

Fundamental Legal Conceptions by Wesley Newcomb Hohfeld (1946) Yale University Press

This very short book is a reprinting of the two articles in which Hohfeld explained his eight types of legal relations: *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 Yale Law Journal 16, and *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 Yale Law Journal 710. The book also contains a Forward by Arthur L Corbin, and an Introduction by Walter Wheeler Cook (itself reprinted from (1919) 28 Yale Law Journal 721).

Hohfeld died in 1918 without ever finishing his planned book on analytical jurisprudence.¹ *Fundamental Legal Conceptions* was an attempt to make his work more widely available, a service perhaps more effectively achieved now by HeinOnline. Hohfeld is usually remembered in connection with the eight legal relations he described, and the associated analysis of legal problems using them. This association is so strong that he has become eponymous in such expressions as “Hohfeldian power”. The legal relations were first outlined publicly in a footnote (n 33) in an article: *The Relations Between Equity and Law*, (1913) 11 Michigan Law Review 537; which was largely comprised of a synopsis produced by Hohfeld for his students, in other words in a note on his teaching materials.

Two aspects of Hohfeld’s work are prominent in this short tale of a book engendered by a jurist who struggled to finish what he was writing. Hohfeld developed the analysis for practical purposes, and he developed it to be used for solving practical legal problems.

Fundamental Legal Conceptions is essentially an expansion of a note to teaching materials, a note that became a two-part article that took four years to publish. This suggests Hohfeld developed his analysis because he needed it to explain the relationship between law and equity to his students. To explain this relationship it was necessary to discriminate clearly between law and equity. To discriminate clearly between law and equity it was necessary to come to an understanding of the nature of legal and more challengingly equitable property interests. The analytical framework was not produced for aesthetic or grandiose intellectual reasons, it was not an attempt to find the hallmark of ultimate truth and justice.² Rather, Hohfeld seems to have been faced with a familiar desperation, caused by trying to explain something that felt obvious to the orator, and yet was patently not at all obvious to the audience. Hohfeld found the language available to him inadequate to the task. His words betrayed him both through unintended ambiguity and inadequacy of discrimination. He was wrestling with language that could not discriminate between legal relations that had significant dissimilarities in a clear and consistent manner, language that produced

¹ See p. 4 of *Fundamental Legal Conceptions*; and n 1 of (1917) 16 Yale LJ 710

² Hohfeld was not trying to determine any necessary features of the legal system, he was not trying to do what Hillel Steiner was trying to do in *An Essay on Rights* (1994) Oxford. Hohfeld was not seeking “elementary particles of justice”, his legal conceptions were “fundamental” because they were, he believed, the simplest of legal relations. The idea is obviously reductionist, every legal thing should be capable of being analysed into its simplest component parts, and such analysis reveals the true nature of the legal thing. NE Simmonds rejects the attempt by Steiner to deduce features of justice in *The Analytical Foundations of Justice* (1995) 54 CLJ 306.

confusion and misunderstanding. Hohfeld wanted simplicity and economy in the relationship between technical expression and legal relation, one word to denote each legal thing. Overly broad ideas and language produced an apparent simplicity of statement, but only by hiding the unresolved ambiguity. Hohfeld needed the kind of simplicity that made the true legal situation and the available legal choices visible through precision of expression and analysis.

This practical genesis of the analysis, is consonant with the second aspect of Hohfeld's work, a consistent emphasis on the practical value of the analysis. Both are confirmed by the Introduction and the articles themselves.³ Hohfeld aimed to provide a tool, and the value of a tool is measured by its usefulness. The Forward confirms Hohfeld's conviction that his analysis was necessary if the law was to be understood. It also confirms that Hohfeld found it hard to gauge what his students would consider a reasonable scholastic load.⁴ A full analysis of any legal situation using Hohfeld's legal relations is laborious. Although it is mere supposition, upon re-reading Hohfeld, it is hard not to feel that one reason he did not publish more was that his analysis always lent itself to further elaboration. He felt it was necessary to classify and portray the familiar legal environment in his own terminology before he could commence his analysis. His introductory remarks, setting up the analysis that formed the focus of his enquiry could easily exceed in quantity the analysis itself.⁵ Even more threateningly the preparatory account of the law could reveal the desirability of restating neighbouring areas of law in order to fully contextualise the research. Hohfeld showed a characteristic tendency to struggle with the necessary task of selection of material that needed to be dealt with. Death intervened before the definitive account of his analytical method was ready for publication in book form. One wonders if a more selective elaboration of legal problems might have allowed for the production of more completed analyses. Perhaps Hohfeld suffered from a compulsion to continue his analysis beyond the practically useful, in an attempt to reach a state of intellectual fulfilment. If so his distress has equipped us with a technical vocabulary of elegance and power.

Before considering the familiar account of "jural relations" it is worth noting where Hohfeld started his analytical endeavour. Hohfeld started by distinguishing factual from legal relations; this conflation of fact and law continues unabated to the present. A piece of paper is described as a contract, a collision in a road as a tort, a house is described as the subject matter of property. Things, people, and the actions people perform are physical phenomena. The reasons people offer for their actions are psychological phenomena. Law is concerned with events, but law is not the same as those events. A contract is the set of legal consequences that flow from the existence of an enforceable agreement; a tort is present if the law imposes damages in the circumstances in which a collision took place; one does not own a house (a physical thing) one has various rights (legal relations i.e. claims, privileges, liberties,

³ See p 3 and pp 25-27 (pp 18-20 of (1913) 23 Yale LJ 16).

⁴ See p x which recounts a student rebellion at Yale sparked by Hohfeld's demands on the students.

⁵ The series of four articles on the liability of corporate shareholders is an example of this: (1909) 9 Columbia Law Review 285, and 492; (1910) 10 Columbia Law Review 283 and 520. The articles started out as an examination of the treatment of the sovereign power of California to impose liability upon the shareholders of companies registered outside of the State that incur liability within the State by the conflict of laws. Hohfeld found it necessary to deconstruct the limited company into its component parts in order to address the issue. The articles are fascinating but hardly well focussed.

immunities) in relation to the estate (a legal thing) that relates (a metaphysical conception) to the place (a physical thing) the house occupies. Hohfeld's distinction is clearly correct and equally clearly tedious and capable of causing confusion if invariably insisted upon. Hohfeld proceeds with a distinction between different types of fact, distinguishing operative facts, facts that are in issue, and evidential facts. Briefly, operative facts are those that determine legal relations, and are specific or particular. Facts in issue are generic in nature, and will be established through the proof of specific operative facts. Evidential facts are those proved before the court determining the case. Of most interest in this passage on facts is Hohfeld's treatment of such terms as "possession" and "domicile". He describes such terms as sets of operative facts that have a legal effect, one might say patterns of operative facts that produce some legal effect. With this exercise in discrimination complete Hohfeld has provided clear indications of the nature of "jural" things, and he starts his explanation of "fundamental jural relations".

Hohfeld was trying to establish the identities of the most basic of legal relations, from which all complex legal relationships must be constructed. To use a philosophical and scientific analogy, he sought the identity and nature of the atomic particles that are combined to make legal substance. Obviously, this enterprise rests upon a number of assumptions, and it is as well to quickly note a few of them. First, it rests upon the assumption that legal relations exist; that it makes sense to speak of a person having a claim over another person who has a duty to comply. That duty and claim are meaningful words that describe something in the real world. Second, it rests upon the assumption that legal relations have generic qualities; that a claim has features that it shares with other claims. That claims and duties with different substantive content share some significant features because each is a claim, and each is associated with a correlative duty. Third, it rests upon the assumption that the structure of legal relationships is atomic in nature, rather than organic or emergent. This assumption, that complex legal relationships are made up of simpler elements, and it is in the combination and arrangement of these simpler relations that complex legal relationships are built up, is essential to the validity of Hohfeldian analysis. In short, the search for fundamental legal relations only makes sense in a legal world that accepts the utility of speaking of legal entities (reductionism not appropriate) that have characteristics that are generic (generalisation is appropriate) and can be analysed into component basic parts (reductionism is appropriate). Hohfeld derived his level of analysis (he identified when one should reduce terms down to simpler terms) and his working assumptions (of generality and independent existence) from legal practice, probably intuitively. This explains his anxious and consistent justification of his analysis through the citation and analysis of judgments.

We can notice the sort of benefits that Hohfeld hoped could be derived from the use of his analysis. First, if the fundamental terms are truly fundamental then they provide an interpretive tool of great potential power. Apparently dissimilar areas of law can be linked, through identification of shared characteristics at this fundamental level. In effect the analysis provides a lowest common denominator, one that allows for a simplified and transparent comparison of different legal situations, without the loss of useful information or distortion of the situation. Use of this common denominator is able to reveal connections, and suggest the applicability of common solutions to common problems. Second, if the fundamental terms are generally adopted then common verbal disagreements can be resolved. It is no small matter in law to avoid

discourse that is barren because the vocabularies of each party do not correspond. Hohfeld hoped he was supplying a universally acceptable terminological framework. Finally, by stripping law of metaphor and colourful characterisation, and reducing matters to their constituent parts, it might be easier to make necessary value choices consciously and deliberately, rather than as the result of a rhetorical packaging of description, and analysis, with value choices. It is often the classification of a legal problem that determines the result of litigation. There is a risk of becoming committed to a particular solution at an early stage of argument, and without a clear apprehension of the alternatives. Reduction of the opposing claims into their fundamental components should make this sort of pre-judging less likely to occur.

Hohfeld did not try to define his fundamental legal relations. This was surely an inspired methodological decision. Instead of attempting definitions Hohfeld described the legal relations and their inter-relationships, and gave examples of them from legal practice. He was thus able to develop his analytical framework from the social practice of the courts and jurists. It is justified not by any *a priori* justification, but as a reflection and refinement of law as it actually exists. This enabled him to achieve several ends without getting mired in arguments about definitions. He was able to give a convincing account of his eight component relations, producing his famous tables of opposites and correlatives. The schema is compelling because it does give a logically coherent and complete account.⁶ He was able to produce examples of each of his legal relations from judgments that proved that each existed in the corpus of positive law. He was able to produce a technical vocabulary that demonstrably allowed for greater discrimination than the vocabulary used in legal practice. He could demonstrate that with his proposed terminology it was possible to say everything that the old vocabulary allowed, and in addition it was possible to make more precise discriminations. He was able to demonstrate that his new terminology allowed for a more complete and precise description of the law than the technical terminology in general use. In other words, he established that his fundamental conceptions were not jargon (words coined for rhetorical effect or deliberate obscurity) but genuinely a technical vocabulary (a specialist vocabulary required to describe a technically complex area of activity). As has been noted all of this was possible by using description supported by authoritative example from judicial reasoning, a method that allowed the analysis to be established on a foundation of legal practice.

Hohfeld did not think he had finished when he introduced and explained his eight fundamental jural relations. He had established an adequate technical vocabulary that would enable him to start his analysis. The issue he was concerned to analyse was the relationship between law and equity. In order to carry out this analysis he needed to consider what was meant by rights (privileges, powers etc) and actions *in rem* and *in personam*. Hohfeld suggested that greater clarity could be obtained by dividing rights

⁶ His eight relations are right, privilege, power, immunity, duty, no-right, liability, and disability. They effectively form two groups of four linked concepts: right, no-right, privilege (no duty), duty; and power, disability (no power), immunity (no liability) and liability. Within each group of four relations for each relation there is a correlative i.e. right duty, and there is an opposite i.e. privilege duty. Hohfeld basically explores the implications of “correlative” (i.e. right and duty), “correlative” means that each is the necessary and sufficient condition for the existence of the other and they are not identical. So: if right then duty, if no duty (privilege) then no-right; similarly, if power then liability, if no power (disability) then no liability (immunity). Once we accept “correlative” then everything else follows inexorably.

(privileges, powers etc) into those that were enforceable against one or a few people, rights he described as paucital (rights enforceable against individuals); and rights (privileges, powers etc) that were enforceable against a large number of people, rights that he described as multital (rights good against the world at large). Of multital rights some arose and existed in reference to property, and these were what might be termed property rights. Thus, in Hohfeld's terms when jurists used the expression: "*in rem*" they often intended "multital rights (powers etc) existing in relation to some item of property". Any right (power etc) must have some individual person who was subject to the correlative duty (liability etc), and multital rights were no different in this respect to any other rights, there were no such legal relations as rights (powers) enforceable against large and indefinite group, the law simply reiterated the same right duty many times. Also, the nature of a right (power etc) was not determined by the form of proceedings or remedies available for its enforcement. Thus, a multital right relating to a chattel was no less a property right because specific recovery of the chattel might not be available in vindication of the right. The remedial right would invariably be paucital in nature, but the secondary right (power etc) should not be confused with primary right (power etc) it vindicated. Hohfeld did not have space to proceed with his analyses any further, and in particular did not manage to deal with common and special relations; or, consensual and constructive (imposed by law) relations; or, substantive and adjectival relations – although as noted he touched on this subject; or, perfect and imperfect relations (which it must be confessed remain a puzzle); or, concurrent and exclusive relations (which were at the heart of his analysis of the relationship between the law and equity).

At the end of the short book (or the two articles) the reader is aware of several things. First, that Hohfeld could elaborate a problem apparently indefinitely. Second, that in the process of elaboration numerous false arguments were exposed as absurd. Third, that the task of elaboration invited a whole new range of errors of classification. In short, it is easy to understand why Hohfeld's methodology has not been generally adopted. His rebellious students had a valid objection to subjecting the whole corpus of law to his analysis. However, those students who later reported that the time they had spent under Hohfeld had been the most useful of their academic careers were also right.⁷ The ability to break down a complex legal situation into its constituent legal parts, the fundamental legal conceptions of Hohfeld, does reveal absurd errors of reasoning. It can also reveal the possibility of alternative solutions when it is argued that choice is limited to one path or another, for example that either personal or property rights are in issue (either *in personam* or *in rem*). Consider, obviously it is not contradictory to allow a right to a claimant whilst denying a power to the same claimant; nor is it contradictory to allow a right to have multital effects but be ineffective with regard to a sub-group; nor is it contradictory to allow a paucital (personal) remedy for the violation of a multital (property) right. Familiarity with Hohfeld allows one to deconstruct legal relations, and examine them without distracting preconceptions created by linguistic choice – he provides a universal terminology adequate to any legal relationship.

Hohfeld has survived for the best part of 100 years. He has been influential in the common law world, and has informed later jurists who have been able to break out of an undifferentiated world of rights in things or against people. He has provided a

⁷ On at least one occasion the same student: see p xi.

vocabulary adequate to the description of the common law legal relations. However, his terminology has never achieved the level of usage that would make it the *lingua franca* of the legal world. It is too precise, too difficult to apply, too verbose. Reading this little book remains worthwhile today; it is short and stunningly disciplined in its approach to language. It is shorter than most government consultation documents, and far more likely to repay the time spent reading it. Re-reading it was valuable, one forgets just how much of Hohfeld becomes part of the mental context in which legal problems are considered, and how much was missed or neglected on first reading. Hohfeld knew that his analytical framework could not solve legal problems. It was meant to allow legal problems to be seen clearly. His analysis is most useful in two distinct situations: when one senses an error in reasoning but struggles to locate it; and when one cannot apprehend clearly the available legal responses to a problem. When one needs the precision in analysis and ability to discriminate that Hohfeld supplies then nothing else will serve.

Graham Ferris and Erika Kirk, Nottingham Law School