannot choose cannot have rights.

Several scholars, including this author (1993), have offered alternatives to the choice and interest theories. Feinberg (1980) has offered one very influential alternative. He holds that we must distinguish *making claim to*, *claiming that* and *having a claim*. Making claim to is an activity we perform

when we “petition or seek by virtue of some right, to demand as due” (Feinberg 1980, pp. 149–150). For example, I can make claim to the towel I left at the pool this morning. Making claim to something is performative in the sense that making claim to something causes normative things to happen. It creates a duty for someone to give the claimant the thing to which claim is made. To claim that something is the case is merely to assert that it is true. I can claim that the Earth is flat. One can claim that anything is true. In particular, one can claim that one has certain rights. This can easily lead people to confuse making claim to with claiming that. One has a claim when one is in a position to make a claim to or to claim that. Many individuals might have a claim to something, might have a case meriting consideration. According to Feinberg, the only person who has a right to it is the person who has the best or strongest case. To have a right is to have a claim recognized as valid by a set of rules or moral principles.

It is not clear that Feinberg’s view can account for immunity-rights. His account is completely focused on claims and duties. Moreover, it is not clear that Feinberg has a theory of the relational nature of rights. His discussion of making claim to, claiming that and having a claim does not provide any account of why the obligations implied by rights are *to* the right-holder.

Wellman (1985) holds that a right is a set of Hohfeldian relations which provides the right-holder with an advantage to which a right-holder can appeal in a confrontation with another party. On Wellman’s view, a right is an advantage in that it favors the right holder’s will over the will of the other party. Wellman does not assert that a relation is advantageous when it protects an interest of the right-holder or that a relation is advantageous when it protects a choice of the right-holder. In this manner he avoids problems with rights such as a judge’s right to sentence and a police officer’s right to arrest. Wellman conceives of the conferring of an advantage as something that necessarily involves a third-party. So every right has three parties: the right holder, the person against whom the right holds and a third-party to whom the right holder can appeal to intervene if there is a conflict of wills. Wellman’s theory can account for the relational nature of rights by asserting that an obligation implied by a right is *to* the person whose will is advantaged.

Some disagree with Wellman’s claim that there are three parties to every right. Consider Myriah and Robinson Crusoe on their island. Suppose that a disease has killed everyone else in the universe. On Wellman’s view, it is not possible for Myriah to have a right that Robinson not beat her. On an interest theory, Myriah can still have this right because it remains in her interest not to be beaten. Wellman’s theory has the counter-intuitive implication that those who violate the criminal law do not violate the legal rights of their victims. His view has this implication because it is the state which has the power to file a charge of rape. If a woman is raped and the prosecutor refuses to file charges against the rapist, the

woman cannot step in and file criminal charges herself. Her will is not advantaged. A final problem with Wellman's view is that it implies that humans who do not have a will (e.g., newborns and those with extremely severe mental problems) cannot have rights. Wellman is aware of this implication of his view, accepts it and argues that this problem is not as serious as it may seem.

Dworkin holds that "rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole" (1984, p. 153). His important work raises some interpretational issues. For example, it is not clear whether Dworkin intends to offer a general theory of rights or only a theory of political rights. However, it seems that he holds that a right is a state of affairs whose specification calls for some particular opportunity, resource or liberty for some particular individual(s). If Issac has a right to health care then someone has a duty to bring about the state of affairs in which some particular individual (i.e., Issac) has some particular resource (e.g., medications). Dworkin contrasts a right with a goal. A goal is a state of affairs whose specification *does not* call for some particular opportunity, resource or liberty for some particular individual(s). Increasing the gross domestic product is a goal because realizing the state of affairs in which the gross domestic product increases does not call for any particular individual to get anything. Furthermore, on Dworkin's view, it is a necessary feature of rights that they are more important than, they trump, goals.

Dworkin seems to overlook cases in which one person has a right that another person do something which has nothing to do with the first person's opportunities, resources or liberties. Suppose that you promise me that you will care for my aged mother. It would seem that I have a right that you care for my mother but that this right has nothing to do with my opportunities, resources or liberties. It does not seem to make sense to hold that a right is a state of affairs. One might have a right that a state of affairs obtain but it seems to be a category mistake to hold that a right *is* a state of affairs. It also seems that the metaphor of trumps is misleading. In a card game if one suit is trump, then any card of that suit takes the trick when played against any card of any other suit. If spades are trump, then the two of spades takes the trick even when played against the king of hearts. Dworkin's trump metaphor leads one to think that he holds that even the least important right outweighs the most important goal. It naturally leads one to think that the only thing which can be more important than a right is another right. Suppose that I have a right that you give me a five-cent bag of popcorn. Through some bizarre set of circumstances, if you bring me the bag of popcorn, the economic efficiency of the world will be dramatically reduced for generations to come. My right to the bag of popcorn is not as important as the loss of economic efficiency. So rights are not trumps. Dworkin recognizes this problem with his theory but some find that his response is not satisfactory.

#### IV. Issues in Rights Theory

Bentham (1987, p. 53) held that the notion of moral rights was “nonsense upon stilts” because rights require social recognition and moral rights have none. The issue of whether rights require social recognition can be illustrated with an example from Martin (1993). Martin holds that, because there was no social recognition of their rights, the victims of Aztec human sacrifice rituals did not have a right not to be killed. While it was wrong for the priests to kill their victims, they did not violate any rights. Others hold that, while social recognition is a necessary feature of legal rights, it is not a necessary feature of moral rights. These scholars hold that the victims of Aztec human sacrifice rituals had moral rights which the priests violated.

Rights conflict has puzzled scholars. There are two kinds of rights conflict. External rights conflict occurs when rights conflict with non-rights-based moral considerations. Internal rights conflict occurs when rights conflict with each other. There are two kinds of internal rights conflict: permissible rights transgression and unavoidable rights transgression.

Suppose (to use an example from Feinberg 1980) that you are on a hike when an unexpected blizzard strikes. You happen across a boarded up cabin. You break in and, to avoid death, eat the food stored in the cabin and burn its furniture for warmth. It seems that your right to life is in conflict with the cabin owner’s property rights. It seems that it is permissible for you to transgress on the cabin owner’s property rights. You could decide to wander off into the snow to die. In that case, no rights are transgressed.

Suppose (to use an example made famous by Thomson 1986) that Edward is the driver of a trolley. The brakes on the trolley have failed. Up ahead, there is spur line onto which Edward can turn the trolley. There is a person, Samantha, standing on the main line and another person, Jennifer, standing on the spur line. If Edward does not turn the trolley Samantha will die and if he does Jennifer will die. In the absence of one of the two women, it seems clear that the other has a right that Edward not run her over. But in this case it seems physically impossible for Edward to avoid transgressing one of the women’s rights.

There are two frequently discussed responses to internal rights conflict: the *prima facie* view and the specification view. The *prima facie* view was originally developed by Ross (1987). There are two key facets of this view. The first is the claim that there are some rights which are not absolute. An *absolute* right is a right which implies an absolute obligation. An absolute obligation is an “unconditionally incumbent” obligation (Feinberg 1973, p. 80). The second is the concept of weighing. A *prima facie* right is a right which implies a *prima facie* obligation. A *prima facie* obligation is an obligation which can be outweighed by other obligations. An *actual* right is a *prima facie* right which can be but, in a particular

situation, is not outweighed by any other rights. An absolute right is a *prima facie* right which cannot be outweighed in any possible situation. When there is a conflict between *prima facie* rights, one must weigh the conflicting rights to determine which right is overridden. On the *prima facie* view, the owner of the cabin in Feinberg's example has a *prima facie* right that his chair not be burned for heat. You have a *prima facie* right to burn the chair. On the *prima facie* view, the conflict between these rights is resolved by asserting that your right outweighs the cabin owner's right. The Thomson example is particularly difficult because it is not clear whether Jennifer's or Samantha's right is of greater weight.

On the specification view, most, if not all, statements of rights implicitly contain clauses which limit the situation in which one has the right. On this view, rights contain long strings of disjunctively joined conditions after an "unless." According to this view, the cabin owner does not have a right that you not burn the chair. Rather, the owner has a more limited right (e.g., the right that you not burn the chair unless it is necessary to save your life or . . .). No rights transgression actually occurs because it merely seemed that you were transgressing on the cabin owner's rights. As before, the Thomson example is difficult because it is not clear how any limit on Samantha's rights would not also limit Jennifer's rights.

The discussion of external rights conflict has focused on the conflict between rights and utility and the issue of whether utilitarianism can provide a plausible account of rights. As far back as Mill (1979), consequentialists have been worried that their view cannot provide a plausible account of rights. Some, such as Dworkin, have held that a necessary feature of rights is that they override utility. If that is true, then utilitarianism is unable to account for rights. Many utilitarians, however, have argued that their view can provide a plausible account of rights. (Brandt 1984; Lyons 1994.)

What sorts of beings can have rights? Debate on this question can be divided into at least three subdebates. One seeks to determine which presently existing individual entities can have rights and covers such issues as the rights of fetuses and those in persistent vegetative states. A second debate seeks to understand whether presently existing groups can have rights and covers such issues as the rights of nations and corporations. A third debate seeks to understand the rights of past or future entities and covers such issues as the rights of the dead and future generations.

In general, those discussing presently existing individuals have argued that some sort of mental functioning is necessary and/or sufficient to be able to have rights. For example, Feinberg (1980) argues that having the mental states needed for purposive behavior is a necessary condition for having rights. Regan (1992) argues that the capacity to have sensations or feelings is a necessary condition for having rights. Wellman (1995) argues that the ability to make choices is a necessary condition for having rights.

What is the proper analysis of claims in which groups are said to have rights? Some, let us call them “individualists,” think that all group rights can be analyzed as complex sets of individual rights. Others, let us call them “collectivists,” think that some claims of group rights cannot be analyzed as complex sets of individual rights.

Individualism comes in two versions: eliminative and non-eliminative. An eliminative individualist thinks that there are no group rights and that all claims of group rights are false. The eliminative individualist holds that the correct analysis of group rights refers to at least one analysis which does not exist. A non-eliminative individualist thinks that there are group rights, that some claims of group rights are true and that all group rights can be analyzed as sets of individual rights. On the non-eliminative individualist’s view, group rights are similar to my legal right to free speech in that both hold that we use a short, grammatically singular, name (“General Electric’s right to \$1,000 from me,” “my right to say that Al Gore is a nerd”) to refer to what is actually a large and complex set of individual rights.

It is common for people to claim that entities which do not presently exist have rights. People frequently enter into contracts which specify that others have obligations to do things after they have died. Life insurance contracts are the most obvious example. It is common to talk of the rights of future generations to a clean environment. There is, however, an ancient and powerful argument against the view that past and future individuals can have rights (Epicurus 1993). A right cannot exist unless there is a right-holder. Past and future individuals, by definition, do not now exist and therefore they cannot now have rights. This argument is called the problem of the subject.

Some, such as Partridge (1981), hold that utilitarian considerations justify obligations concerning past and future individuals but that, because of the problem of the subject, these individuals have no rights. Feinberg argues that the interests of past and future individuals can exist even though those individuals do not. Surviving interests continue to exist after their subject dies and potential interests exist before the subject is born. These interests, according to Feinberg, are like any other interests and they can be set back. When one of these interests is wrongly set back, a right of a past or future individual is violated. Many, e.g., Lomasky (1987), have rejected Feinberg’s view.

Rights have generated many debates other than those mentioned here. The individuation of rights is a difficult and complex problem. (Hohfeld 2001; Raz 1986; Wellman 1985.) What is *a* right and where does one right end and another begin? Some, including Marxists and some feminists, have argued that rights are morally pernicious while others have upheld the traditional view that rights are essential to human flourishing. (Baier 1994; Glendon 1991; Kiss 1995.) There are many debates about the existence and contours of various specific rights. Do we have a right

to health care? What is the precise shape of the right to contract? When is the right to be free from sexual harassment violated? Does the Patriot Act violate our rights to free speech? What is the nature and justification of constitutional rights? These questions are only a few of the many questions about rights which spring up naturally in our rights-focused world. Scholars interested in these questions, as well as the others discussed in this essay, should note that Wellman's *Rights and Duties* (2002) is an excellent six-volume collection of the work on rights.

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