Hohfeld: A Reappraisal

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It is now more than sixty years since Wesley Newcomb Hohfeld died in 1918. Surely this should have been long enough for the importance of his contribution to jurisprudence and to legal practice to be established. And yet, while his analysis of jural relations forms a part of most courses in jurisprudence, his terminology is not to be found in legal argument or judicial decisions. Has his scheme, then, no more usefulness than to baffle law students, and be promptly forgotten?

Assessment of Hohfeld's ideas is bedevilled by a multitude of misinterpretations that have been placed upon them, and to evaluate his ideas it is first essential to have a clear idea of what he did, and did not, say.

Hohfeld's Scheme of Jural Relations

Hohfeld's scheme of jural relations was published in 1913 in the Yale Law Journal, in an article entitled "Some Fundamental Legal Coneptions as applied in Judicial Reasoning."[1] After an introductory discussion on the need for a more discriminating analysis of legal interests, and a discusssion of legal conceptions contrasted with non-legal conceptions and operative facts contrasted with evidential facts, he sets out the following table of fundamental legal relations:[2]

Jural Opposites	rights no-rights	privilege duty	power disability	immunity liability
Jural Correlatives	right duty	privilege no-right	power liability	immunity disability

Much of the criticism that has been directed at Hohfeld's scheme has been aimed at his choice of terms for his fundamental concepts. Hohfeld himself recognized the difficulty of using terms in common loose legal usage for his more precise concepts, and a considerable part of his article is a justification of his choice of terms. None of this criticism affects the conceptual validity of the scheme, and I will not discuss it further, except to make one change in Hohfeld's terminology. As Hohfeld suggested,[3] I will henceforth use "claim" for "right" in the narrow sense he used. This leaves "right" free to be used in its more common legal meaning, as a description of the conglomerates of Hohfeldian claims, privileges, powers and immunities that go to make up, for example, rights of property.

Claims and Duties

Of the claim-duty relation, Hohfeld says little. However he does suggest that the key to claim lies in duty as the invariable correla-

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1. Hohfeld, W.N. *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 Yale L.J. 16.
2. *Op. cit.*, p. 30.
3. *Op. cit.*, p. 32.

tive.[4] He instances the situation where A has a claim against B and B shall stay off A's land. The correlative (and equivalent) is then that B has a duty towards A to stay off the land.

The claim-duty relation corresponds to the second of the questions Corbin suggests for determining legal relations: "What *must* A (or B) do, under threat of societal penalty assessed for the benefit of the other?"[5]

Thus in the above example, B having a duty towards A to stay off the land, B *must* stay off the land.

Privileges and No-rights

Hohfeld commences by discussing privilege in terms of its opposite duty and correlative no-right. He states that a privilege is the negation of a duty.[6] In the above example, if A has a privilege of entry of the land, this is the negation of a duty to stay off. He then goes on to suggest that what is meant is always that a privilege is the negation of a duty of the opposite tenor. On this basis he says that it is possible for a privilege to co-exist with a duty of a similar tenor. In the example, if A has contracted with B that A shall enter on his own land, A's privilege to enter and his contractual duty to B to enter co-exist. I shall return to this point later.

Hohfeld then clearly distinguishes between claim and privilege in terms of their respective correlatives. The invariable correlative of a claim is a duty, but the correlative of a privilege is a no-right, or in other words the absence of a claim in another party.

He goes on to cite passages from Holland[7] and Gray[8] in which the term "right" is used indiscriminately to refer to both claims and privileges, leading to results that do not necessarily follow from the premises. In discussing Gray's shrimp salad example, Hohfeld carefully distinguishes in Gray's "right" to eat the salad his privilege to do so and secondly his claim not to be interfered with in doing so. He shows that although the privilege and the claim not to be interfered with in exercising the privilege will normally be present together, this is not necessarily so, and the claim can be abolished by contract without affecting the privilege — thought perhaps affecting the peace of the meal!

He further cites from the judgments of Lord Lindley in *Quinn* v. *Leathem*[9] and Lord Bowen in *Mogul Steamship Co.* v. *McGregor*[10] to show again that a confusion of claims and privileges means that the conclusions in the judgments do not follow logically from the arguments presented.

The privilege no-right relation corresponds with the first of Corbin's suggested questions:

"What *may* A (or B) do, without societal penalty assessed for the benefit of the other?"[11]

4. *Op. cit.*, p. 31.
5. Corbin, A.C. *Legal Analysis and Terminology* (1919) 29 Yale L.J. 163, at p. 165.
6. *Op. cit.*, p. 32.
7. Holland, T.E. *The Elements of Jurisprudence* (10th ed.) at p. 83.
8. Gray, J.C. *The Nature and Sources of the Law* secs 45, 184.
9. (1901) A.C. 495, at p. 534.
10. (1889) 23 Q.B.D. 598, at p. 611.
11. *Op. cit.*, at p. 1653.

A having a privilege to do an act, he will not be subject to any penalty at the suit of B if he exercises his privilege to act.

Dias[12] — his inflammatory bowler hat in this respect analogous to Gray's upsetting shrimp salad — provides some good examples from case-law, of the distinction between claim and privilege. Perhaps the most clear-cut of these is *Chaffers* v. *Goldsmid*.[13] In that case the plaintiff, a constituent, presented a petition to the defendant, a Member of Parliament, for transmission to Parliament. This the defendant refused to do. It was held that neither damages nor an order of *mandamus* would lie. In Hohfeldian terms, the plaintiff asserted a claim that the defendant was under a duty to him to present the petition to Parliament, but it was held that while the defendant had a privilege so to do, he was under no duty. The plaintiff consequently had a no-right, and could not compel the required course of action by the defendant.

Powers and Liabilities

Powers are the only jural phenomenon that Hohfeld makes any attempt to define in a conventional sense.[14] He starts by pointing out that a given legal relation may be changed by facts not under the volitional control of a human being, or by facts which are under the volitional control of a person or persons. He defines power by reference to the second situation, the person exercising the volitional control having a legal power to effect the particular change of legal relations.

He then goes on to enumerate examples of legal powers in his sense of the term. Inter alia, he includes powers associated with property — abandonment and power to transfer title — creation of agency, powers of appointment in relation to property interests, powers of a vendee under a conditional contract of sale, powers of the offeror and offeree in contractual negotiations, and powers with regard to options. As an example of a liability, Hohfeld suggests the position of a person engaged in a "public calling", such an innkeeper. By holding himself out as open to guests, the innkeeper is under a liability correlative to a power in travellers. By making sufficient tender, the traveller imposes on the innkeeper a duty that he shall be accommodated, with a correlative claim in the traveller.

Towards the end of his discussion on this topic, Hohfeld mentions briefly the association of powers with privileges and duties. This point requires further development and is considered by Dias.[15] A power in *vacuo* is meaningless. It must be associated with either a privilege to exercise or not to exercise it, or with a duty to exercise or a duty not to exercise it.

Where a power in A (and correlative liability in B) is associated with a privilege in its exercise, no action will lie at the suit of B whether or not A exercise the power. Thus if A, a landowner, gives B gratuitously permission to enter on the land, and after B enters, changes his mind and revokes the licence, B must accept the deci-

12. Dias, R.W.M. *Jurisprudence.*
13. [1894] 1 Q.B. 186.
14. *Op. cit.*, p. 44.
15. *Op. cit.*

sion and leave. A has the power to revoke the licence, and privilege in the exercise of the power.

Where a power is coupled with a duty to exercise it, the power must be exercised. There is no discretion. The power of a judge to give a decision in a case is of this type. Where the power is a public power, *mandamus* will lie to enforce its exercise, the power being ministerial. On the other hand, a power may be associated with a duty not to exercise it. When the power is then exercised, the exercise will be effective to alter the legal relations the subject of the power, but the person exercising it will be liable for breach of his duty not to do so. Thus a person in possession of stolen property who sells the property in the market overt will pass good title to it, though he commits a conversion by so doing.

Finally, the power-liability relation corresponds to the third of Corbin's suggested questions:

"What *can* A (or B) do, so as to change the existing legal relations of the other?"[16]

The liability of this relation can of course be either detrimental, usually, or on occasion beneficial.

Immunities and Disabilities

To Salmond's three jural relations involving claim, privilege and power,[17] Hohfeld added a fourth, the immunity-disability relation. By analogy with the comparison of claim and privilege, he defined immunity by comparison with power, as one's freedom from the legal power or "control" of another as regards some legal relation. As examples, he suggested the immunity of an owner of property from having title to the property transferred by anyone else, in the absence of a special situation such as an agency to sell, and immunities from taxation.

Following Corbin's three questions, a fourth that would correspond with an immunity-disability relation would be:

"What *cannot* A (or B) do, so as to change the existing legal relations of the other?"

Criticisms of Hohfeld's Scheme

Linguistic Criticism

Apart from the dispute about the choice of terms for his concepts already mentioned, Hohfeld has been criticized for his writing style by friend and foe alike, yet this seems largely unjustified. The criticism seems mainly based on his use of neologisms, yet in the scheme of relations only no-right is a new term, and a new term was essential for this concept as there was no accepted word to express it. Admittedly in a subsequent article of the same title in 26 Yale Law Journal,[18] in an analysis of rights *in rem* and rights *in personam*, he introduced the terms unital, paucital and multital rights. Though

16. *Op. cit.*, at p. 165.
17. Salmond, J. *On Jurisprudence* (12th ed.), at p. 42n.
18. Hohfeld, W.N. *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1916) 26 Yale L.J. 710.

these are the extent of his linguistic creativity, they seem to have stuck in lawyers' throats ever since, for all they are more comprehensible than rights *in rem* and rights *in personam.*

A more valid criticism of Hohfeld's style is not of what he did say, but of what he did not say. He considered his fundamental legal relations *sui generis*, and thought formal definition consequently unsatisfactory, if not useless. He attempted to illustrate the relations by exhibiting them as opposites and correlatives, and giving examples of their use in concrete cases, anticipating Professor Hart's approach. But if the terms are *sui generis*, relating them will not give too much information, and a limited number of examples is really insufficient to delimit their meaning.

Absolute Duties

Perhaps the major substantive criticism of the scheme has been that it does not include Austin's absolute duties, or duties without a correlative claim. The duties of the criminal law are said to be the outstanding example of this. Yet this criticism also would seem unjustified.

The problem seems to be an unwillingness to accept the State as subject to the law, because it is the source of the law. However legal relations exist not between persons as such, but between legal entities — entities recognized by the law. And the recognition is a recognition that legal rights can inhere in those entities. The law recognizes rights not just in persons, but also in corporations and par excellence in the State. To say as Corbin does "a so-called legal relation to the State or to a corporation may always be reduced to many legal relations with the individuals composing the State or the corporation"[19] seems completely erroneous.

Admittedly the State can change the law, but before the law is changed the State is subject to it, and after it is changed, the State remains subject to the changed law. Campbell[20] suggests that the State as creator of law is a separate entity from the State as subject to law. They are certainly conceptually distinct, and it is useful to consider them separately. Once this is done, the problem of absolute duties disappears.

Incompleteness

Another ground of criticism of the scheme has been that it is incomplete. One of the main arguments in this direction has been with regard to absolute duties, which have been considered.

Another is that because jural relations can be altered by events not under the control of an individual, and the scheme makes no allowance for this, it is thereby incomplete. Hohfeld was well aware of this. At the start of his discussion of powers and liabilities, he points out that a change in a given legal relation may result from, first, facts not under volitional control and, secondly, facts under the volitional control of an individual or individuals. He then defines the power-liability relation by reference to the latter situation and does

19. *Op. cit.*, at p. 165.
20. Campbell, A.H. *Some Footnotes to Salmond's Jurisprudence* (1940) 7 C.L.J. 206.

not further consider the former. While it is therefore quite true that the scheme does not incorporate this situation — which Dias[21] calls "subjection" without a correlative term, as both parties to the jural relations are presumably equally subject to the extrinsic event — the criticism seems somewhat to miss the mark. The scheme is after all one of "fundamental jural relations", not one of possible causes of change in jural relations, and subjection can not be considered a jural relation *per se.*

It has also been suggested that the concept of "power" should be further divided into "capacity" possessed by individuals generally, and "authority" expressly given to an individual or small group of individuals in specified circumstances. But in terms of their essential effect, i.e. to bring about a change in a given jural relation, these two ideas do not differ. They differ only in whether they are a power possessed by the many or only by the few, and this does not seem a useful distinction for present purposes. Similarly, "liberties", "privileges" and "licences" do not seem essentially different.[22]

With particular reference to capacities, but also to a lesser extent to authorities, duties and other jural elements, it is necessary to keep the idea of the jural relation clearly separate from the conditions which are associated with it. Thus in making a will it is necessary that the will be in writing, signed and witnessed. These conditions are not jural relations, but the requirements for effective exercise of the power, an exercise that the legal system will recognize as changing the subject jural relation.

It is possible that power might be usefully classified on whether or not the consent of the party under the correlative liability is necessary for effective exercise of the power, but this question requires further consideration not possible here.

Other minor criticisms of Hohfeld's scheme will be mentioned in the following discussion.

Conceptual Developments of Hohfeld's Scheme

The Jural Relation

Although Hohfeld talked of "jural relations", and his examples all dealt with the relations between two individuals, he did not at any point expressly state that this was essential. Indeed he appeared to consider his eight elements fundamental, and to each constitute a jural relation.

It was left to Corbin, writing soon afterwards, to point out that "the term 'legal relation' should always be used with reference to two persons, neither more nor less."[23] This is obviously correct. A claim in A can not exist without a duty in B. A duty in B — the question of absolute duties apart — must be correlative with a claim in A. But the claim and duty are more than two separate, though closely related things. They are two aspects of the one thing — the claim-

21. *Op. cit.*
22. Despite the distinction drawn by Professor Williams. See Williams, G.L. *The Concept of Legal Liberty* (1956) 56 Col. L.R. 1129.
23. *Op. cit.*, p. 165.

duty relation between A and B. A's claim is the claim-duty relation seen from A's point of view, and B's duty is the claim-duty relation seen from B's point of view. Thus Hohfeld's eight fundamenal conceptions can be halved — claim-duty relations, privilege-no-right relations, power-liability relations, and immunity-disability relations.

Radin also takes this point, but goes further, saying: "They are not even two aspects of the same thing. They are two absolutely equivalent statements of the same thing."[24] That is a semantic question, but appears by over-statement to obscure more than it clarifies.

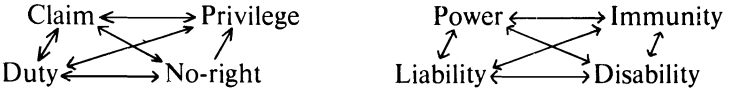
Jural Opposites

Hohfeld speaks of jural opposites in terms of negation. Thus he says, referring to entry on land, that the privilege of entering is the negation of a duty to stay off. This seems too strong a word. Pound[25] has pointed out tthat some of Hohfeld's terms represent merely the absence of others, as no-right is not a positive concept itself but is merely the absence of a claim. The point can be taken further. The privilege-no-right relation represents the absence of a duty-claim relation, and the immunity-disability relation represents the absence of a power-liability relation. Thus the fundamental conceptions can be simplified further, to the presence or absence of a claim-duty relation, and the presence or absence of a power-liability relation.

Pound has gone on from this to suggest that because of their negative nature, terms such as privilege and disability lack jural significance. This again is purely a semantic question, but if the presence of a relation has jural significance, the absence of it would seem to have equal significance. Certainly the privilege-no-right relation is anything but insignificant practically.

Duty and Power

Professor Williams reaches much this point, by expressing Hohfelds's scheme as follows:[26]



Here the vertical arrows join jural correlatives, the oblique arrows jural opposites (or contradictories), and the horizontal arrows what Professor Williams calls jural contradictories of correlatives.

The two complexes are related. Hall,[27] followed by Dias,[28] suggests that a temporal perspective is necessary to view the relationship. Taking as an example a power and the claim-duty relation created by the exercise of the power, he points out that the exercise of the power and the relation created can not co-exist. At the point of

24. Radin, M. *A Restatement of Hohfeld* (1938) 51 Harvard L.R. 1141.
25. Pound, R. *Jurisprudence* Vol. IV.
26. *Op. cit.*, at p. 1138.
27. Hall, J *Foundations of Jurisprudence.*
38. *Op. cit.*

exercise of the power, the claim-duty relation is in the future. Once the claim-duty relation is in existence, the point of exercise of the power is in the past.

This is true, but not particularly helpful. A more useful view is to appreciate that the "duty" complex deals with static jural relations, and the "power" complex with changing jural relations. Thus exercise of a power must either create a new claim-duty relation or abolish an existing one (or both), or less usually create a new power-liability relation or abolish an existing one (or both).

It has been pointed out that a power must always be associated with either a duty or a privilege with respect to its exercise. Equally a duty must be associated with either a liability or an immunity with respect to its change. But these reduce to the self-evident propositions that a power must be associated with either a duty or no duty as to its exercise, and a duty must either be subject or not subject to change.

Privilege

I differ only with diffidence from Professor Williams,[29] not to mention Hohfeld himself as previously indicated, but I would suggest that Hohfeld's scheme can be more easily understood if privilege is further conceptualized than generally appears to have been done.

Consider a strictly hypothetical pre-legal individual in isolation. The essence of this state would be that with regard to any given act or omission there would be a freedom of choice to do or not to do. Once two or more such individuals are put together, their spearate total liberties can not co-exist. This can be resolved by physical force, or by development of a consensual legal system. The legal system does two things with regard to their relations. In certain circumstances it imposes a prescriptive pattern of behaviour — Hohfeld's duty — in place of the previous freedom of choice, and in order that the system not be static, it provides for powers to change the duties — the two concepts at the core of Professor Hart's concept of law.[30]

But where a prescriptive pattern of behaviour is not imposed — the absence of a duty — Hohfeld's privilege remains, and its essence is still freedom of choice. A "duty to do" and a "duty not to do" are distinct, but there is only one privilege, "to do or not to do". Of course as manifested in action, a privilege must take the form of either doing or not doing, and this course of action will be consistent with the content of, on the one hand, a duty to do or, on the other, a duty not to do. But though the manifestation may be the same, the concepts are not, and the presence of a duty with regard to a particular subject matter can not co-exist with a privilege as to the same subject matter, which is only to say that there cannot be both a duty and no duty at the same time.

Once the existence of a duty and a privilege is seen to be inconsistent, Professor Williams' separate cnsideration of positive and negative duties is unnecessary, and the awkwardness of his terminology

29. See the discussion in the Columbia Law Review article previously cited.
30. Hart, H.L.A. *The Concept of Law.*

of "liberty not", "no-duty not" and "no right . . . not" can be avoided.

Misinterpretations of Hohfeld's Scheme

What, then, are the misinterpretations of Hohfeld's scheme that have so obscured what he said? In considering these, I am considerably indebted to Finnis's prior review of this topic.[31]

Stone

One of the more spectacular confusions of Hohfeld's scheme is that of Professor Stone in 'Legal Systems and Lawyers' Reasonings' at page 143. I shall analyse this section by section.

> "For the ambiguously wide term 'a liberty', he substituted the notion of 'a privilege' limited to those situations in which the law ermits A to act as he wishes."

Prior to this point, Stone notes that Salmond had developed the concept of "a liberty" in the British literature and gives Salmond's definition as " 'a liberty' was what I may do without being prevented by the law", or in other words what I may do when the law imposes no duty to act in a particular way on me. This would appear conceptually identical with Hohfeld's privilege, that X has a privilege when he does not have a duty. It is clear from n. 59 of Hohfeld's article, that he considered the two ideas the same.

> ". . . but imposes no duty on B to permit him to do so, or in other words, leaves B also free to act as he wishes."

Stone mentions Salmond's problem of a "liberty" to express opinions on public affairs, and a (supposed correlative) duty on others not to interfere with its exercise, and gives Salmond's solution:

> "If a landowner gives me a license to go upon his land, I have a right to do so in the sense in which a right means a liberty; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me."[32]

Hohfeld also, in his disuccsion of Gray's shrimp salad, distinguished the privilege from the claim to non-interference:

> "This passage seems to suggest primarily two classes of relation: first, the party's respective privileges, as against A, B, C, D and others in relation to eating the salad . . . second, the party's respective rights (or claims) as against A, B, C, D and others that they should not interfere with the physical act of eating the salad . . ."[33]

Corbin makes the distinction even more explicitly:

> "Observe carefully that the concept *privilege* does not itself include a *right* to non-interference by another person, although such a privilege and such a right very commonly are found together."[34]

31. Finnis, J. *Some Professorial Fallacies about Rights* 4 Adelaide L.R. 377.
32. *Op. cit.*, at p. 142.
33. *Op. cit.*, at pp. 34-35.
34. *Op. cit.*, at p. 167.

Despite these admonitions, Stone fails to separate the jural relation concerning the act from the jural relation concerning interference with the act, and attempts to combine them. It is no part of Hohfeld's definition of A's privilege that it imposes no duty on B not to interfere with A's activity, or leaves B also free to act as he wishes. A's privilege must be associated, on B's part, with either a duty (to or not to) or a privilege with regard to interference, but neither is an essential or any part of A's privilege. It is, whichever it be, a completely separate jural relation.

> "B in this case has in Hohfeld's sense, a 'no-right' to prevent A, but he does also have a privilege (Salmond's liberty) of preventing him, if he wishes."

This continues the above error. B's possible privilege of interference is a completely separate relation from B's no-right correlative to A's privilege.

> "The correlative of this 'privilege' of A is B's 'no-right' to legal redress when A exercises this terminating privilege."

This appears in the corresponding passage in 'The Province and Fuction of Law' as:

> "The correlative to A's 'privilege' is B's 'no-right'."[35]

As such, it is harmless, but adds nothing to what has gone before. As modified, as Finnis points out, it makes no sense unless A is substituted for B and vice versa. It then confuses A's no-right with regard to B's interference, with a no-right to legal redress, which again is a quite separate jural relation, as will be discussed below. And what is a "terminating privilege"? — presumably B's privilege of interference.

If A's privilege, as Stone appears to think, must be associated with B's privilege to interfere, where does the more usual situation, where B is under a duty not to interfere, fit in? He does not say.

Husik

> ". . . for me to have a privilege of doing a thing means, as mentioned before, (1) to have no duty of doing the thing, (2) to have no claim or right aganst others that they should refrain from interfering with my doing the thing, and (3) to be under no duty not to do the thing."[36]

Husik's analysis suffers from the same confusion of act and interference with the act as Stone's. (1) and (3) above are a sufficient and complete definition of privilege. (2) is a separate jural relation, and no part of the privilege.

Paton

Paton continues the same error. Speaking of privilege, he says:

> "Here no precise relationship to others is in question, save that the law will protect my liberty if others interfere with its exercise."[37]

35. Stone, J. *The Province and Function of Law* 120.
36. Husik, I. *Hohfeld's Jurisprudence* (1923-4) 72 U. Pa. L.R. 263, at p. 267.
37. Paton, G.W. *Textbook of Jurisprudence* 4th ed. 291.

Lloyd

The second major misinterpretation of Hohfeld's scheme is perhaps best exemplified by Lord Lloyd. This is the confusion of the primary legal relation with the quite separate legal relation that is created by the court as remedy or sanction, as will be discussed further under the consideration of axioms in interpreting Hohfeld. Thus in speaking of immunity, Lloyd says:

> "For instance, in making a statement in the course of a parliamentary debate the speaker enjoys an absolute immunity from suit, however defamatory the statement might be. This position therefore involves an 'immunity' from legal action with a corresponding disability on the part of the person defamed, since he is legally disabled from bringing proceedings."[38]

Although in common speech there may be immunity from legal action, this immunity is not an Hohfeldian immunity. In fact, the speaker has a privilege to say what he likes, and the usual duty to avoid defamation is absent. The person defamed therefore has no-right not to be defamed, and an action will not lie because there has been no breach of duty by the speaker.

Pound

Another important misinterpretation of Hohfeld's scheme is to fail to use his terms in the sense he did, and then be critical because different results are obtained from the different usage. This is most so with 'right'. Pound says:

> "Moreover Hohfeld's scheme presupposes that there can only be one opposite and one correlative and that there must be an opposite and a correlative. But there may be many contrasts and there are sometimes two correlatives. For example, correlative to one's right as owner of Blackacre is his neighbour's duty not to trespass and his liability for trespass by his servant, trespass by his cow, and (in England) for breaking loose of his ponded water and invasion of the land."[39]

As Stone[40] has pointed out, this uses "right" in just the wide sense Hohfeld was trying to avoid, so it is not surprising that a number of "correlatives" are found.

Other Minor Misinterpretations

Buckland,[41] in disputing the need for a distinction between privilege and power, appears to confuse legal and non-legal conceptions, as discussed early in Hohfeld's article. The need for both distinctions should be clear, and will not be further discussed.

Without going any deeper into Kocourek's analysis, he is often quoted as saying that a no-right could be "an elephant, a star or an angel."[42] If this criticism was meant seriously, it reveals a cnsidera-

38. Lloyd, D. *The Idea of Law* 315.
39. Pound, R. *Fifty Years of Jurisprudence* (1936-7) 50 Harvard L.R. 557, at p. 573.
40. Stone, J. *The Province and Function of Law* 131.
41. Buckland, W.W. *Some Reflections on Jurisprudence* 96.
42. Kocourek, A. *The Hohfeld System of Fundamental Legal Concepts* (1920) 15 Illinois Law Quarterly 23.

ble misinterpretation. Hohfeld's opposites are expressly jural opposites, not philosophical ones, and no-right means just what it says, absence of a right.

Axioms for applying Hohfeld's Scheme

Finnis[43] gives three axioms to aid in the application of Hohfeld's scheme and to avoid misinterpretation.

(1) *Each Hohfeldian relation concerns only one activity of one person.*

Finnis considers only claim-duty and privilege-no-right but this axiom is equally applicable to the power-liability and immunity-disability relations. From the preceding discussion of jural relations, it is evident that each relation exists between two and only two legal entities. Any apparent relation between an individual and a group, or two groups, can be broken down into separate relations between individuals. And within each relation, a prescriptive pattern of behaviour is imposed, or power given, to one party only. The other is merely a passive recipient of the effect of this duty or power.

This axiom has its greatest application in separating the relations involved in A's action and B's interference with that action, as troubled Stone, but applies equally to the separation of the primary legal relation and possible sanctions.

(2) *A Hohfeldian claim can never be to do or omit something: it always is a claim that somebody else do or omit something.*

This again follows from the previous conceptual discussion. Within the relation, the prescriptive behaviour pattern is imposed on one party only, the one under a duty. The relation is concerned only with this activity, and possible actions by the party having a claim are outside the relation.

Stone[44] also fails to appreciate this, because of his confusion of act and interference. With reference to the shrimp salad example, he suggests that if there were a contract to permit X to eat the salad, he would have a claim to eat it and A, B, C and D the duty not to interfere. X's claim is of course against the interference, and the eating is a privilege.

(3) *The relevance of 'legal remedies' to the defining terms of his scheme is left entirely undetermined by Hohfeld.*

I would suggest that legal remedies can best be understood as follows. The courts have an adjudicative role within the legal system. Their main function is to determine whether there has been first, a breach of duty or secondly, a purported exercise of power which has been ineffective. But the courts can determine this with respect to any legal relation, though of course in practice they will not act unless there is some evidence of one or the other. It is not conceptually helpful to talk of claims that the court shall act, or rights to sue. The individual does not have jural relations with the court.

The court has power, on finding a breach of duty or ineffective use of power, to alter the jural relation. It may confirm the original claim-duty relation if this was in dispute, as by an injunction or an

43. *Op. cit.*, at p. 379 *et seq.*
44. Stone, J. *The Province and Function of Law* 121 n.

order for specific performance. Or it may substitute another claim-duty relation, as to pay damages. Because the legal system is basically consensual, this will usually be effective, but if not, progressively more severe duties may be imposed, backed ultimately by physical force, as with execution or imprisonment.

A's claim thus exists by virtue of B's duty, this usually being based on an interest of A's, but is quite independent of the legal remedy.

With this approach, I would suggest the best analysis of Lloyd's revocable "irrevocable licence",[45] discussed by Finnis,[46] is as follows. Smith having a ticket, Brown is under a duty not to interfere with Smith's privilege to enter. But Brown retains a power to revoke these relations, though he is also under a duty not to exercise it. By withdrawing his consent to Smith's entry, Brown effectively exercises this power, reimposing on Smith his pre-ticket duty not to enter. Smith is left with a claim that Brown should not have exercised the power, and it is for breach of this duty that damages will subsequently be awarded.

I concur in these three axioms of Finnis, which cover the misinterpretations of Stone and Lloyd. I would suggest a fourth, to cover Pound's difficulties.

(4) *As between two individuals, a given activity will give rise to one and only one jural relation.*

This may be considered the converse of the first axiom, and again follows from the preceding conceptual discussion. It avoids Pound's multiplicity of duties correlative to a given claim.

It does assume the legal system is uniform, and this would seem to give the clue to the difference between legal and equitable rights. Being derivatively different legal systems, common law and equity may impose different jural relations on given fact situations. Thus at common law a trustee would have a privilege as regards use of trust property, so that he could use it as he wished, but equity imposes duties correlative to claims in the beneficiaries, to use it for their benefit. Apart from this, legal and equitable rights are not analytically different.

Utility of Hohfeld's Scheme

What, then, of the utility of Hohfeldian analysis? At a jurisprudential level, Finnis[47] shows, in an analysis *inter alia* of Professor Dworkin's central argument in "Taking Rights Seriously", on the basis that Dworkin's strong rights are in effect claims against interference, that it contains logical inconsistencies. Thus Dworkin's conclusion that:

> "In our society a man does sometimes have the right, in the strong sense, to disobey a law. He has the right whenever that law wrongly invades his rights against the government".[48]

45. *Loc. cit.*
46. *Op. cit.*, at p. 381.
47. *Op. cit.*, at p. 382 *et seq.*
48. New York Review of Books 17 Dec 1970 Special Supplement 23, at p. 25.

can be shown not to necessarily follow from his argument when subjected to Hohfeldian analysis. He similarly analyses the Vatican Council's Declaration "On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious," and shows that it contains statements which are unsupportable. Rostow[49] has analysed the Hart/Devlin debate and in doing so shows that some criticism by Wollheim of Devlin are unwarranted once Devlin's argument is expressed in Hohfeldian terms. The world might be a simpler (and better?) place if all jurisprudential discourse was subjected to Hohfeldian analysis.

Professor Hart[50] has taken the analysis of a right, though perhaps Bentham's rather than Hohfeld's, and made it the core of his concept of law. In so doing, he has provided a legal theory on which to base Hohfeld's analysis, which Hohfeld has been criticized for lacking. While accepting most of Hart's analysis, I would disagree with the need for the third condition he postulates as necessary for the validity of the statement "X has a right":

> "This obligation is made by law dependent on the choice either of X or some other person authorized to act on his behalf".[51]

and his suggestion that recognition of choice is a unifying basis for rights. While choice is an essential component of privilege, choice with regard to claim is only as to calling in aid the adjudicative process, and the claim exists independently of this, as discussed. Equally, power exists independently of the choice to exercise it. The static-dynamic relation of duty and power, as mentioned, seems better.

However, the utility of jurisprudence for the practising lawyer is perhaps another debate. The American Law Institute has adopted Hohfeldian terminology for its Restatement of the Law, which suggests the scheme provides a more precise method for expressing the law. While no statute law has yet been so expressed, it seems likely that any new codification of the law emanating from the United States will use Hohfeldian language.

But surely the utility of the scheme for the practising lawyer must be simply this. While people continue to consider that all "rights" must be enforceable in the courts, because a court in the past has held such and such a "right" enforceable, much time will be wasted, and sweat and tears, if not blood, spilled, in the hopeless attempt to enforce what are in fact privileges. A claim may be enforced because it involves a duty on the other party to the relation, but how may another party be forced to act or refrain from acting when he has a privilege and the aggrieved party consequently no-right to force him? *Chaffers* v. *Goldsmid*[52] failed for precisely this reason. Many other examples could be given. Yet actions will continue to fail from a failure to appreciate the distinction, until the law is clarified.

Dias[53] points out that Hohfeld's scheme applies so generally to the case-law that it is legitimate to use it as a means of analysing

49. Rostow, E.V. *The Enforcement of Morals* (1960) C.L.J. 174.
50. *Op. cit.*
51. Hart, H.L.A. *Definition and Theory in Jurisprudence* (1954) 70 L.Q.R. 37, at p. 49.
52. [1894] 1 Q.B. 186.
53. *Op. cit.*

individual decisions. Once this is done, it provides a method of comparison between decided cases. Retrospectively this allows determination of cases which are in fact exceptional, and those which are in accordance with a line of authority. Prospectively, it may provide grounds of appeal in a case decided contrary to authority, and more generally will allow cases to be decided and the law to develop more in accord with principle and less by exceptions.

Hohfeld himself thought his scheme might make it possible "to discover essential similarities and illuminating analogies . . . to discern common principles of justice and policy . . . to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant."[54] This may have been overly optimistic, but it will only be achieved, and Hohfeld's analysis seen as perhaps the most important contribution to analytical jurisprudence of the twentieth century, if his scheme be clearly understood, and adopted and applied by more than just the faithful at Yale.

54. *Op. cit.*, at p. 59.