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A Review of Hohfeld's Fundamental Legal Concepts

Alan D. Cullison*

WESLEY N. HOHFELD tried to split the atom of legal discourse and to identify its elementary particles. He identified eight atomic particles which he called "the lowest common denominators of the law."¹ All legal concepts, he thought, can be completely analyzed, even defined, in terms of these eight fundamental legal conceptions:²

Right	No-Right	Power	Disability
Duty	Privilege	Liability	Immunity

Of course, Hohfeld had in mind very specific meanings for these eight terms; so it is not the words themselves, but rather the meanings he had in mind, that tell Hohfeld's story. The first thing that needs clarifying is what kind of rights, duties, etc., Hohfeld was talking about. Where do they come from? How do you know one when you see it? In general, Hohfeld's rights, duties, powers, etc., all come from the rules of positive law.

The Source of Hohfeld's "Duty"

The term "duty" is commonly used in ways that Hohfeld clearly did not have in mind. By "duty" he did not mean what a father means when saying to his son, "It is your duty to mow the lawn every week." Nor did he mean what a moralist means when saying, "Every man has a duty to treat others as he would have them treat him." These differences are easy to see; Hohfeld was talking about *legal* duties. But still, there are different kinds of legal duties, corresponding to different views of what "law" is. Most lawyers are legal positivists; they think of "law" as being a body of rules, so they tend to see a legal duty as something derived from the rules of positive law. However, many lawyers feel that "law" is inextricably tied up in social policy and that a legal duty arises from the goals of society, the public good, or whatever.³ When social policy gives rise to a right, they say, it is for the positive law to spell out a remedy; and if it fails to provide for a remedy, that is

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¹ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913), reprinted in Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 23 at 63-64 (Cook ed. 1923) [hereinafter cited as Hohfeld].

² Hohfeld 23, at 36.

³ See, e.g., Green, *Judge and Jury* 19-20, 74-77 (1930). Dean Green identifies five factors that go into a court's decision of when there is a duty: the administrative, the ethical or moral, the economic, the prophylactic or preventive, and the justice factor (the capacity to bear the loss). For elaboration, see *id.* at 77-153.

a defect in the positive law.⁴ Other lawyers (the legal realists) think of "law" as being what officials, especially courts, do about disputes brought to them for settlement. These lawyers would say the availability of an actual court judgment is the acid test for a legal duty.⁵ Regardless of what is good for society or what the rules of positive law say, the realists feel if a plaintiff's key witness dies and leaves him unable to prove his case then in fact he has no right, and the wrongdoer has no duty.

All of the different meanings of the word "duty" seem to have one thing in common, something bad is likely to happen somewhere when a duty is breached.⁶ If the son should fail in his duty to mow the yard every week, his father no doubt contemplates punishing him in some way, at least by withholding favors he would otherwise allow. Should a person fail in the moralist's duty to follow the Golden Rule, then, at least in the moralist's view of things, the world would somehow be worse off. For the son's lawnmowing duty, the "something bad" that is likely to happen in the event of a breach is a kind of sanction to be imposed against the errant son himself. But in the case of the moralist's duty, the wrongdoer may himself go scot-free. The bad thing that results from his breach of duty is borne by the whole world. The lawyer who identifies the "law" with what is good for society might view a "legal" duty as something like the moralist's duty. The "something bad" which results from a breach is not primarily a sanction on the wrongdoer⁷ but rather an impairment of the values or goals of society. By contrast, to the realist who sees law as what courts do, the bad thing that results from a breach of a legal duty would be a sanction, a court judgment of liability, that is realistically available against the wrongdoer.

Hohfeld's "duty" arises from rules of positive law.⁸ His legal atom-splitting was the work of a legal positivist or, what is the same thing, of an analytical jurisprudent. Even if the public good makes certain conduct imperative, there is no "duty" to conform to such conduct

⁴ According to this view, civil liability is imposed *because* of the rights and duties that spring from the purposes, values, and goals of society. The positivists and realists tend to turn things around and say there are no rights and duties *until* there is provision for civil liability, that is, rights and duties exist *because* civil liability is imposed. To the aforementioned lawyers, this may seem to put the cart before the horse. See Patterson, *Jurisprudence: Men and Ideas of the Law* 86 (1953).

⁵ Llewellyn, *The Bramble Bush* 85-86 (1960).

⁶ See Anderson, *The Logic of Norms, 2 Logique Et Analyse* 84 (1958), reprinted in *Communication Sciences and Law: Reflections From the Jurimetrics Conference* 69 (Allen & Caldwell, ed. 1965), which discusses in a similar vein the meaning of "obligation."

⁷ Of course, a sanction *might* be imposed, but the sanction on the wrongdoer does not regularly follow, nor is it necessarily prescribed, according to this view, when a "duty" is breached.

⁸ Hohfeld 23, at 32; see Cullison, *An Orientation For Formalized Hohfeldian Analysis*, *M.U.L.L.* 58, 61-63 (1966).

in Hohfeld's sense unless the positive law itself provides for it. On the other hand, if the positive law does give rise to a duty, it is proper in Hohfeld's way of thinking to say there is a duty even when a remedy for its breach is not realistically available. But what, then, is the "something bad" that results or threatens when Hohfeld's kind of duty is breached? It is the positive law's provision for liability, a sanction prescribed by the rules of positive law. A person has a legal duty to do something in Hohfeld's sense when the rules of positive law would make him liable for not doing it.⁹ Thus, if the rules of civil liability would make *A* liable to *B* for punching *B* in the nose (as is likely to be the case), then it is proper to say that *A* owes *B* a duty *not* to punch *B* in the nose.

The distinctions we have been drawing may seem very elusive or even pointless. What difference does it make where duties come from? For one thing the distinction helps us keep in mind how courts, especially appellate courts, reason out their decisions. Suppose a court writes in its opinion:

The defendant is liable for plaintiff's injuries because he has breached a duty he owed to the plaintiff.

If the court is using the word "duty" in Hohfeld's sense, then all it is saying is this:

The defendant is liable for plaintiff's injuries because the rules of law make him liable.

The "duty," if it is of the Hohfeldian variety, arises from the rules of liability, and if the rules do not make the defendant liable for what he did, then he had no duty (in Hohfeld's sense), which he could breach. However, courts very often base their decisions on "duties" that simply do not spring from the pre-existing rules of positive law. Then, a statement like the above is likely to mean something like this:

The defendant is liable for plaintiff's injuries, not because the rules of law make him liable, but because (in our opinion) it is socially desirable that he bear the loss rather than the plaintiff.

Once the case is decided and liability is imposed, the decision will stand as a precedent for imposing liability on people who do what that defendant did. In other words, the positive law will now impose liability where it did not do so before; a new rule of law will have emerged, so it will be proper to say in a later case that a person has a Hohfeldian-type duty to do what the earlier defendant failed to do.

⁹ See Hohfeld, *The Nature of Stockholders' Individual Liability for Corporation Debts*, 9 Colum. L. Rev. 285 (1909), reprinted in Hohfeld 194, at 202. Hohfeld's position was not precisely clear, but evidently he meant to link duties with civil liability. See Patterson, *op. cit. supra* note 4, at 62; Radin, *A Restatement of Hohfeld*, 51 Harv. L. Rev. 1141, 1151-53 (1938). See also Corbin, *Legal Analysis And Terminology*, 29 Yale L.J. 163, 164, 167 (1919). See further note 36 *infra* and accompanying text.

Judge Cardozo's classic opinion in *MacPherson v. Buick Motor Co.*¹⁰ is illustrative. "The question to be determined," said Cardozo, "is whether the defendant [auto manufacturer] owed a duty of care and vigilance to any one but the immediate purchaser [retail dealer]." The answer, of course, was in the affirmative. A remote purchaser was allowed recovery in negligence against the manufacturer despite a lack of privity between them. The "duty" which Cardozo found was not based on any pre-existing rule of law making manufacturers liable in negligence to remote purchasers. There was no such rule in New York until *MacPherson* was decided. Cardozo invented a new rule and a new duty, justifying them with policy arguments and analogies to other (distinguishable) cases. Cardozo's opinions are unusual for their clarity, yet it is well recognized that other judges commonly follow the same processes but without articulating each step of their reasoning.¹¹

It should be pointed out that there are many so-called "duties" which come from the positive law but which evidently are not Hohfeldian duties because they are not directly related to rules of liability. The so-called "duty" to mitigate damages is an example. If an injured person who has a good cause of action fails to take reasonable measures to minimize his injury, he may be precluded from recovering the damages he could have avoided. The rules of law may be said to impose "something bad" for his failure, but it is only a limitation on his right of recovery rather than civil liability that is imposed.¹² Similarly, it is sometimes said that a vendee of realty has a "duty" to inspect the land he buys, meaning he will have no remedy against his vendor for injuries he sustains because of dangerous conditions on the premises.¹³ Again, this is not a Hohfeldian duty since the rules do not make a vendee liable for anything necessarily. If he fails to inspect he may suffer an injury for which he will have no remedy.¹⁴ Another category of non-Hohfeldian duties that come from the positive law are the duties of officials. For example, Article 9 of the Uniform Commercial Code mentions "duties" of filing officers with respect to the Code's filing system, yet the

¹⁰ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹¹ See Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960). Llewellyn urged that most present-day appellate judges decide cases in the "Grand Style" of judges like Cardozo, but with less articulation of what they are about.

¹² Restatement, Contracts § 336, comment d (1932), repudiates the "duty" terminology for describing the rule on mitigation of damages. The reason given is that a person's "legal position is in no way affected by his failure to make this effort" to mitigate his damages, i.e., the law does not penalize his inaction in any way; it only limits his recovery to what it would have been had he acted.

¹³ See Restatement, Torts § 353, comment c (1934).

¹⁴ When the "duty to inspect" terminology is used to refer to the vendee's liability to third parties who are injured, the usage is more in line with Hohfeld's. See *id.* § 353. This was the meaning Cardozo had in mind when he spoke of Buick Motor Co.'s "duty to inspect" the wheels it bought for use in its autos. *MacPherson v. Buick Motor Co.*, *supra* note 10.

Code does not contemplate holding a filing officer civilly liable for damages that might result from a breach of these "duties."¹⁵

Legal Relations

Hohfeld used the term "duty" in an even more specific way than what we have outlined thus far. Hohfeldian duties always involve two people, one who is said to have or owe the duty, and another to whom the duty is said to be owed. Thus, A might owe a Hohfeldian duty to B, but he cannot owe such a duty to himself, and A might owe two separate duties to B and C, but he cannot owe the same duty to both of them.¹⁶ The reason for this usage becomes clear when it is recalled that (1) a Hohfeldian duty to do something arises when the positive law would make a person civilly liable for not doing it, and (2) Hohfeld was trying to reduce legal conceptualization to its lowest common denominators. If under the rules of law A would be liable to B for not doing something, then A owes a duty specifically to B to do it. When the rules of law would make A liable to *both* B and C for not doing something, Hohfeld preferred to say that A owes separate duties to B and C since his liability to them in event of breach would be separable. Their causes of action would be independent of one another, so A's duties (if they are to be "lowest common denominators") should also be independent of one another. It is thus seen that Hohfeld used the term "duty" to designate a certain kind of legal relation between pairs of specific people with respect to an act. *There is really no such thing as a "duty" beyond this.* To say that A owes B a duty to do a certain thing is merely to say something about how the rules of law would treat A and B if it happened that A failed to do the thing.¹⁷

So far we have been dealing only with Hohfeld's "duty," but his other seven fundamental legal conceptions follow a similar pattern. They also describe legal relations between pairs of people with respect to acts. To say, for instance, that A has a "power" as against B to do a certain thing is merely to say something about how the rules of law would treat A and B in the event that A does whatever it is he has the "power" to do.

¹⁵ Uniform Commercial Code §§ 9-403, 9-405, 9-406. The "duty" terminology is used only in the captions to these sections; the text uses the imperative "shall." Under § 1-109, section captions are made part of the enacted Code. On official duties, see further, Patterson, *op. cit. supra* note 4, at 165-66.

¹⁶ Corbin, *supra* note 9, at 165. Hohfeld demonstrated the analytical power of his two-party relations in his analysis of *in rem* concepts. Hohfeld, 65. See also Hohfeld, Nature Of Stockholders' Individual Liability For Corporation Debts, *supra* note 9; Hohfeld, The Individual Liability Of Stockholders And The Conflict Of Laws, 9 Colum. L. Rev. 492 (1909), reprinted in Hohfeld 229.

¹⁷ Although duties do not "exist" in any physical or metaphysical sense, it is convenient to talk about duties as though they did. And the same goes for rights, privileges, powers, etc. Indeed, the main reason for having these terms in the legal vocabulary at all seems to be that they provide a shorthand for talking about the effects of legal rules.

Some of Hohfeld's eight terms are duplicative in that they designate the same legal relation as others. A "right," as Hohfeld viewed it, is merely a "duty" from the other fellow's viewpoint. Rights and duties, Hohfeld said, are jural correlatives. Whenever there is a duty there must also be a correlative right, and vice versa. Similarly, privileges and no-rights are correlatives, as are powers and liabilities, and immunities and disabilities. When Hohfeld's eight terms are paired off with their correlatives, they define four types of fundamental legal relations: ¹⁸

Right-duty relations
 Privilege-no-right relations
 Power-liability relations
 Immunity-disability relations

A "right" is a right-duty relation as seen through the eyes of one party to the relation, while the correlative "duty" is the same right-duty relation as seen through the eyes of the other party. To illustrate: Suppose (as is no doubt the case under the conventional rules of law) that A owes B a duty not to steal B's pocketbook. It is the same thing, neither more nor less, to say that B has a right as against A that A not steal his pocketbook. These are equivalent statements, the first describing a specific right-duty relation from A's viewpoint and the second describing precisely the same right-duty relation from B's viewpoint. And all that either statement asserts is that if A steals B's pocketbook, the rules of law will make A liable to B for his loss.

The Right-Duty and Privilege-No-Right Relations

We have seen that rights, duties, and the right-duty relations they describe arise when the rules of civil liability would make a person liable for certain acts. By contrast, privileges, no-rights, and the privilege-no-right relations they describe arise when the rules of civil liability would *not* make the person liable for the acts. For example, if the positive law would make A liable to B for stealing his pocketbook, then we would say that:

- (1) A owes B a duty not to steal B's pocketbook,
- (2) B has a right as against A that A not steal his pocketbook,

¹⁸ Hohfeld organized his eight fundamental legal conceptions into pairs of jural opposites and pairs of jural correlatives in the following manner

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

Hohfeld 23, at 36. Sometimes he used the terms "conception" and "relation" interchangeably, especially when referring to his eight terms. Thus, he might sometimes refer to a "duty" as a fundamental legal *conception*, and sometimes as a fundamental legal *relation*. We have tried in the text above to preserve a distinction between these terms; a duty is a "conception" which describes a right-duty "relation"; a right is a different "conception" which describes the same "relation."

- (3) it is not so that *A* has a privilege as against *B* to steal *B*'s pocketbook, and
- (4) it is not so that *B* has a no-right as against *A* that *A* not steal *B*'s pocketbook.

However, if the positive law would *not* make *A* liable to *B* for stealing *B*'s pocketbook, then we would say that:

- (5) *A* has a privilege as against *B* to steal *B*'s pocketbook,
- (6) *B* has a no-right as against *A* that *A* not steal *B*'s pocketbook,
- (7) it is not so that *A* owes *B* a duty not to steal *B*'s pocketbook, and
- (8) it is not so that *B* has a right as against *A* that *A* not steal his pocketbook.

It is apparent that the foregoing right-duty relation between *A* and *B* is wholly inconsistent with the foregoing privilege-no-right relation between *A* and *B*. Either one or the other relation must exist between them depending on what the law is, but both relations cannot exist at the same time.¹⁹

In effect, Hohfeld's rights, duties, privileges, and no-rights are simply shorthand terms for saying what liabilities the law prescribes between two people for the doing or not doing of an act. When *A* fails to do a certain act, the law will either make him liable to *B* for it or not. He cannot be both liable and not liable to *B*, but he must be one or the other. If he would be liable for not doing the act, we say he owes *B* a "duty" to *do* it (a right-duty relation); but if he would not be liable to *B* for not doing it, we say he has a "privilege" as against *B* *not* to do it (a privilege-no-right relation). Since *A* would be either liable or not liable, one or the other but not both, it is clear that *A* has either the duty *to do* or the privilege *not to do* the act, one or the other but not both. Similarly, the law might predicate liability on *A*'s *doing* the act. If *A* would be liable to *B* for doing it, we would say he owes *B* a "duty" *not* to do it; but if he would not be liable for doing it, we would say he has a "privilege" as against *B* *to do* it. Again, *A* has either the duty *not* to do or the privilege *to do* the act, one or the other but not both.

Hohfeld's system is often misunderstood, and probably the most frequently misunderstood of his terms is his "privilege." To many people when someone has a "privilege" it means that he is free to act or not as he sees fit. Thus, one of Hohfeld's critics wrote:

[F]or me to have a privilege of doing a thing, means . . . (1) to have no duty of doing the thing, (2) to have no claim or right against others that they should refrain from interfering with my doing the thing, and (3) to be under no duty not to do the thing.²⁰

¹⁹ Hohfeld expressed this dichotomy by saying that rights and no-rights are "jural opposites," as are duties and privileges. See *supra* note 18.

²⁰ Husik, Hohfeld's Jurisprudence, 72 U. Pa. L. Rev. 263, 267 (1924).

This is plainly not what Hohfeld meant by "privilege." Hohfeld distinguished between the privilege to do a thing and the privilege not to do it. These are wholly separate privileges and, while they sometimes exist together, they do not always go hand in hand. For example, under ordinary circumstances *A* owes *B* neither a duty to paint *A*'s house nor a duty not to paint it. That is to say, *A* is ordinarily privileged as against *B* to paint *A*'s house or not as he sees fit. In neither case would the rules of law make him liable to *B*. However, suppose *A* enters into a binding contract with *B* whereby *A* agrees to paint the house. Under these circumstances *A* would owe *B* a duty to paint the house since the law would make him liable to *B* (in contract) if he failed to paint it as he promised. *A* would *not* have a privilege as against *B* not to paint the house, but he *would* have a privilege to paint the house. On the other hand, if *A* contracts with *B* not to paint the house, then he would have no privilege to paint the house, but he would be privileged not to paint it.²¹ These illustrations show that it is possible, under appropriate circumstances, for *A* to have both privileges (to do the thing or not to do it), or to have just one of them (either one). Evidently it is not possible for *A* to have neither privilege, for that would mean *A* would be liable to *B* whether he painted the house or not.²²

It is claimed sometimes especially by those who misunderstand his concept,²³ that Hohfeld's "privilege" is legally insignificant. Of course, if "privilege" included both the privilege to do a thing and the privilege not to do it, then it would be tempting to hold that the term does not concern a jural relation at all. However, as we saw, Hohfeld's privilege is not confined to acts which can be done or not without legal repercussions. Moreover, as Hohfeld said,

A rule of law that *permits* is just as real as a rule of law that *forbids*; and, similarly, saying that the law *permits* a given act to *X* as between himself and *Y* predicates just as genuine a legal relation as saying that the law *forbids* a certain act to *X* as between himself and *Y*.²⁴

²¹ Which is to say he has a privilege to do his duty, but no privilege not to do what it is his duty to do. See *infra* note 22.

²² To say that *A* has neither privilege is to say that he owes contrary duties to *B*, that is, a duty to paint the house, and a duty not to paint it. Evidently, a duty always implies a privilege to do the duty, although it denies or precludes a privilege not to do the duty. The latter privilege is the "jural opposite" of the duty, but the former privilege is not.

²³ Husik, *supra* note 20, at 267. See also Kocourek, The Hohfeld System Of Fundamental Legal Concepts, 15 Ill. L. Rev. 24, 27 (1920).

²⁴ Hohfeld 23, at 48 n. 59. Hohfeld's argument, it should be noted, is based upon analogy rather than deduction. He is saying that a privilege is *like* a rule of law that permits, not that it is *derived from* a rule of law that permits. For, apparently, some privileges are derived from the mere *absence* of a rule of law that *forbids* (that is, from the absence of a rule prescribing liability). Where there is no rule of law making *X* liable for doing a thing, we would probably say *X* is privileged to do it, even when there is no rule clearly saying *X* would *not* be liable for doing it.

If we expect to describe the legal positions of pairs of people with respect to acts, it is necessary to have a term to be used in describing their positions when the law does not impose liability.

Perhaps the most frequent objection to Hohfeld's "privilege" has been aimed at the word he used rather than the concept it represents. The objection runs something like this: In the world of everyday affairs the term "right" is probably used more often than "privilege" to represent the concept Hohfeld had in mind. Imagine, for instance, an employee who is out on strike against his employer, saying "I have a right to strike." Clearly, it is urged, he does not have a Hohfeldian "right" to strike, for nobody would be liable to him if he did not strike; nobody has a correlative duty that he strike. What he has in Hohfeld's terms is a "privilege" to strike; he himself will not be liable to his employer for striking. Similarly, the "right" of free speech is not a "right" in Hohfeld's sense but rather a "privilege." This usage of the word "right" for what Hohfeld calls a "privilege" is quite common, so we should modify Hohfeld's "privilege" label to conform to general usage.

Following this kind of argument several of Hohfeld's critics have chosen to discard his terminology as misleading. One alternative that has been used is to call Hohfeld's right a "demand-right" and his privilege a "privilege-right."²⁵

Hohfeld's terminology is not really as misleading as his critics make it out. Quite possibly the employee striking against his employer uses the word "right" because he wants to say more than he is not accountable in court (or in any other forum) for striking. Perhaps he also wants to say that his employer may be accountable to him if the employer interferes with his striking. In Hohfeld's terms, the employee has as against his employer (1) a "privilege" to strike, and (2) a "right" that his "privilege" not be interfered with. If the employee uses the word "right" in order to assert the accountability of someone who tries to interfere with his striking, then his usage is not drastically out of line with Hohfeld's terminology. The employee talks about his "right to strike," whereas Hohfeld would talk about his "right that his privilege to strike not be interfered with." It is most significant that courts often use the word "right" to mean a kind of noninterferability. For example, when a court is about to uphold the summary dismissal of a public employee, it might say, "Public employment is a privilege, not a right."²⁶ Or when a court is about to uphold the summary revocation of a liquor

²⁵ *E.g.*, Anderson, *Logic, Norms, and Roles*, 4 *Ratio* 36 (1962), reprinted in *Mathematical Methods in Small Group Processes* ch. 1 (Crisswell, Solomon & Suppes, ed. 1962).

²⁶ See, *e.g.*, *Goldway v. Board of Higher Education*, 178 Misc. 1023, 37 N.Y.S.2d 34 (S.Ct. 1942). A schoolteacher was fired after claiming his privilege against self-incrimination in a legislative hearing. Said the court in upholding the teacher's dismissal: "For the right to hold public employment is a privilege which may reasonably be qualified by legislative action." 37 N.Y.S.2d at 36.

license, it might say, "Selling liquor in this state is a privilege, not a right."²⁷ What these courts seem to be saying is that a mere "privilege" can be terminated summarily, while a "right" cannot. The real question in these cases is what protection the law gives to a public employee or a beer license holder from such *interference* by public administrative authorities. If public employment is a "right" by this terminology, then a public employee cannot be dismissed without good cause and procedural safeguards. When the court calls public employment a "right," it is saying that the employee has (in Hohfeldian terms) (1) a "privilege" to work for the government (in the sense that he is not legally accountable if he does work for the government), and also (2) a "right" not to be fired arbitrarily (in the sense that he will have a legal remedy if he is so fired). But when the court calls public employment a "privilege, not a right," then it is saying that all the employee has is (in Hohfeld's terms) the privilege (1) above, not the right (2) above.²⁸

It thus appears that the variance between common usage and Hohfeldian terminology is as much attributable to the imprecision of the former as it is to the inappropriateness of the latter. What people have in mind when they talk about the "right" to do something is quite possibly what Hohfeld would also call a "right," but not what he would call a right *to do the thing*. Rather, they may have in mind what Hohfeld would call a right *that their privilege to do the thing not be interfered with*.

The Power-Liability and Immunity-Disability Relations

Hohfeld's power-liability and immunity-disability relations arise from the rules of positive law in somewhat the same way as do the right-duty and privilege-no-right relations. However, they are con-

²⁷ See, e.g., *Gaissert v. State*, 57 Ga.App. 842, 197 S.E. 54 (1938) (upholding conviction of selling liquor without a license. *Reversed* on the particular facts of the case in *Gaissert v. State*, 86 Ga. 599, 198 S.E. 675 (1938)). The court's syllabus says:

1. The selling of malt beverages in this State is a privilege and not a right. In order for a sale of such beverage in a municipality or county of this State to be legal, a permit or license from the governing authorities of such county is necessary. The act empowers county authorities to grant such licenses, but the power to act is left to the discretion of the local authority. 197 S.E. at 55.

See also *Yarbrough v. Montoya*, 54 N.M. 91, 214 P.2d 769, 771 (1950) (*Reversing* decision of lower court granting license; ordering new trial).

Of course, the same "privilege and not a right" argument is used in many other contexts. E.g., *Thayer Amusement Corp. v. Moulton*, 63 R.I. 182, 7 A.2d 682, 686 (1939) (refusal of permission to show film publicly). A more modern example, one currently in vogue, is the use of the argument to justify suspending drivers' licenses for refusing to submit to blood tests when arrested for drunken driving. See, e.g., *Marbut v. Motor Vehicle Dept.*, 194 Kan. 620, 400 P.2d 982, 984 (1965): "A license to operate a vehicle upon the highways is neither a contract right nor a property right. It is [a] mere privilege the suspension of which does not deprive the individual of due process of law."

²⁸ Needless to say, it begs the question to say, for example, that public employment can be summarily and arbitrarily terminated *because* such employment is only a privilege and not a right. To say it is only a privilege is just to state the conclusion in different words.

cerned with changes in legal relations under the rules of positive law rather than with civil liability. To say that *A* has a "power" as against *B* to do a thing is to say that under the rules of law the legal relations involving *A* and *B* will change in some way if *A* exercises his power.²⁹ And it is the same thing, neither more nor less, to say that *B* has a "liability" that *A* do whatever it is he has a "power" to do. For example, when *B* offers to enter into a contract with *A*, the latter acquires a "power" to change the legal relations between the two of them by accepting *B*'s offer. Accepting the offer would, under the rules of contract law, extinguish privilege-no-right relations between *A* and *B* and create right-duty relations in their place. *A* has what is called a "power of acceptance," while *B* has a correlative liability.³⁰

Of course, there is no such thing either physically or metaphysically as a "power" or a "liability" any more than there is such a thing as a "right" or a "duty." To say that *A* has a power of acceptance, for example, is merely to say that if *A* accepts *B*'s offer then contractual right-duty relations will arise between *A* and *B*.³¹ If *B* had made no offer, then *A* would not have a power of acceptance; there would be no power-liability relation between *A* and *B* whereby *A* could make a binding contract by his own unilateral action. Instead, *A* would have a "disability" and *B* would have a correlative "immunity," and there would be an immunity-disability relation between *A* and *B* in this respect.³² When *B* has made no offer, a purported acceptance by *A* would not be effective under the rules of law to create any new right-duty relations. It thus appears that Hohfeld's powers, liabilities, immunities, and disabilities are merely shorthand terms for saying what changes in legal relations the law effects when a certain act is done. When *A* does a certain act, the law will either change legal relations or it will not. If legal relations would be changed, we say *A* has a power, but if legal relations would not be affected by *A* doing the act, we say *A* has a disability.

One possibly deceptive feature of the power-liability and immunity-disability relations is that they concern changes in *any* kind of legal relations, including other power-liability or immunity-disability relations as well as right-duty and privilege-no-right relations. Thus, it would be proper in Hohfeld's terms to speak of *B*'s *power of offer*, since

²⁹ Hohfeld 23, at 50-51.

³⁰ Corbin uses the term "power of acceptance" in his treatise on contracts. 1 Corbin, *Contracts*, ch. 2 (1950).

³¹ An ordinary bilateral contract would normally give rise to two right-duty relations. Each party would acquire a duty, with correlative rights in the other party. Of course, a contract *could* give rise to other kinds of legal relations; thus a landowner can by contract give another person a privilege (often called a "license") to enter his land.

³² Hohfeld expressed this dichotomy by saying that powers and disabilities are "jural opposites," as are liabilities and immunities. See *supra* note 18.

under the rules of law the offer by *B* has the effect of creating a power of acceptance in *A* in place of the disability he originally had. *B*'s making an offer changes the legal relations between himself and *A*, so it is proper to view the offer as the exercise of a power. Furthermore, once *B* has made his offer, he has a power of revocation (another legal relation created by *B*'s exercise of his power of offer). He can revoke his offer, thereby extinguishing *A*'s power of acceptance and reinstating the immunity-disability relation between himself and *A*.³³

Basically, there are four kinds of changes in legal relations that can be accomplished through the exercise of a power:

- (a) a change from an immunity-disability relation to the opposite power-liability relation. *Illustration*: *B* makes his contract offer to *A*, thereby creating a power of acceptance in *A* in place of the opposite disability which *A* had before.
- (b) a change from a power-liability relation to the opposite immunity-disability relation. *Illustration*: *B* revokes his contract offer to *A* before *A* accepts, thereby terminating *A*'s power of acceptance and reinstating the opposite disability that *A* had before *B*'s contract offer was made.
- (c) a change from a privilege-no-right relation to the opposite right-duty relation. *Illustration*: *A* exercises his power of acceptance by accepting *B*'s contract offer before it is revoked, thereby creating contract rights and duties in place of the pre-existing no-rights and privileges.
- (d) a change from a right-duty relation to the opposite privilege-no-right relation. *Illustration*: a landowner gives a hunter his permission to enter his land for hunting, thereby extinguishing the hunter's duty not to enter and replacing it with the opposite privilege of entering.

Any power involves at least one of these four kinds of changes in legal relations. And whenever a person's volitional act would result under the rules of law in any of these four kinds of changes in legal relations, it is then proper to say that the person has a power.

Typically, powers are thought of as involving a large number of changes in legal relations. For example, an owner of property has the "power" to abandon the property, thereby extinguishing myriads of legal relations and replacing them with their respective opposite relations.³⁴ It would be more in line with Hohfeld's atom-splitting principle

³³ See Hohfeld 23, at 55-57. Corbin uses the term "power of revocation" in his treatise. 1 Corbin, Contracts § 38 (1950).

³⁴ Hohfeld himself spoke of abandonment as though it involved only one power:

Many examples of legal powers may readily be given. Thus, *X*, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object,—e.g., the power to acquire title to the latter by appropriating it. (Hohfeld 23, at 51.)

to view the abandonment of property as the exercise of many powers simultaneously, that is at least one power for each change in legal relation that occurs when the abandonment is accomplished. Indeed, Hohfeldian powers must be broken down in this manner if we are to maintain the notion of fundamental legal relations as involving pairs of specific people. Before abandonment the owner of property has literally millions of legal relations with millions of other people with respect to the property. For example, each other person has a duty not to convert the property to his own use, and the owner has the rights correlative to all of these duties. Once the abandonment is accomplished, most of the legal relations involving the abandoned property will be extinguished and the opposite relations will come into play. Thus, when the owner abandons his property he loses his rights that others not take the property for their own use. There will be privilege-no-right relations where there once were right-duty relations. Analytically, the owner's "power of abandonment" should be regarded as including separate powers to change these specific right-duty relations into the opposite privilege-no-right relations.

Another complicating feature of powers is that they can change legal relations between people other than the holder of the power. The power of an agent who negotiates a contract for his principal is an example. He can accept a contract offer on behalf of his principal and thereby create right-duty relations between his principal and a third party. His power thus affects legal relations between other people. Analytically, the agent has at least two powers in this kind of situation: a power as against his principal and a power as against the third party. The principal has a correlative liability as does the third party.³⁵

Hohfeld's usage of the term "liability" might seem strange in some contexts. Lawyers are accustomed to using the term to mean the specific kind of liability that one has when another has a good cause of action against him. Hohfeld's usage includes this meaning of "liability," but it includes more besides. If *A* has a good cause of action against *B*, he has, in Hohfeld's terms, a "power" to bring the compulsory processes of law against *B*, and *B* has the correlative *liability*. When *A* exercises his power and succeeds in getting a court judgment against *B*, the legal relations between the two of them will change (as is characteristic of a power-liability relation). Once judgment is entered *A* will have a battery of new powers relating to execution, for example, and *B* will have correlative liabilities.³⁶ Thus, Hohfeld's meaning of "liability" includes the conventional meaning of that term. But his usage is broader; a person has a "liability" any time his legal relations can be changed

³⁵ Hohfeld 23, at 60-61.

³⁶ Hohfeld, at 59-60; Hohfeld, *The Relations Between Equity And Law*, 11 Mich. L. Rev. 537 (1913), reprinted in Hohfeld 115, at 129, 131-35, 148-49 nn. 24, 27.

by the voluntary act of another person who is said to have the correlative power.

Similarly, Hohfeld's usage of the term "immunity" is somewhat broader than the most common usage. "Immunity" is normally thought of as pertaining to the compulsory processes of courts, but Hohfeld applied the term whenever a legal relation is not subject to change by the voluntary act of another person.

Conclusion

Hohfeld's fundamental legal relations are essentially shorthand ways of describing the legal effects of acts done by human beings. The ultimate legal effect is a court judgment. Generally, courts enter only two kinds of judgments: those *granting* remedy (judgments imposing civil liability) and those *denying* remedy (judgments of nonliability). Hohfeld's right-duty relation designates a judgment granting relief as the legal effect of an act, while his privilege-no-right relation designates a judgment denying relief as the legal effect of an act.

These two fundamental relations permit us to describe the liability or nonliability (in the narrow conventional sense of liability to compulsory process) of pairs of people, one to the other, with respect to any act that one of them might do. If *A*'s doing of an act would render him civilly liable to *B*, we say *A* owes *B* a duty not to do the act, and so on. Given any pair of people and any act, we can completely describe the liabilities and nonliabilities that would obtain should the act be done or not done. For example, if the act is something *A* might do then at least one of the following relations obtains:

- (1) *A* owes *B* a duty not to do the act (Therefore, *A* is not privileged to do the act, but he is privileged not to do it).
- (2) *A* is privileged to do the act (Therefore, *A* owes no duty not to do the act; he may or may not be privileged to do it).
- (3) *A* is privileged not to do the act (Therefore, *A* owes no duty to do the act; he may or may not be privileged to do it).
- (4) *A* owes *B* a duty to do the act (Therefore, *A* is not privileged not to do the act, but he is privileged to do it).³⁷

Hohfeld's right-duty and privilege-no-right relations are fairly manageable since the number of "legal effects" they refer to are limited to only two: liability and nonliability (to court judgment). The principle behind Hohfeld's power-liability and immunity-disability relations is much the same (they also describe "legal effects" of voluntary acts), but these relations are not nearly so manageable since the "legal effects" involved are almost unlimited in number. The legal effects involved

³⁷ Note that situations (2) and (3) are not necessarily inconsistent. Situations (1) and (2), (3) and (4), and (1) and (4) are inconsistent.

here are changes in legal relations, but there are myriads of legal relations in the world.

In theory it should be possible then, to completely describe the legal effects of any act of any person by following Hohfeld's method of analysis, by breaking legal relations down into separate two-party relations, and applying his fundamental concepts. Such an analytical task is, of course, far beyond the capacity of the human mind, not because it is hard to understand, but because the detail becomes so overwhelmingly intricate, especially when attention is turned to power-liability and immunity-disability relations and the remote "legal effects" they describe. This work is for computers if it is ever to be done. And now that the computer revolution is fully under way, even to the point of entering the sacred and conservative legal world, Hohfeld's work seems to be acquiring a new relevance. It would be useful in bringing the analytical power of computer technology to bear on the confused maze of legal terminology.

Heretofore, Hohfeld's work has been invaluable in providing deep insights into legal terminology and the use of language in formulating rules to guide decisions. It has helped us to see the utter barrenness of legal terms like "title," "due process," "privity," and "ownership."³⁸ It has exploded the myth that equity did not contradict the doctrines of law.³⁹ It has destroyed the concept of "in rem" rights, duties, etc.⁴⁰ All legal terms, all legal concepts are supposedly designed to help courts decide cases. If the concepts are to be helpful at all, they must have some reference to "legal effects," and ultimately to the "ultimate legal effects" of granting or denying remedial judgments. Accordingly, it was Hohfeld's thought that any legal term can be analyzed in terms of his fundamental legal relations, for they comprise a precise system for describing legal effects at all levels of remoteness. "Title," for example, is not a thing. If the term has any meaning at all, the meaning lies in the legal effects of "having title," that is, in the complex of rights, powers, privileges, immunities, etc., that the law gives to a person who has title to something. The insight that Hohfeld's analytical system provides has already been immensely valuable for understanding legal concepts. Now that computer technology is opening new dimensions, it may be possible to pursue Hohfeld's work with greater precision and in closer detail. If Hohfeld's analysis carried on by hand has allowed us to sweep great clouds of fog from our legal terminology, just imagine how much cleaning could be done if Hohfeld's system were turned over to computers.

³⁸ See Patterson, *op. cit. supra* note 4, at 139.

³⁹ See Hohfeld 115.

⁴⁰ See Hohfeld 64.