

RELATIONS, LEGAL AND OTHERWISE

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In his latest criticism of the Hohfeld system of legal analysis, Professor Albert Kocourek expresses surprise that in spite of the defects to which he has directed attention it continues to prosper.¹ It is suggested that the reason for such prosperity is that the system has a direct relation to the problems before not merely the student, but the lawyer and the judge, and that its cultivation brings practical results. Making the discriminations called for by this system means the difference between winning and losing cases, between decisions for the plaintiff and decisions for the defendant. Thus it satisfies the pragmatic definition of truth as given by Mr. Dooley: "If it works, it's true." And it is also suggested that recent learned criticisms of the system miss fire for the reason that they do not take its practical character into consideration. They are concerned with a formal system of jurisprudence, defined according to the methods of philosophy in a manner which shall be intellectually satisfactory to the definer; they are not concerned with the supplying of necessary tools—and adequate analysis and legal terminology—to the practical solution of every day legal problems.²

Professor Hohfeld's purpose and methods were extremely practical. He saw the inveterate tendency to confuse differing interests in plaintiff or in defendant by referring to them under some general terms, such as "rights," and that if the various kinds of interests which each had were accurately distinguished, the plaintiff's "rights" might often not meet those of the defendant head-on but would be seen to differ in kind. Such discrimination would thus avoid an *impasse* and lead to a decision. A very astute judge or lawyer might without aid readily perceive the necessary distinction, but the use of a single general term to denote each of various differing interests necessarily tends to obscure the distinction. So Professor Hohfeld devised his table of jural relations by which these discriminations necessarily to be made in the solution of legal problems may be easily made and

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¹ Kocourek, *Non-Legal Content Relations* (1922) 4 Ill. L. Q. 233, 239, criticizing Goble, *Affirmative and Negative Legal Relations* (1922) 4 Ill. L. Q. 94.

² This was well pointed out by Professor W. W. Cook, *Handbook and Proc. of Assoc. of Am. Law Schools* (1920) pp. 84, 85, in reply to criticisms by Professor Kocourek and W. H. Page, *Ibid.* pp. 194, 199. See also 4 *Am. Law S. Rev.*

readily recognized since stated not in terms strange to the court but in those to which it was already accustomed—right, privilege, power, immunity, and their correlatives, duty, no-right, liability, disability. To such terms he gave a simple and invariable meaning—in each case one very generally used by the courts.³ The result affords not merely a means of stating clearly legal discriminations which are perceived; it affords also an assurance—if such analysis is constantly used—against failure to perceive vital distinctions. A possibly incidental, but nevertheless important corollary, is the suggestion—by such careful laying bare of the essential problem—of analogies otherwise unperceived.⁴

³ Professor Hohfeld's original articles were *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 Yale L. J. 16, and *Ibid.* (1917) 26 *Ibid.* 710. See Hohfeld, *Fundamental Legal Conceptions*, published by the Yale University Press. Professor A. L. Corbin has given concise definitions of the terms used in *Legal Analysis and Terminology* (1919) 29 Yale L. J. 163, and has discussed Professor Kocourek's views in *Jural Relations and Their Classification* (1921) 30 *Ibid.* 226. For other citations see Goble, 4 Ill. L. Q. 94 (note 1). There is a misprint in Professor Goble's reprint, *Ibid.*, of the Hohfeld tables, by which the table of "Jural Opposites" is termed "Jural Correlatives," and the table of "Jural Correlatives" is termed "Jural Opposites." The correlatives are as stated in the text. When one has a right against another or claim upon him, such other owes him a duty; when one has as to another a privilege of acting, such other has as to him a no-right; when one has a power to change legal relations against another, that other is under a liability to him to suffer such change; and when one has an immunity from any such change by another, such other is as to him under a disability to affect such change. Mr. Kocourek has extensively criticized the Table of "Jural Opposites," (*The Hohfeld System* (1920) 15 Ill. L. Rev. 24) apparently overlooking that its only purpose is definitional to add clarity to the explanation of the meaning of the terms employed by showing where and when they are antithetical. If the table does not thus help a reader it may be overlooked entirely, and attention placed only upon the jural correlatives.

⁴ Examples of the practical utility of such system of analysis are numerous. Many are referred to by Goble, 4 Ill. L. Q. 94 (note 1). A very interesting one is that made by Professor Corbin between powers in general, such as powers of appointment and the power created in an offeree by the making to him of an offer to a contract. *Offer and Acceptance and Some Resulting Legal Relations* (1917) 26 Yale L. J. 169. What seems a particularly striking result of the failure to make such discriminations appears under the guise of a finding of facts in the recent case of *Chamberlain v. Hemingway* (1921) 97 Conn. 156, 115 Atl. 632. In a suit for an injunction and an accounting for misappropriation of property in information, it appeared that plaintiff and defendant had formerly been partners in an insurance agency business, and that upon dissolution of the partnership by court proceedings and pursuant to court order, the receiver, after spirited bidding by both partners, had sold to the plaintiff for \$4100 the books containing information as to the fire policies of much value in securing renewals. Each partner had then engaged separately in the same business, representing the same companies. By using in-

Now the purpose of the analysis which is called for by the application of the method and terminology of the Hohfeld system to the solution of legal problems is the stating, free from any extraneous and confusing issues, of the question really involved. It is not the answering of such question. It is true that by such statement, an analogy to a settled rule of law may be suggested so that the answer follows almost as a matter of course. Nevertheless, that is really another step beyond the analysis. It has been urged that the Hohfeld system overlooks the effect upon judicial decisions of forces undisclosed by mere analysis. Such criticism results from a failure to understand its function. The stating of the problem leaves room then for the free play of other elements, e. g., social policy—"public policy"—in its solution. Professor Hohfeld turned his attention especially to problems of analysis, but neither he nor those who have followed him have overlooked or underestimated the place of such other elements in the administration of justice.⁵ Some confusion has doubtless been caused by a failure to recognize the sense in which Hohfeld used the word "fundamental" in his term, "fundamental legal conceptions." (The other words of his original title are generally overlooked: "*Some Fundamental Legal Conceptions as applied in Judicial Reasoning.*")⁶ Analysis is not fundamental in legal decisions in the same sense in which the law of nature or natural law is in some legal systems, the "right to contract" in the employer's idea of the social struggle, or

formation as to policy renewals obtained both from previous copying from the books and also directly from the companies, the defendant secured many renewals, thus furnishing the occasion for the suit. The trial court, recognizing the insurance companies' undoubted "rights" to the information for use in connection with their liability under each policy, refused to believe that the agents had any "rights" to such information and gave judgment for the defendant, making a finding of fact that the agents had no property as against the companies in such information. The Supreme Court felt bound by this finding and hence it held that the defendant was violating the plaintiff's right so far as he acquired the information directly from the partnership books and must account therefor, but that he was not guilty of such violation so far as he acquired the information from the companies. The trial court failed to discriminate between the companies' rights to the information and their privileges and powers as to its use, and it also failed to discriminate between the companies' "rights" and those of the defendant. The result is the anomaly that not the defendant's use of the information, but his manner of obtaining it, is held objectionable. See (1922) 31 Yale L. J. 666.

⁵ Cook, *Hohfeld's Contributions to the Science of Law* (1919) 29 Yale L. J. 163; Corbin, *Jural Relations and Their Classification* (1921) 30 Ibid. 226. See Mr. Justice Cardozo's book, *The Nature of the Judicial Process* (1921) for a statement and evaluation of the various elements which shape the judicial judgment.

⁶ (1913) 23 Yale L. J. 16.

the "right to strike" in the employée's, or heaven and hell to the theologian. But it is fundamental in the sense of being an essential tool of the legal business. To hoe corn it is fundamental that one must have a hoe. And in saying this we by no means imply that the living plant is not the thing we are after.

When we turn to Professor Kocourek's recent articles⁷ we find, on the other hand, a process of watering the hoe. And the result is as unreal so far as the actual judicial process is concerned as such a process would be in agriculture. His views center about his attack upon law where *permissive*, which he views as not law, but as merely negation. Avoiding the court room altogether, he goes into his study and there is convinced of the intellectual necessity of constraint to any definition of law. He considers that constraint,—the application of force—is necessary in order to give positive content to any conception. And he indulges in a dialectical triumph. Every art and science must have a positive content. A negative is a contradictory positive, is in itself nothing. Constraint is positive. Permission is not. Therefore, constraint gives rise to a legal relation; permission does not. And privilege means no duty and that means no legal relation. (Does he not here and in his inveterate attempt to identify privilege as no-duty, and thus emphasize its claimed lack of positive content, fall into a dialectical dilemma himself; for is not a privilege equal if anything not to a *not duty*, but to a *not duty not to*, e. g., a privilege of entry equals a not duty *not to enter*, and do not the two negatives make a positive?) And he employs his baby elephant example. If in one room there is a baby elephant and in the other there is not, what is in the other room?⁸ We might suggest a like figure that if there is in one writer's brain a conception of constraint as a necessity to law and in another's there is not, *non constat* that there is necessarily in the second only a negation or vacuum, for there may be there a perfectly valid though different concept of law. It all turns upon the premise with which one starts.

The statement that a legal relation must have a positive content is probably a shorthand reference to the *action of the court* based upon such relation. A legal relation is but a mental concept—a very important one, it is true, since the action of society's agent, the court, will depend on the kind of concept it has. But a legal relation as such can hardly have content; it is not a pail, but an idea; and until that idea is translated into actual conduct by somebody, it would seem that it is neither positive nor negative. In the sense of being an ac-

⁷ See note 1, *supra*. Other articles are cited by Goble, 4 Ill. L. Q. 94 (note 1).

⁸ See especially Kocourek, 4 Ill. L. Q. 233, 237 (note 7).

tion of the mind it is positive, but so far as it affects law it is neither. When, however, the court acts upon the mental concept which it has, then there is a positive act. And it is submitted that such act is equally positive, whether it is in favor of plaintiff or in favor of defendant.

The suggested answer to the last idea is that while courts and lawyers spend much of their time in arriving at judgments for defendants, i. e., decisions that the courts will not act affirmatively on behalf of a suitor, yet that in so doing the court is not declaring law. Its function is to assay the true metal of the law from the refuse, and in deciding for the defendant it is simply discarding the refuse.

Now a difference in the assumed premises for a definition of law may lead to a difference in words only and hence not be important. Yet it would seem desirable to make one's premise accord as nearly as may be with the ordinary views of mankind, the views perhaps of the "ordinary prudent man." The place to discover such views, it is submitted, is in the court room, and not in the study. And it is further submitted that no one participating in the ordinary judicial proceeding feels that the declaration of a judgment for a defendant is, from the legal standpoint, merely negative and not law. The court does not assume to act merely negatively; it will discuss the defendant's "rights" as well as the plaintiff's. Even when adjudging for the plaintiff it may only declare permissively, as often in the case of the declaratory judgment. And the judgment, permissive or otherwise, becomes *res adjudicata* between the parties, making useless any other attempt to relitigate the same issues.

How far the assumed definition of law is at variance with actual legal and judicial practice is shown by the uses made by lawyers and judges of so-called "negative" decisions as precedents. Logically, under the definition we should discard such material as the assayer discards the refuse. Actually, we rely upon it equally with the "true metal" in charting our course for the future. It would be both stupid and unfortunate if we did not do so. The actual situations passed on by the courts are so few compared to those which may possibly arise that we need all the help we can get in order that our prophecies for the future may be even moderately reliable, and we cannot afford to discard half the material which is available to shed light on future judicial action. The point is well demonstrated by Professor George W. Goble, in the article criticized by Mr. Kocourek in his discussion previously cited,⁹ where by an illuminating diagram the author shows how the field of actual controversy is much smaller than the field of possible legal controversy, and how such field of actual controversy

⁹ See note 1, *supra*.

is approximately equally divided between "affirmative" relations and "negative" relations. All judicial controversies are alike grist for the lawyer's mill, and he cannot be asked to discard a large part thereof merely to comply with the requirements of a particular definition of law.

In the same article Mr. Goble doubts the necessity of constraint as an element of a legal relation, and suggests that a more accurate test is one recognizing as legal all relations which properly come within the purview of courts. He adds, however, a very interesting idea. It is that the so-called negative relations (privilege-no-right and immunity-disability) involve an element of constraint, that a judgment for defendant involves constraint, and that a sanction for such constraint is the judgment for costs. This is an interesting and valuable suggestion. It would seem, however, not to be in accord with Hohfeld's original definitions, for Hohfeld made the presence or absence of societal action—"constraint"—the test of the distinction between duty and the lack thereof. Hence in the suggested case the judgment for costs seems to be the sanction of the *duty not to sue*, of which the defendant has the correlative right not to be sued. It is very rarely that a privilege will be found standing alone and unprotected by rights against interference. Yet where such situation occurs, the privilege holder would seem absolutely unprotected by society in the exercise of his privilege, his only advantage being that if he succeeds in exercising it he cannot be penalized therefor. The first suggested definition of a legal relation as one which properly comes within the purview of courts would seem fully adequate and complete.

It is suggested that Mr. Kocourek's criticism of the author's use of the terms "affirmative relations" and "negative relations" is justified. Mr. Goble himself points out that any relation can be stated in either an affirmative or negative form. It seems unsound, therefore, to speak of permissive relations as negative. In the intercourse between human beings, permission is as important as prohibition, perhaps more so. But Mr. Kocourek, even after properly pointing out that more is meant than merely negation in the term "negative relations," proceeds in spite of this to his dialectical argument, based on his requirement of constraint as a necessity to a legal relation, that no constraint is no legal relation. He asks, "What proof has Professor Goble adduced that a 'negative' situation, such as Noright—Noduty is a legal relation?" It would appear that the common experience of litigants with courts is not proof, if it does not square with *a priori* definitions.

As suggested, this at bottom would seem to be all a difference in names. It might be thought that as Mr. Kocourek recognizes the duty of courts to sift out the "true metal" of legal relations from non-legal relations, we might continue to make the discriminations between

right-duty and privilege-no-right, or between power-liability and immunity-disability, whether we call all these legal relations or insist that in each group the latter relations are non-legal. But the necessity he feels to follow his definition without varying a hair's breadth, no matter where or over what obstacles it takes him, has led him to some interesting results. He has felt compelled to construct a system setting forth the way law operates, which is a model of ingenious complexity. Whatever may be the philosophical merits of jurisprudence it has made comparatively little direct appeal to lawyers and judges. We fear that notwithstanding the adroitness of the method, little practical aid in "judicial reasoning" will be or can be expected from such a highly complicated scheme to supplement and reinforce an individual definition of law.¹⁰

Again, this definition of law leads to an interesting difficulty in reconciling the concepts employed with those with which courts are familiar. A good example is the difficulty found in dealing with the familiar concept of *license*. This has been defined from earliest English law to the present in terms of "legal privilege," a definition, of course, followed in the Hohfeld terminology. And the concept has always been recognized as legal. In view of Mr. Kocourek's definitions, something must smash. So he says: "A license, therefore, is either a kind of power, or it has not been provided for, since as against the owner of the land it cannot be a liberty ('privilege') without doing violence to the ordinary meaning of the term 'liberty,' and, likewise, confusing the non-jural concept of 'liberty' with the jural concept of 'power'."¹¹ But a license under the Hohfeld system is provided for, it is not a kind of power (thus, it is not analogous to a power of appointment) and it is defined in terms of legal relations which not only do not do violence to ordinary meanings, but accord with judicial usage for centuries.¹²

Again, since this idea of law is not based directly on court action, no use may be made of the analogies suggested by similar actions of the court in slightly differing situations. The learned author claims

¹⁰ In addition to the intricacy and complexity of the scheme, caused in part at least by Mr. Kocourek's attempt to make the actions of courts accord with his chosen definition of law, is the difficulty occasioned by his choice of a strange and unusual terminology. He has seemed here definitely to attempt to depart from current legal usage. See *Plurality of Advantage and Disadvantage in Jural Relations* (1920) 19 Mich. L. Rev. 49. *Tabulae Minores Jurisprudentiae* (1921) 30 Yale L. J. 215, and *Polarized and Unpolarized Legal Relations* (1921) 9 Ky. L. J. 131.

¹¹ (1920) 15 Ill. L. Rev. 24, 32.

¹² See Clark, *Licenses in Real Property Law* (1921) 21 Colum. L. Rev. 757, 763.

that the Hohfeldian privilege includes three distinct and separable ideas, (1) liberty (freedom), (2) privilege (special advantage), and (3) power (disadvantage to another). If I understand him correctly, an example of (1) is walking on one's own land, of (2) is walking on another's land by permission, and of (3) is ejecting a trespasser. These are all different kinds of acts and they may lead to differing legal relations, but one idea common to all is the absence of societal penalty for the doing of the acts. Thus the element of *privilege* is common, and it is important to know that fact and to have a convenient term with which to refer to it. Just as a right may mean a right to ten dollars, or a right to one thousand dollars, so one privilege may differ in value from another. But all privileges have the common element of being good defenses to legal actions. Mr. Kocourek, in his system, refuses to recognize the existence of such a common element.

There is here apparent a fundamental failure to grasp the real method of the Hohfeld scheme, a failure which becomes more apparent in a final criticism in which the author indulges. Mr. Goble stated that Mr. Kocourek's "liberty" was a legal compound of acting and omission, suggesting that O, the owner of land, may by contract with S, assume a duty not to enter upon his own land, but he still retains his privilege (liberty) of omission, i. e., of staying off.¹³ Mr. Kocourek answers that if there is a duty to stay off, there can then be no liberty of staying off, "or else one may have a privilege and a duty as to the same act." "In other words, Duty and No-duty are the same things—a rather unusual result, even from unusual system of terminology."¹⁴ It should be noted that this is not only no answer to the contention that his own concepts are not as absolute as he apparently views them, but the last statement is a complete *non-sequitur*, absolutely at variance with the whole Hohfeldian idea. One may have a privilege and a duty as to the same act, and that does not show that privilege and duty are the same thing. The Hohfeldian terms apply to varying actions by the court and hence one act may lead to many legal relations. If O has undertaken a duty to stay off his land, he will have a judgment go against him when sued for going on. He may nevertheless, have a privilege of staying off, so that if sued for not going on, he will have a judgment in his favor. Examples of such kind are innumerable. Thus one may be privileged to do an act which will result in a change of legal relations, as in the case of a license to extinguish an easement, which involves a privilege to do the acts and a power thereby to extinguish an easement.¹⁵ An emphasis

¹³ (1922) 4 Ill. L. Q. 94, 103 (note 16).

¹⁴ (1922) 4 Ill. L. Q. 233, 238, 239.

¹⁵ Cf. Clark *op.cit.* note 12 *supra*, at p. 766.

on logical definitions has thus led to the overlooking of the Hohfeld method of separately isolating and defining each varying situation *before the court*, since the court may act in various ways, depending upon the manner in which the issue is presented. This failure to appreciate the method involved has been apparent since Mr. Kocourek's original criticism of the Hohfeld system, for there he stated that it is "a curious situation that the same jural situation can be at once a 'privilege,' a 'right,' and an 'immunity'."¹⁶ It is submitted that this "curious situation" is one of the reasons why the Hohfeld system is of great practical utility in the analysis of legal problems.

In one portion of his latest discussion, however, the learned author comes very close to an approximate statement of the Hohfeldian theory. He states that by it the test of a legal relation is "every situation which is or may be procedurally asserted for a declaration or denial of right, or for an imposition of a sanction, or for any other purpose within the scope of adjudicative action, *whether well founded or not.*" Omitting the italicized words, the substance of the statement seems sound.¹⁷ The author then asserts that "this is a liberal program which gives enormous breadth to the law." (Is not the law supposed to have "enormous breadth"?) He concludes: "Where one person can claim nothing from another which the law under any circumstances will support, we fail to discover what is gained in clearness of thought or of precision in calling such a situation a legal relation. If it is a legal relation, what makes it a legal relation?" It is hoped that the gain has been somewhat indicated in this article. As to what makes it a legal relation, what should, if not judicial action, either permissive or restrictive, upon the basis of its assumed existence?

A mind so acute as Professor Kocourek's will necessarily enlighten upon any subject about which it concerns itself. Thus his suggestion as to the nature of a right *in rem*, that it is one where the duty bearer

¹⁶ (1920) 15 Ill. L. Rev. 24, 33.

¹⁷ So far as the statement assumes that a *legal relation* is identical with a *situation*, it may be open to question. It would seem that the situation, if thereby is meant the actual happening which has led to the litigation, is not itself a legal relation, for that is but the court's concept of the relationship between the parties litigant which leads it to enter a certain kind of judgment. True that concept is induced in turn by the reflex or concept of the actual happening which the court has from listening to the evidence, and this may be what is meant by identifying a legal relation with a "situation" which may be "asserted." But here, too, the court has two successive concepts, not one. This is perhaps more clearly shown by a trial before judge and jury than one before a judge alone, but it seems true in either case. It would, therefore, seem more accurate to say that a legal relation *results from*, rather than is identical with, a situation.

is unidentified, is one of value and of interest.¹⁸ It is to be hoped that he will explore this subject further. Nor is it to be suggested that no further work beyond Hohfeld's is necessary in furnishing the necessary tools for legal analysis. Thus Hohfeld did not deal with imperfect relations, such as future or conditional rights or duties. How, for example, should we properly analyze contingent remainders or executory devises? An interesting field for future development lies here at hand. But it is suggested that the Hohfeld system does furnish a practicable and comparatively simple system for making and understanding distinctions and discriminations necessary for the solution of judicial problems and that, therefore, it should flourish and prosper.

¹⁸ See *Rights in Rem* (1920) 68 U. Pa. L. Rev. 322; *Polarized and Unpolarized Legal Relations* (1921) 9 Ky. L. J. 131. Professors Hohfeld and Corbin have pointed out that a right *in rem* is always one of a large class of fundamentally similar yet separate rights available by one against persons constituting a very large and indefinite class of people. (1917) 26 Yale L. J. 710, 718; (1921) 30 Yale L. J. 226, 232 (note 4). Thus Kocourek emphasizes the indefiniteness of incidence of the burden; while Hohfeld and Corbin emphasize the presence of a large number of similar relations.