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Roy L. Stone

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An Analysis of Hohfeld

The words commonly used to describe legal relations frequently convey multiple inconsistent meanings. The confusion that results from this inherent weakness in the language of the law has produced many attempts to reduce that language to terms that suggest a single idea. A most remarkable theory of reduction was expressed in Professor Hohfeld's formulation of a logical system of language based on fundamental legal conceptions. In this Article, Mister Roy L. Stone critically examines these conceptions and the language employed in establishing them. He concludes that Hohfeldian logic is based on certain invalid assumptions that necessarily preclude its implementation in the resolution of legal issues.

Roy L. Stone*

I. LANGUAGE AND META-LANGUAGE

We have come to a time and a place where we must consider the logic or that artificial reason of the law that is embodied in what Hohfeld calls fundamental legal conceptions. In ordinary legal usage, this logic may be found in the various terms contained in the entries of Stroud's Judicial Dictionary or in Words and Phrases Judicially Defined. A list of such terms could be prepared after the manner of Professor Austin's advice in his lecture on “Excuses,” and a description of the use of each such term in the ordinary range of its application in the judicial process should disclose what was formerly called the logical space or the logical geography of the word. We will learn how each word is used, in what relation one word stands to its neighbor, and in what conditions a particular word may be appropriately used. Whether we adopt this methodology is a matter of choice; we will choose this method if we accept, as part of our general philosophic outlook, several propositions: Logic is posterior, not prior, to language; logic issues out of tautologies rather than language, for logic is not empirically derived. Language possesses an open texture and is based upon different strata. As Strawson argues,


language functions independently of logic and although logic may test the truth and falsity of statements its does not test their meaningfulness.  

There is an alternative methodology based upon other axioms of choice. Language and logic and mathematics issue respectively out of definitions, tautologies, and identities. Language and logic are conjoined in the sense that language is somehow derived from logic, whose truth functions stand prior to language and determine the senselessness of propositions. This is the argument of Quine, and of Wittgenstein in the Tractatus. It leads to the view that once we have derived what, by analogy to Hohfeld's language, can be called fundamental logical conceptions, language and its usage may be tested by applying the laws of logic as a yardstick or met wand to test the truth or falsity of linguistic statements, propositions, and the like. The usefulness of such a test may depend on the completeness of the terms of the test itself and on the applicability of the test to the subject tested. Russell's account of the syllogism in A History of Western Philosophy is in point:

Apart from such inferences as the above, Aristotle and his followers thought that all deductive inference, when strictly stated, is syllogistic. By setting forth all the valid kinds of syllogism, and setting out any suggested argument in syllogistic form, it should therefore be possible to avoid all fallacies.

This system was the beginning of formal logic, and, as such, was both important and admirable. But considered as the end, not the beginning, of formal logic, it is open to three kinds of criticism:

1. Formal defects within the system itself.
2. Over-estimation of the syllogism, as compared to other forms of deductive argument.
3. Over-estimation of deduction as a form of argument.

Hohfeld's analysis must be dealt with in some detail, not merely because it is a remarkable attempt to reduce legal propositions to some form of logical synthesis, not merely because it attempts to rid "le Mot Juridique" of its sens multiples, but because it contains certain fundamental errors. These are (1) the somewhat naive assumption that the logic of the system can act as a yardstick or met wand, and (2) the very basis of the

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2. STRAWSON, INTRODUCTION TO LOGICAL THEORY (1952).
4. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1951).
5. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 23 YALE L.J. 16 (1913).
analysis, which is some sort of desire to rid legal thought and legal language of words that form too convenient a part of argument and judgment. An example is the attempt to describe contracts, options, etc. as jural relations. In describing the creation of a logical language whose constituent elements are, in the order of their enunciation, Names, Constants and variables, Functions, Propositions and propositional functions, Improper symbols, connectives, Operators, quantifiers, the Logistic method, Syntax and Semantics, Church points out the difficulty of describing logic without using a meta-language. By this he means that to make explicit how his logical symbols work he must use some language and by regression ultimately ordinary language.

Hohfeld fails to see that meta-languages must likewise be used to describe his fundamental legal conceptions. He also ignores the necessity in the judicial process of one of the functions performed by a meta-language, namely the translation of actions, events, facts, situations, and things described in ordinary language into legal terminology. This may well be a haphazard, illogical, random process, a process contained in the rules of pleading and resulting in criteria that Hohfeld dismisses in delineating the facts in issue.

There is some uncertainty as to the criteria he uses, or the criteria that can be found for his use of "constitutive facts" and "evidentiary facts." The rules of pleading prescribe that a party must not plead evidence or law, although the latter rule dates back to the middle of the nineteenth century. No distinction is noted, if there is any distinction, in the judicial process at a time when the special pleader was at the height of his practice, before the Hilary Rules of 1845 and before the 1868 edition of Bullen and Leake ceased to be the most important book in the barrister's library. Hohfeld, thus, fails in part to relate, describe, transform the "logical irregularities of language" when he makes his logical translation into fundamental legal conceptions.

A reference to the procedure followed by logicians in setting up an artificial language will provide a basis for a criticism of the method of logical translation employed by Hohfeld. In his *Intro-

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7. CHURCH, INTRODUCTION TO MATHEMATICAL LOGIC 1–68 (1956).
duction to Mathematical Logic, Church describes the procedure to be used in setting up a formalized language. Initially, a familiar language, such as English, must be adopted, much as it would be in writing a Latin grammar in English. The establishment of a formalized language, however, would require greater precision in the statement of the rules of the formalized language, with fewer irregularities and exceptions. Moreover, the construction of such a language would be activated by the “idea that the rules of the language being constructed embody a theory or system of logical analysis.”

As Church indicates, the device of describing one language in terms of another is used not only in constructing formalized languages but also in theorizing the objectives of a formalized language, since the theory behind the use and principle of a formalized language is often more important than its actual and practical use as a language. When one language is employed to talk about some other language, Church calls the latter the object language and the former the meta-language.

In setting up a formalized language, accordingly, a certain portion of the English language, not limited by precise definitions, would be employed as a meta-language. This meta-language would be sufficiently flexible to permit a formulation of general instructions for the manipulation of concrete physical objects. It is thus a language that deals with matters of everyday human experience and that goes beyond such matters only in that no finite upper limit is imposed on the number of objects that may be involved in any particular case, or on the time that may be required for their manipulation according to instructions.

The new language, therefore, is not defined by translating its expressions (sentences, names, forms) into corresponding English expressions. As Church points out, this would impose the logically unsatisfactory features of the English language on the new language. A more desirable approach is to obtain an uninterpreted calculus or logistic system by excluding all considerations of meaning from the purely formal part of the language.

Church has adopted a detailed method of realizing this objective. First he would specify the language by listing single, indivisible symbols, which he calls primitive symbols. A finite linear
sequence of primitive symbols is called a formula, and rules are given by which certain formulas are designated well-formed formulas, to be regarded as the only genuine expressions of the language. After some of these well-formed formulas are chosen as axioms, primitive rules of inference (or rules of procedure) are laid down. From these rules, based on appropriate well-formed formulas, a well-formed formula is immediately inferred as a conclusion.13

A finite sequence of one or more well-formed formulas is called a proof by Church, if each of these well-formed formulas is an axiom or is immediately inferred from preceding well-formed formulas in the sequence by means of one of the rules of inference. This scheme of delineating the primitive symbols of a logistic system, the rules that transform certain formulas into well-formed formulas, the rules of inference, and the axioms of the system is Church’s “primitive basis of the logistic system.”14

II. CRITICISM OF HOHFELD’S META-LANGUAGE

I now wish to examine, and so criticize, the way in which Hohfeld derives his fundamental legal conceptions from the use of legal language, as found in judgments and textbooks. Hohfeld describes, in a Proustian or nonlegal manner, the operative facts—that is, the facts, events, actions, and situations—of the case in question, as follows.15

Passing now to the field of contracts, suppose A mails a letter to B offering to sell the former’s land, Whiteacre, to the latter for ten thousand dollars, such letter being duly received. The operative facts thus far mentioned have created a power as regards B and a correlative liability as regards A. B, by dropping a letter of acceptance in the box, has the power to impose potential or inchoate obligation ex contractu on A and himself; and, assuming that the land is worth fifteen thousand dollars, that particular legal quantity—the “power plus liability” relation between A and B—seems to be worth about five thousand dollars to B. The liability of A will continue for a reasonable time unless, in exercise of his power to do so, A previously extinguishes it by that series of operative facts known as “revocation.” These last matters are usually described by saying that A’s “offer” will “continue” or “remain open” for a reasonable time, or for the definite time actually specified, unless A previously “withdraws” or “revokes” such offer.

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13. So long as we are dealing only with a logistic system that remains uninterpreted, the terms such as “premise,” “immediately infer,” and “conclusion” have only such meaning as is conferred upon them by the rules of inference themselves.
14. Church, op. cit. supra note 7, at 50.
15. Hohfeld, supra note 5, at 49–50.
This passage clearly demonstrates the sort of logical mistranslation which fosters the weakness in Hohfeld's conclusion that the fundamental legal conceptions are those eight concepts, right, duty, privilege, etc. "Between the conception and its articulation is a gap which no logic can jump" might be an excuse for an account given by Einstein in relation to his own somewhat platonic mode of thinking. It will hardly do to justify or excuse Hohfeld's analysis in view of his own stringent requirements for the opinions and judgments of others.

Operative or constitutive facts should be considered no more than the generalized description of a rule of law or a combination of rules such as offer, acceptance, title, salvage, patent, mens rea. Hohfeld must really intend the same, although his description of operative facts is obscure. For example, he states: "Thus, X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest (rights, power, immunities, etc.) through that totality of operative facts known as abandonment . . . ."\(^\text{16}\)

Hohfeld describes the purposes of his analysis as entailing the reduction of what seems to be simple into greater clarity by making more searching, complicated, and detailed inquiries and by stating that, as a practical matter, his analysis will help in deciding legal cases.\(^\text{17}\) It was Hohfeld's submission that the "right kind of simplicity" could result only from a more thorough and selective analysis. His stated purpose was not "merely philosophical." Rather, he chose to emphasize "certain oft-neglected matters," with the intention of facilitating an understanding and solution of the practical problems of the law. With this end in view, he was chiefly concerned with the basic conceptions of the law — "the legal elements that enter into all types of jural interests.

Hohfeld began by stating two reasons for the inveterate failure to distinguish between the legal and nonlegal components of a given problem. First, the mental processes involved in physical and mental relations on one hand and purely legal relations on the other, are extremely difficult to differentiate. A second reason was the ambiguity and looseness of legal terminology, of which he gave the following illustration.\(^\text{18}\)

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16. \textit{Id.} at 45.
17. Whether this statement is intended to be an assumption or a proof is unclear.
The word “property” furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a “blended” sense as to convey no definite meaning whatever.

Hohfeld also points out the evils of “figurative” and “metaphorical” uses—that is, the confusion of the thing and the aggregate of rights connected with, or related to, the thing. This is a practice inveterate in law, and Pollock and Maitland¹⁹ and Chal lis²⁰ have marked the distinction. Whether this sort of anthropomorphism and personification can now be usefully removed is questionable. This matter will be considered later.

Hohfeld next discusses the same point with respect to contract, in which he elaborates the distinction between constitutive facts and the jural relation, without disclosing any distinguishing criteria between one set of jural relations, grounded in a set of constitutive facts, and another set of jural relations, grounded in the same set of constitutive facts. For example, no standards are established to determine whether an action lies in contract or in tort, or whether the facts support a contract or an estoppel. Moreover, the distinction between, and the criteria for deriving, constitutive facts and evidential facts are left unclarified. Hohfeld defined “Operative, constitutive, causal, or ‘dispositive’ facts” as those which, “under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously.”²¹

The definition of operative or constitutive facts is also unclear. It seems to import the generalized statement of rules of law rather as a textbook would make propositions about law. They are somewhat aphoristic and have value only insofar as they relate to the rest of the law, and Hohfeld seems to realize this in the next suggestion that negative operative facts are important. Negative operative facts are no more than those facts of law, generalized somewhat aphoristically, which are omitted from the propositions contained in the operative or constitutive facts. The exam-

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¹⁹ E.g., 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 3–4, 32 (2d ed. 1898).
²⁰ CHALLIS, REAL PROPERTY 1–3 (3d ed. 1911).
²¹ Hohfeld, supra note 5, at 25.
ples Hohfeld gives illustrate this and we might ask why the rest of the law should not be given as examples of nonoperative facts, for propositions of law are relative and so correlated that they are understood within the complex of their relations but cannot be isolated and explained outside this complex. The laws are merely functions in a calculus. Now let us look at one of Hohfeld's examples:  

For example, in the creation of a contractual obligation between A and B, the affirmative operative facts are, *inter alia*, that each of the parties is a human being, that each of them has lived for not less than a certain period of time, (is not “under age”), that A has made an “offer,” that B has “accepted” it, etc. It is sometimes necessary to consider, also, what may, from the particular point of view, be regarded as negative operative facts. Thus, e.g., the fact that A did not wilfully misrepresent an important matter to B, and the fact that A had not “revoked” his offer, must really be included as parts of the totality of operative facts in the case already put.

That operative and indeed nonoperative facts are no more than generalized statements of legal rules appears from Hohfeld's suggestion that possession, capacity, domicile, etc., are generic forms of operative facts. Why “possession” is generic or more generic, if that is possible, than “offer” is difficult to understand, and Hohfeld gives no criteria for his use of the Aristotelian formula from which specific and generic adjectives are derived. He states, for example, that in many situations “a single convenient term is employed to designate (generically) certain miscellaneous groups of operative facts which, though differing widely as to their individual ‘ingredients,’ have, as regards a given matter, the same net force and effect.” He further stated that, when employed with “discrimination,” the term “possession” was a word of this character as was the term “capacity,” the term “domicile,” etc.

Hohfeld next attempts to distinguish between operative facts and the time honored phrase, “facts in issue,” a term of art pleaders use to describe how, out of the averments in the pleadings, the issue on the facts was formulated. In other words, what constitutes the *res gestae*. The distinction between *res gestae* and evidence is well thought out, as are the rules of pleading. We know that since 1875 the law cannot be pleaded, and evidence could never be pleaded. How the *res gestae* is pleaded is partly a matter of art and partly a matter of law. What is relevant to the issue is the broad rule embodying the criteria for the materiality and particularity of averments. Hohfeld’s suggestions do not seem to

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22. *Id.* at 25-26.
23. *Id.* at 28.
strike at the point, nor does he prescribe any criteria upon which to make the distinction between operative facts and the facts in issue. It might be that operative facts, are merely those generalized rules of law that describe the facts in issue. If this were so it might be said that operative facts describe both the facts in issue and the evidential facts, for once ascertained from the evidence relevant to the issue, the evidential facts describe in some way or, as lawyers would say, prove the facts in issue. It should be reiterated that here there is no absolute and rigidly logical test, for the admissibility of evidence depends on its relevance to the issue, and the issue depends in part on the facts and in part on the law. A lawyer, in advising upon a case or settling the pleadings, continually shifts his attention from the facts to the law and from the law to the facts. How far this intellectual gymnastic can be directed by strict logic is difficult to assess. After all, thinking is not a philosophical activity, but psychological or physiological. The following quotation from Hohfeld should indicate why the above criticisms have been leveled against him:

In passing, it may not be amiss to notice that the term, “facts in issue,” is sometimes used in the present connection. If, as is usual, the term means “facts put in issue by the pleadings,” the expression is an unfortunate one. The operative facts alleged by the pleadings are more or less generic in character; and if the pleadings be sufficient, only such generic operative facts are “put in issue.” The operative facts of real life are, on the other hand, very specific. That being so, it is clear that the real and specific facts finally relied on are comparatively seldom put in issue by the pleadings. . . . A common fallacy in this connection is to regard the specific operative facts established in a given case as being but “evidence” of the generic (or “ultimate”) operative facts alleged in the pleadings.

An evidential fact is one which, on being ascertained, affords some logical basis—not conclusive—for inferring some other fact. The latter may be either a constitutive fact or an intermediate evidential fact. Of all the facts to be ascertained by the tribunal, the operative are, of course, of primary importance; the evidential are subsidiary in their functions.

24. Id. at 26–27.

25. It has already been noted that an “operative fact” is any fact the existence or occurrence of which will cause new legal relations between persons. If some repetition may be forgiven, Hohfeld insisted that a clear distinction should always be observed between the physical phenomena and the legal relations consequent thereon. The former were the world of the senses, the latter are intellectual conceptions. Operative facts were sometimes described by him as “investitive,” “constitutive,” “causal,” and “dispositive.” In Hohfeld’s system the “extinguishment” of a legal relation is necessarily the creation of a new one. See Corbin, Legal Analysis and Terminology, 20 Yale L.J. 168 (1919).
As has been indicated, however, the clear-cut distinctions between operative facts and evidentiary facts, between facts and law, which Hohfeld insisted upon, are not and cannot be made in practice.

The analogy of a meta-language is useful to show some of the difficulties which Hohfeld does not seem to have resolved in his use of operative or constitutive facts and negative operative facts. The examples he gives in describing the operative facts of a contract seem to correspond to the descriptive requirements of any textbook on the law of contract. Pollock,\(^\text{26}\) for example, describes offer and acceptance by using technical legal words, intermingled with words of ordinary language. Suppose a textbook is written so succinctly as Withers' *Reminders on Reversions* or Gover on *Title*, where every descriptive statement looks like a rule of law. These statements supposedly would be the operative facts in a situation where the acts, events, and situations are all subsumable, abstractable, or somehow describable under an established rule of law, precisely and completely articulated in legal language. Yet, it is very rare, if indeed it is at all possible, that this should be the case. The following case would be of this order: An infant domiciled in France offers a lunatic resident of the United Kingdom, but domiciled in New York State, a chattel real situate in Scotland at a price certain, which he accepts. Now if these are the operative facts, their logico-legal translation would entail reference to French law, English law, Scots law and the law of the state of New York, all private, international, and domestic law.

Examples of capacity, infancy, and domicile have been deliberately chosen because it is not clear whether Hohfeld's fundamental legal conceptions, the bare matrix of correlatives and jural opposites, right, duty, privilege, no right, etc. adequately describe what, in Roman law, was a large bulk of jurisprudence — the law of persons. Again, whether an equally important part of Roman law and early English law, the law of actions, can adequately be described by this matrix is questionable. The bare statement that right is the correlative of duty and the opposite of no right explains nothing. Even if we search for right, duty, no right and privilege, power, immunity, liability and disability within the judicially defined language of the law, or in the other authorities of the law, the legal game as played by judges and jurisconsults alike will add nothing to an understanding of the construct of these fundamental legal conceptions.

Even Wittgenstein’s ukase “Don’t ask for the meaning, ask for the use,” will reveal neither the meaning nor the use, nor indeed the usage of these fundamental legal conceptions in all those rules that describe the *placita legum* of, say, English law or Roman law. This is simply because, within these jurisprudential systems, powers, rights, and duties, for example, are described more after the manner of Salmond27 than of Hohfeld. Lord Lindley’s opinion in *Quinn v. Leatham*,28 so criticised by Hohfeld, at least illustrates legal usage. From legal language, then, it is not possible to derive Hohfeld’s bare matrix without the use of a meta-language, in Church’s sense of the word as described above.

Indeed, Hohfeld has to resort to such a meta-language to explain his matrix and how it works. There is nothing objectionable in this procedure, so long as it is realized that there are different levels of logic, that there are first, second, and third order statements, and that there are hidden difficulties in making logical translations, and so in making linguistic translations. In considering how far Hohfeld’s matrix does for a logico-legal language what the truth functions of logic do for ordinary language, Hohfeld’s meta-language must be analyzed.

Before analyzing Hohfeld’s meta-language, however, another method of deriving logic from legal language deserves mention. It has been suggested that the verbal forms of legal statements should be analyzed, and their fundamental constructs revealed by reducing the statements to primitive, in Russell’s sense, relations. Section 1 of the Larceny Act (1916) or section 40 of the Law of Property Act (1925) could be reduced to such forms, and the terms “must,” “may,” “ought,” “it is forbidden,” may form the basis of legal utterance. This procedure is, to some extent, related to the lessons of legal history from Maitland’s aphorism on the forms of action, Dr. Glanville Williams’ “Foundations of Tortious Liability,”29 and Professor Daube’s *Forms of Roman Legislation*.30 Professor Daube distinguishes between conditional and relative clauses, imperative and infinitive, the distinction between *opportere* and *necesse est*. He also draws a distinction between the concept “right” and “duty,” not from any correlation or opposition of these legal concepts, but from the mode of their expression. “Hence it [*opportere*] may refer not only to what is necessary, to

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duties, but also to what is permitted, to rights." This method of form criticism Professor Daube has applied to possession, in his "Concerning the Classification of Interdicts." It leads to the germ of an idea stated by Mr. Cohen, that it may be more fruitful to create a modal logic by reference to "may" and "must" than to create some bare matrix of rights, duties, etc.

In the Ship Money case, an early use of form criticism appears. The issue in that case was whether the statute De Tallagio was a statute, since it was not entered on the Parliament roll. The court resolved the issue by referring to the fact that De Tallagio contains the words statutum est. If the form of a verb, or as in this case, the words used in the statuere, rather than the constituer sense, can help to determine a legal concept, and Maitland is full of talk about the use of words in early English law, a systemic analysis of the words used in legal decision, after the manner of Russell and Whitehead's procedure in Principia Mathematica, may yield a fruitful account of the logic of the law. The usefulness of comparative law is unclear, and, as in other disciplines, alternate logics and alternate geometries may be found, or, indeed, alternate theories which are at the moment irreconcilable, such as relativity theory and quantum mechanics. Moreover, legal usage may be so random and undisciplined that no logic can be derived from it.

Hohfeld's "fundamental legal conceptions" and the meta-language he uses may now be defined and described. He begins as follows:

The strictly fundamental legal relations are, after all, sui generis; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to

31. Ibid.
32. Daube, Concerning the Classification of Interdicts, 6 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUE 23 (1951).
34. King v. Hampden, 3 State Trials 825 (Ex. 1637) (Howell ed. 1816).
35. 1897, 25 Edw. 1, cs. 5, 6.
36. E.g., 2 POLLOCK & MAITLAND, supra note 7, at 29, 30, 223, 571.
37. RUSSELL & WHITEHEAD, PRINCIPIA MATHEMATICA (2d ed. 1925).
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exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

Jural Opposites

<table>
<thead>
<tr>
<th>Right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>no-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
</tr>
</tbody>
</table>

Jural Correlatives

<table>
<thead>
<tr>
<th>right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>duty</td>
<td>no-right</td>
<td>liability</td>
<td>disability</td>
</tr>
</tbody>
</table>

Rights and Duties. As already intimated, the term “rights” tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities. 38

At the outset, Hohfeld’s procedure seems to be optimistic, but the use of “exemplify” here, considering the cases cited, is somewhat curious, for the Correlatives and Opposites do not square with the authorities. Hohfeld seems pre-eminently, and perhaps properly, concerned with the inconsistencies of judicial usage and definition. Whether this matrix would be more illuminating if it reconciled in some logical scheme these differing uses instead of distinguishing them, will remain to be seen. He cites the lexicographer Walker’s definition of “right” as the starting point of his discussion, and this only illustrates the richness of the usage of the word “right.” 39 A juristic, linguistic analyst or phenomenalist would, after the manner of Professor Austin’s procedure in his lecture on “Excuses,” 40 thumb through the dictionary searching out the entries under “property, interest, power, prerogative, immunity, privilege,” which constitute Walker’s definition of “right.” Having done this, he would test, in judicial language or in the language of the legal game, the appropriate uses of these words, in an attempt to discover under what conditions they are characteristically used. “Right” would therefore be contrasted with not merely “privilege,” “power,” and “immunity,” but with “property,” “interest,” “prerogative,” etc. Hohfeld’s comment on the dictionary definition is in itself ambiguous. Yet he appears to criticize it because of its “ambiguity.”

Ambiguity, as Professor Hart has pointed out, is not the only

39. Ibid.
40. Austin, op. cit. supra note 1.
source of difficulty in legal language. In Professor Hart’s example, a testator leaves his “vessels” to his son: “If one wants to know whether this includes his flying-boat, it is the vagueness of ‘vessel’ which is the source of the trouble; but if the question is whether the bequest refers to the testator’s boats or his drinking-cups, then ambiguity is responsible” for the confusion. Whether vagueness or ambiguity lies at the bottom of Hohfeld’s examples is questionable, and when Hohfeld sets out his matrix he may be giving the word “right” or “duty” such an artificial construction that he is performing some linguistic translation that he does not or cannot describe. “Recognizing, as we must, the very broad and indiscriminate use of the term, ‘right,’ what clue,” he asks, “do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning?” Yet Hohfeld leaves unstated his criteria for definite and appropriate meaning.

It is consonant with legal usage that “right,” as Professor

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41. Hart, Dias and Hughes on Jurisprudence, 4 J. Soc. Public Teachers of L. (n.s.), 143, 144 (1958). Professor Hart also discusses other “cardinal features of language” which are relevant in the present context.

Thirdly: We are tempted, when we are faced with words, to look round for just one thing or quality for which the word is supposed to stand. It is often wise to resist this temptation. Perhaps the words stand not merely for one kind of thing but for a range of diverse, though related things. We should not assume whenever we use the expression “possession” that this must on all occasions refer to the same state of affairs, and the same is true of words like “crime” and “law” itself. Moreover, words like “right” and “duty” do not directly stand for any states of affairs.

Fourthly: For any account descriptive of any thing or event or state of affairs, it is always possible to substitute either a more specific or a more general description . . .

Fifthly: Obsession with the notion that words must always stand for the same “qualities” or the same set of qualities whenever they are used has stimulated two contrapuntal tendencies. The first is to insist that words like “possession” or “law” must, in spite of appearance, stand always for the same common qualities and the diversity is only apparent: this leads to the imposition on the diversity of the facts of a spurious “constructive” or fictitious unity. The second tendency is to insist that only some one of the range of cases in which a word is used is the proper or “real” meaning of the word . . .

Id. at 144–45.

42. Ibid.

43. Hohfeld, supra note 5, at 31.
Daube has pointed out, entails the notion of “it is permitted” and “duty,” “it is necessary.” When Hohfeld states the clue, he admittedly correlates “right” with “duty,” but in doing so, he has to describe the correlation in a meta-language. How far he can be said to have empirically derived this correlation from the cases is unclear, particularly when he is driven to show that the opinion of Lord Lindley in *Quinn v. Leatham* is inconsistent with his own matrix. This conclusion seems to conflict with Hohfeld’s statement, recognizing as he must that broad and indiscriminate use of the word “right.” For this would seem to direct an analysis of its many uses, rather than a mere recognition of the random indeterminacy of the word and a subsequent confinement within the limits of his own matrix. It is significant that the answer to his question is derived from a “clue,” and that clue is said to be “duty.”

It is certain that even those who use the word and the conception “right” in the broadest possible way are accustomed to thinking of “duty” as the invariable correlative. As said in *Lake Shore & M.S.R. Co. v. Kurtz*:

“A duty or a legal obligation is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.”

It might be observed parenthetically that “ought” in this case does not correspond with Professor Daube’s “It is necessary” (“opportere”), which sometimes seems best translated by “must.” Hohfeld then illustrates, rather than exemplifies, his argument with the following case.

If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.

This example, for which no authority is cited, looks more like an illustration. It describes, in the language of ordinary speech, a situation without any constitutive facts and seems to effect Hohfeld’s own criteria of judging not of “material facts” but jural relations. If a contract is *functus officii* as soon as it is concluded and gives rise to legal relations, we must ask the same sort of question about “staying off the place.”

In considering the linguistic formula that will follow the words “right” and “duty” to illustrate that they are correlatives, two

45. Hohfeld, supra note 5, at 31–32.
46. 10 Ind. App. 60, 37 N.E. 303 (1894).
47. Hohfeld, supra note 5, at 32.
contrapuntal criticisms may be made. The first is to ask what sort of verb is represented or contained in “right” or “duty,” and must it always be of the same form, say, “may” and “must”? Radin’s restatement of Hohfeld employs the sort of verbs which may be consistently used in relation to the fundamental legal conception, primarily because Radin doubts that Hohfeldian language represents judicial language. Corbin, in his restatement of Hohfeld, uncritically transposes “right,” “duty,” “power,” etc. in linguistic formulae of verbs. Dr. Glanville Williams questions the validity of Hohfeld’s terminology, for reasons similar to those expressed by Radin. He suggests substituting the word “liberty” for “privilege,” and he further suggests that in the discussion of “privilege,” Hohfeld goes wrong. The immediate purpose of citing this Article is to show what caution must be exercised in making what may be called logico-legal translations and in propounding a test which Dr. Williams puts thus:

[I]n arguing from a concept to its correlative, the content of the concept must not be changed. . . . Wherever there is the possibility of fallacy, the content of the right should be stated in the same language as the content of the correlative duty, and vice versa. If the verbal formula be changed, this may give rise to the suspicion that the content of the concept has been changed, and consequently that there is a flaw in the reasoning.

To test whether an alleged “right” is a right in the strict sense, ask whether it has a legal duty correlative to it, and keep to the same formula when stating the duty. . . .

Applying this test, Dr. Williams goes on to show that the phrase “right of way” is a logical misnomer, since no correlative duty attaches to the person against whom the right may be exercised.

49. Corbin, supra note 25.
51. Id. at 1144–45.
52. Thus it is fallacious to argue that the “right” of a licensee to go upon land is correlative to a duty on the occupier not to set traps. Similarly the “right of way” (as, by way of easement) is not a right, because there is no duty of way. A person entitled to a right of way has not a right to walk, because the other is under no duty that he shall walk. If the dominant owner decides to stay at home and not walk, this would be no tort to the servient owner. The “right of way” is a liberty of way combined with the ordinary right not to be assaulted when exercising it and a right not to have the way obstructed.

There is another method of showing that “right of way” is a misnomer. No one ever has a right to do something; he only has a right that some one else shall do (or refrain from doing) something. In other
In equating "right" and "may," "duty" and "must," "power" and "can," Radin makes a useful point, but if he merely restates Hohfeld's substantive fundamental legal conceptions in a linguistic formula of verbal parts of speech, he may establish an empirical method without actually using it. This empirical method will derive from the way law or rules of law are stated in ordinary language; that is, the ordinary legal language partaking of the particular logic of the legal game. This, again, is what any logical account of the law must be based on, and a Russellian program, that is, the method of *Principia Mathematica*, must be adopted to derive the logic of the law. As noted above, the method outlined by Church is the one that should be followed.

Radin translates the essentials of Hohfeld's system of analysis into four basic forms.5

I.  
B ought to do a particular act that A desires him to do. . . .

II.  
B may refrain from doing a particular act that A desires him to do.

III.  
B ought to refrain from a particular act that A does not desire him to do. . . .

IV.  
B may do a particular act that A does not desire him to do.

These formulas are taken to be exhaustive and that they are exhaustive is one of the foundations of the system of analysis here presented.

Radin also points out that the first form could be expressed in terms of A's right against B, and the second in terms of B's right against A. He further asserts that these rights are quite dissimilar, in that the first is in the form of a demand, while the second might be called a privilege, liberty, or license. Yet, in legal literature, these terms generally are not used in the Hohfeldian sense.

In the discussion of Hohfeld's own matrix, certain arguments for preferring "liberty" to "privilege" will be explored. As has been suggested, judicial usage and the language of legal literature are too encrusted with unrestricted uses of "rights" and "duties" to

words, every right in the strict sense relates to the conduct of another, while a liberty and a power relate to the conduct of the holder of the liberty or power. A statement that a person has a right to do something generally means that he has a right in the strict sense not to be interfered with in doing it.


54. *Id.* at 1147–49.
fit any refined linguistic formula as arbitrary as "rights," "duties," "privileges," "powers," "liberties," "prerogatives," and "subjection." A linguistically analytical method, however, would reveal the hard lineaments of the central core of meaning, and having exposed the conditions under which it has its particular use, its proper use should also appear. This should suffice to prevent the unclearness, obfuscation, and obscurantism of judicial language.

Thus, self-discipline, rather than a restatement of old rules in new terms, is needed. If a logic is to be derived from the law, then a logic written in a new symbolism, freed from the overtones and undertones, the pastiche and melanges, of ordinary words of every day judicial utterance should be used. Such a symbolic logic needs a symbolic language to remove the difficulty, the vagueness, and the ambiguity of legal language.

Yet this symbolism will, like that of Russell, suffer from the stultifying reduction of words into the symbolism. For legal words, like ordinary language, have an open texture and are built upon different logics and have different strata. For example, Wittgenstein's *Green is Green* was translated into Berkley's paradox "I never read nor heard, that Lex was Rex; but it is common and most true, that Rex is Lex, for he is 'lex loquens,' a living, a speaking, an acting law: and because the king is 'lex loquens,' therefore it is said, that 'rex censetur habere omnia jura in scrinio pectoris sui.' " There is a richness about words which a symbolic language does not, because it is not expected to, translate. This richness of ordinary language is imported into legal language, so that the word "right" includes "liberties," "powers," "privileges," "prerogatives," "interest," etc. Perhaps the task is to discover how the uses of these words blend into one another, rather than to create artificial central cores of meaning, by reference to correlatives and jural opposites which themselves entail several unclarified words.

Bacon's "garland of the prerogative," in the Assize *Browneloe v. Michell*, included those things that the king complained were the subject matter of legal decision "more lately, than in the time of her late Majesty," that is to say his powers, privileges, prerogatives, and titles. Prerogative is used to explain the meaning of "right" in the reference to Walker's dictionary, quoted by Hohfeld. It is as hallowed in royal and ancient usage as "liberties" or "privileges," and how far it should receive some support in its

55. King v. Hampden, 3 State Trials 825, 1098 (Ex. 1637) (Howell ed. 1816).
claim to be a fundamental legal conception is something not canvassed in the literature. It does have some claim, although the prerogative of the crown could be thought to include all the fundamental legal conceptions. Yet in some senses, it is as much a right in rem, in the classic language of the law. The prerogatives to imprison per speciale mandatum domini regis, to proclaim law, and to pardon, for example, apply generally, like a duty in tort as defined by Professor Winfield. Similarly, seventeenth century thought on the liberties of the individual and the charter of liberties, included claims concerning absoluta proprietas in goods and land, which look like rights. The distinction Professor Berlin propounds in political theory, namely two concepts of liberty—liberty to and liberty from—and also may apply to legal language. Moreover, reducing the relative functions of all matters in that complex calculus of the law to a simple matrix of eight fundamental legal conceptions, each conception being written in a word of inordinately emotive content, seems indeed to be a labyrinthine meandering through an ingens silva.

Dr. Glanville Williams in his Article on "The Concept of Legal Liberty" suggests that "correlative" is sometimes confused with "corollary." A correlative, according to Dr. Williams, is one of two things having a reciprocal relation such that one of them necessarily implies, or is complementary to, the other; for example, husband-wife, parent-child, and right-duty. A corollary, on the other hand, is an immediate deduction from a given proposition, generally so obvious as not to require separate proof.

The use of "correlative" is, therefore, not entirely accurate,

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57. Winfield, Torts 7-9 (Lewis ed. 1954).
59. It is in the relation of these terms to each other that Hohfeld's terminology is most in need of revision. He spoke of A's right and B's duty in I, as "correlatives" of each other. The difficulty in the use of this term is not merely terminological... The difficulty arises from the fact that Hohfeld really regarded them as correlatives, that is to say, as two separate things united to each other. The union was, to be sure, indissoluble, but the two were none the less separable in discourse, if not in fact.

But that was error and a sin against the very analysis he was attempting. It gives a kind of reality to mere words which they must not be allowed, if we hope to reach realism in law. It also permits a specious and false emphasis to be placed on duties as against rights.

Radin, supra note 48, at 1149-50.
60. Williams, supra note 50.
and a study of the use of the word "opportere" in Roman law, as Professor Daube explains in his *Forms of Roman Legislation*, is productive of two ramifications. One has already been suggested, namely that *opportere* might at one time mean "must," entailing "duty," and at another, "may," entailing "right," and whether "must" and "may" are correlative, can hardly be resolved without the criteria necessary to decide the question. This Hohfeld does not provide. The other ramification is that *opportere* could mean many other things, such as "it is fitting" or "it is needful." This entails a distinction between *fas* and *ius*. As duty, right, *fas* and *ius* could all be derived from *opportere* there seems no reason why "duty" should not be a correlative of "ius" and "right" the correlative of "fas"; and yet "fas," having as it does the overtone of older religious and moral reference, is more akin to "duty" while "ius" seems more akin to "right." "Droit" in French law means, indeed, both "law" and "right," and "ius" itself, in the phrase "ius civil" or "ius gentium," means "law." There is no reason to suppose that these overtones found in the Roman law are not present to some degree in modern jurisprudence. Certainly Becquart has found them in *Les mots a sense multiples dans le Droit Civil Francais*. Corbin explains correlatives and opposites as follows:

Correlatives
- right
- privilege
- power
- immunity
- duty
- no-right
- liability
- disability

Each pair of correlatives must always exist together; when some person (A) has one of the pair, another person (B) necessarily has the other. One of the terms expresses the relation of A to B; the other term expresses the relation of B to A.

It is significant that Corbin uses the word "necessarily" in respect of "correlative." The force of "necessarily," "necessary," and "necessity," however, is left undisclosed. If it is logically necessary, then the Hohfeldian analysis seems somewhat trivial, for under the guise of an all-embracing series of jural relations contained in the eight fundamental legal conceptions, he uses only one truth found in one of the two truth functions, material implication and entailment, but his discussion does not make clear which.

The correlatives seem then to amount to this:

"If right then duty" and
"If privilege then no-right."

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Or, perhaps right entails duty and privilege entails no-right. The jural opposites will comprise material non-implication or perhaps non-entailment, and will then amount to this:

<table>
<thead>
<tr>
<th>right</th>
<th>but not</th>
<th>no-right</th>
</tr>
</thead>
<tbody>
<tr>
<td>privilege</td>
<td>but not</td>
<td>duty</td>
</tr>
</tbody>
</table>

This suggests that legal rules may comprise other logical functions. Reference to Church's *Introduction to Mathematical Logic* will reveal the richness of even the formal languages with which logicians are concerned.

Hohfeld's insistence on keeping "rights" distinct from "privileges," "liberties," "powers," etc., and in keeping "privileges" distinct from "liberties," "licenses," etc., not only ignores the judicial usage that blends and blurs, perhaps not without significance, these different concepts, but he also fails to notice that there may be some logical relationship between "rights," "privileges," "powers," and "immunities," and these may be expressed in the truth functions. Where, for example, "rights" and "privileges" are blended in judicial language it is conceivable that disjunction-alternation might be used inclusively as follows:

\[(\operatorname{v}) \text{ Rights or privileges (or both);} \]

and where rights and privileges are used as identical words or equivalences, equivalence may be used as follows:

\[(\equiv) \text{ Rights if and only if privileges.}\]

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So called modal concepts might conveniently be divided into three or four main groups. There are the alethic modes or modes of truth. These are concepts such as the necessary (the necessarily true), the possible (the possibly true), and the contingent (the contingently true). There are the epistemic modes or modes of knowing. These are concepts such as the verified (that which is known to be true), the undecided, and the falsified (that which is known to be false). There are the deontic modes or modes of obligation. These are concepts such as the obligatory (that which we ought to do), the permitted (that which we are allowed to do), and the forbidden (that which we must not do).

As a fourth main group of modal categories one might add the existential modes or modes of existence. These are concepts such as universality, existence, and emptiness (of properties or classes).

There are essential similarities but also characteristic differences between the various groups of modalities. They all deserve, therefore, a special treatment.

Wright, *Deontic Logic*, in *Logical Studies* 58 (1957). My question is what are the modalities of legal language and my suggestion is that there is a legal logic similar to the outline of the deontic logic which Wright describes.

65. Church, *op. cit.* supra note 7.

66. The use of the English words "if," "implies," "equivalent" in these jural readings must not be taken as indicating that the meanings of these English words are faithfully reproduced in the table.
In discussing privileges and no-rights, however, Hohfeld states that "a privilege is the opposite of a duty, the correlative of a 'no-right,'" and emphasizes that the duty, of which the privilege is a negation, "is a duty having a content or tenor precisely opposite to that of the privilege in question."

This is a somewhat odd use of negation and any justification for its oddity should be found in the cases Hohfeld cites in support of his jural opposites "right," "no-right," "privilege," and "duty." To ask what it is like not to be X, when you seem fairly certain what it is like to be X, is a useful question in philosophy, as Professor Austin continually points out. It is not at all clear, however, that jural opposites or mere negation ask this sort of question. Significantly, there is no word for the jural opposite of "right." While the assertion that nomina sunt consequentia rerum, that where there is a word for it, there "it" is, or that where there is no word for it, there is no "it," may be no more than a pure nominalism, the fact that there is no judicial usage for the expression of "no-right" probably stems from the absence of such a conception.

Some brief remarks about Hohfeld's discussion of the judicial process can appropriately be made at this point. He ascribes to Pollock a view of jural relations that is discernible from his views on law and the judicial process. Hohfeld's fundamental legal conceptions likewise exhibit a view of the law derived from the American realist position that laws are the predictions of what the courts will do. This is a sort of intellectualised construction of

67. In the example last put, whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.

Hohfeld, supra note 5, at 32-33.

68. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering. The privilege is perfectly consistent with this sort of duty,—for the latter is of the same content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is of the precise negation of a duty to stay off. Similarly, if A has not contracted with B to perform certain work for the latter, A's privilege of not doing so is the very negation of a duty of doing so. Here again the duty contrasted is of a content or tenor exactly opposite to that of the privilege.

Ibid.

69. Id. at 42 n.59.
Coke’s answer to the King and his counsel in the case of Comendams “that when that case should be, he would do that [which] should be fit for a judge to do.”

Another matter for comment is Hohfeld’s method of ignoring judicial pronouncements where they appear to contradict his formal scheme, while relying on them as somehow justifying his choice of words, such as his preference for “privilege” over “liberty.” This is a minor criticism, but as has been shown, the vagueness which Hohfeld attributes to judicial pronouncement is inherent in the judicial process, the nature of the judicial decision, and the ratiocination, rather than the logic, upon which the law is based.

If, as Maitland thought, “rights” spring from remedies, it is not surprising that the rules which spring from “rights” do not prescribe for cases where there are no rights. In the same sense of non curat in the maxim de minimis non curat lex, the law does not concern itself with that aspect of facts, events, actions, situations, where the law gives no remedy. Kocourek refers to the “anomaic” in this sense, as did Bacon, when speaking of powers to impose taxes: “If they are illegal try them in the courts, if they are legal but grievous propound them in Parliament.”

The law of England and the law of the United States recognize no absolute ownership, since no judgments are in rem, except perhaps an action in rem against a ship. Because no judgments affect the world at large, but take effect inter partes and are res judicata only as between the litigants, these systems of law afford only a better “right” or “title,” or at most the best “right” or “title.” Thus, reference to A’s right or privilege or power or prerogative over a thing in respect of the world at large is outside the framework of legal conceptual analysis. At best, the paradigm case is that inter partes, and occasionally it is inter partes plus some not privy to the case but somehow bound by it. At all events it is never general. It is for this reason that Winfield’s definition of tort as a breach of a duty owed generally is difficult to square

70. 5 Sædding, The Letters and Life of Lord Bacon 367 (1869).
71. 1 Pollock & Maitland, History of English Law 360, 430 (2d ed. 1898).
72. Kocourek, Jurial Relations ch. X § 3 (2d ed. 1928).
73. “And according to these several natures of grievance, there be several remedies. Be they against law? Overthrow them by judgment. Be they too straight and extreme, though legal? Propound them in Parliament.” Bacon, Argument by the King’s Solicitor, in the Lower House of Parliament, in 1610, for Impositions by the Crown, 2 State Trials 390 (Howell ed 1810).
with those cases that form the foundation of tortious liability.\footnote{74. Winfield, \textit{op. cit. supra} note 57, at 5.}

To paraphrase the language of Dr. Donne, preaching before the King at Whitehall,\footnote{75. "God proceeds legally; Publication before Judgment." \textit{Donne, Selected Sermons} 112 (1919).} the law proceeds legally but its publication before and after judgment is not manifest to all. If the law is accepted as an unpredictable, complex calculus of rules, axioms, maxims, cases, out of which are discernible or derivable constants, variables, and functions, the primary concern must center on an analysis of the existing rules of law within their relativistic matrix. In such an analysis, it is difficult to find the concept "no right," and it therefore seems inordinately imaginative and logically unnecessary to manufacture one only for the sake of symmetry.

In \textit{Mogul S.S. Co. v. McGregor}, Hohfeld criticises Bowen's expression of the conflict between two equal rights—"the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others.

Hohfeld calls the plaintiff's right a "legal right or claim in the strict sense" and the defendant's a "privilege." He admits that construing the passage as a whole no difficulties arise; he further admits that the conflict or antinomy is only apparent to the judge and alleges that there is confusion in the "rapidly shifting meanings with which the term 'right' is used." Yet Hohfeld does not deny the validity of the decision. He fails to notice that although there are separate rules of the calculus which, considered in the ambiance of all the other rules of the calculus, might conflict, this causes no great inconvenience. The fact that he has to discuss the use of "privilege" in connection with license and liberty, and, had he animadverted upon cases in constitutional law, prerogative as well, renders the somewhat monadic, atomic reduction to eight fundamental legal conceptions highly artificial.

Judgments are not derived from the preordained, predestined patterns or configurations fitted into a jig-saw puzzle as in a child's game, but are derived from argument, ratiocination, calculation, all of which build a perspicuous picture, rather like a painter painting, than a child playing. There are, of course, different ways of painting, and judges, very often according to the nature of the case, and sometimes according to the intellect and learning of the judge, use different techniques — belong, as it were, to different schools. In the simple case the Realist school of painting best rep-
resents judgment, but Impressionism can produce as effective a result, and where the case is difficult, Pointillism may afford the best technique. Regardless of the choice of methods, the picture is one of a calculus.

What I am trying to say or rather the question I am trying to put is this. Does Hohfeldian analysis render it necessary, entitle a critic, or force a judge to assert that any decision is wrongly decided, any decision, that is, of the House of Lords which, according to English theory, is both binding and authoritative? If so the analysis must be false or at least faulty, for cases cannot be wrong so long as they stand. It may be that Hohfeldian analysis enables us to distinguish new cases from old, and this indeed is what Dias and Hughes, in their Jurisprudence, give as its merits.\(^7\) As previously noted, however, there are other, more practical techniques for drawing the distinction. The attempt to reduce logic to the truth functions, true and false, have only ended with the attempt by Lukasiewicz to show that there is a three-valued logic of truth, possibility, falsity. Aristotle’s “Categories” are not exhaustive, nor does he give any reasons for choosing his categories. The pre-Socratic fundamental substances such as air, earth, fire and water have long since given way to 92 or perhaps an infinite number of elements. Likewise, the attempt to limit eight fundamental conceptions is, as it were, stillborn, as Hohfeld himself has difficulty at the accouchment in reproducing privilege or liberty. He painfully labored to produce this point when he stated: “Thus far it has been assumed that the term ‘privilege’ is the most appropriate and satisfactory to designate the mere negation of duty. Is there good warrant for this?”\(^8\) He then cites authorities which do not provide the necessary proof.\(^9\)

The rest of Hohfeld’s essay is devoted to a similar discussion of the four other correlatives and jural opposites and this discussion neither adds to, nor detracts from, the criticism of the first four. This Article is an attempt to show that Hohfeld’s fundamental legal conceptions are not fundamental, or are fundamental only in the curious way in which Hohfeld makes them fundamental, that they are artificial, that they are probably infertile, that they are possibly impractical and that they are founded upon an American realism which itself misconceives the nature of law.

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77. Dias & Hughes, Jurisprudence (1957).
78. Hohfeld, supra note 5, at 38.
79. This matter is fully discussed in Williams, supra note 50.