If Jurisprudence strikes the law student as a miry bog, the analysis of a legal right ought, at least, to provide a path through the marshland. The disparate rumours of such a path may have a greater tendency to lead him into the middle of the bog than bring him safely to the other side.

It is characteristic of this area of legal theory that the attempt by Hohfeld to provide a precise analysis of legal rights has itself fallen victim to misunderstanding and misrepresentation. The supporters of Hohfeld readily concede that the mastery of his analysis is a difficult discipline,¹ but the prize should be reward enough: a clear understanding of the concept of a legal right. Its value is freely acknowledged among Hohfeld’s antagonists:

The chief attribute of scientific progress is greater clearness of distinction. In this the law has been the most backward of sciences, and it is really astonishing, when one stops to consider the fundamental importance of ultimate categories in legal reasoning that the insufficiency of our technical apparatus, in a scientific sense, had not long before impressed itself.²

Hohfeld claimed to have identified the eight fundamental legal conceptions, and as such to have provided a technical apparatus for legal analysis: the atomic elements into which all legal material can be reduced. In this paper, I shall commence with an introduction to the nature of Hohfeld’s conceptions, before considering the relationships between the eight conceptions. I shall argue that six of Hohfeld’s conceptions are reducible, in terms of the other two, and cannot therefore maintain their position as fundamental conceptions. I shall further suggest that, as a result, Hohfeld’s conceptions do not provide us with the required technical apparatus to analyse with accuracy legal material.

¹ M.A. (Oxon.)

Hohfeld's Fundamental Legal Conceptions

Hohfeld provides us with eight conceptions which he claims to be both fundamental and legal. We can clarify the alleged nature of these conceptions by examining further the two attributes he gives them. The first attribute, "fundamental," is not given a clear definition by Hohfeld but may be regarded as possessing three features:

(i) comprehensive;
(ii) sufficient;
(iii) irreducible.

The conceptions are comprehensive in that all legal positions may be expressed in them. They are "the legal elements that enter into all types of jural interests."³

Furthermore, the conceptions are sufficient: all legal positions may be expressed adequately in them alone. They are referred to as "the lowest generic conceptions to which any and all 'legal quantities' may be reduced."⁴

Thirdly, they are irreducible. This is to say that the conceptions cannot be broken down into anything more basic, and, as a result, they can only be expressed in terms of their relations to each other. They are "the basic conceptions of the law," "the lowest common denominators of the law." "The strictly fundamental legal relations are, after all, sui generis . . ."⁵

There is little room for disagreement with the way that Hohfeld uses the term, "fundamental." His exposition of the second attribute, "legal," is more tendentious, and contestable. The meaning Hohfeld gives to this attribute rests on two preliminary distinctions, made by him before presenting his conceptions.

The first distinction is between legal conceptions and non-legal conceptions.⁶ Hohfeld points out reasons why these have been confused: in early law the legal phenomenon is associated with the physical phenomenon by which it is made manifest; the same word is often used for both phenomena. The principal target that Hohfeld selects is "property." This may be used to refer to the physical object owned, or to refer to the legal interest of the owner. Confusing the two uses leads to transferring the unity of the object owned to the legal interest, and speaking of the right of property. As we shall see, Hohfeld considers the legal interest should be viewed as an aggregate of legal relations and thus more properly be referred to as the rights of the owner.⁷

³ FLC, p. 27.
⁴ FLC, p. 64.
⁵ FLC, pp. 27, 64 and 36.
⁶ FLC, pp. 27ff.
⁷ FLC, pp. 28, 96.
Once the legal interest is separated from the thing over which it is exercised, it can be confined to an abstract existence. From this viewpoint, Hohfeld can mock the distinction between corporeal and incorporeal property. All property is incorporeal since all legal interests are abstract. Hohfeld adduces other examples of the confusion that prevails between legal and non-legal conceptions, notably contract, which is used to refer to both the agreement between the parties (non-legal) and the contractual obligation (legal).

The second preliminary distinction is between operative facts and evidential facts. The former, by satisfying a legal rule, bring about a change in a legal relation; the latter are grounds for inferring other facts, which may be evidential or operative. To the casual reader of Hohfeld's condensed prose, this distinction is not obviously linked to his subsequent analysis of legal rights. However, Hohfeld uses it to make two important points. In the case of a written contract, the document is, at the time of writing, an operative fact which brings about the contractual relation between the parties. But, later, it becomes an evidential fact from which may be inferred the operative fact that a piece of paper existed by which a contractual obligation arose. This point serves to prevent the legal obligation from being identified with the document. Also, the point is made that generic terms, such as possession, are often applied to certain types of operative facts, and these terms are then confused with the legal relations brought about by the operative facts.

Both preliminary distinctions, accordingly, have the function of clarifying a legal relation as something abstract, which is quite separate from the mental or physical phenomena through which it arises, or over which it is exercised. In this sense, Hohfeld refers to a legal relation as being "purely legal."10

To the extent that Hohfeld considers that a legal right is abstract, his notion will not be challenged. A right is a concept, and concepts are generally regarded as being abstract. But Hohfeld's use of "purely legal" goes beyond this. Legal relations are presented solely in terms of these fundamental abstract conceptions. He not only identifies abstract legal conceptions: he identifies legal interests with these abstract conceptions alone.

This is ironic when Hohfeld's stated intent is that "the emphasis is to be placed on those points believed to have the greatest practical value."11 It is as though the author of a textbook for medical practitioners were to start in an introductory chapter by identifying...
medicine as being concerned with the concept of health, and then to
deny that medicine had anything to do with bodies. We should not
expect the author to be able to maintain this dichotomy between the
abstract and the physical in subsequent chapters, when it came to
dealing with the actual practice of medicine. Hohfeld's relegation
of the term "legal" to a purely abstract existence can be challenged
when it comes to examining practical legal situations.

The eight conceptions spring from Hohfeld's dissatisfaction with
the common tendency to assume that all legal relations can be
reduced to rights and duties. Out of the ambiguity of the single
solecistic pair of concepts, Hohfeld brings four distinct pairs. In place
of the vague concept of a right, we have the concepts: right, privilege, power and immunity—together with their correlatives:
duty, no-right, liability, disability. Each concept is also the jural
opposite of another concept. They can be presented in Glanville
Williams' famous table, with their jural correlatives vertically above
or below and their jural opposites diagonally opposite, as follows.

\[
\begin{array}{cc}
\text{RIGHT} & \text{PRIVILEGE} \\
\text{DUTY} & \text{NO-RIGHT}
\end{array}
\quad
\begin{array}{cc}
\text{POWER} & \text{IMMUNITY} \\
\text{LIABILITY} & \text{DISABILITY}
\end{array}
\]

A right is a legal claim of one person that another person acts or
omits to act in a certain way. The position of the other person is
described by saying that he has a duty.

A privilege describes the position of a person who is free to do, or
refrain from, some act, without transgressing a legal obligation to
another person. The position of the other person is described as
having a no-right.

A power is the legal ability of one person to change the legal
situation of another. The position of the other person is described
as having a liability.

An immunity describes the position of a person who is free to
enjoy a legal relation without it being changed by another person.
The position of the other person is described as having a disability.

Each fundamental legal conception may be contrasted with its
opposite. The presence of the one indicates the absence of the other,
with regard to a particular act or omission. If A has a right that B
does x, then A does not have a no-right that B does x; if B has a

12 FLC, p. 35.
13 "Right" is sometimes given the alternative title of "claim," or "claim-right." Some authors
prefer "liberty" to "privilege."
14 FLC, p. 38.
15 FLC, pp. 38ff.
16 FLC, pp. 50ff.
17 FLC, pp. 60ff.
liberty (or privilege) with respect to A to do y, then B does not have a
duty to A not to do y; and so on.

Finnis has drawn attention to three cardinal features of Hohfeld's
analysis,18 failure to respect any one of which is a sure means of
confusion and misunderstanding. We shall cover Finnis's points here
in a slightly different presentation,19 and append a further important
feature of Hohfeld's analysis. The cardinal features are then as
follows.

(1) Each legal relation is concerned with one activity, or
omission, of one person.

(2) Each legal relation regards an activity, or omission, with
respect to two, and only two, persons.

(3) The analysis of a legal relation ignores the question of
sanctions.

(4) The analysis is concerned with the effect of all laws on a
particular activity or omission. It is not concerned with
presenting the material of a particular law.

Features (1) and (2) indicate that the currency of Hohfeld's
analysis is the bipartite relation concerned with one activity or
omission. The position of each party is described by a fundamental
legal conception, which is the correlative of that describing the
position of the other party. It is important to stress that the
 correlative conceptions refer to the one activity or omission. "Any
given single relation necessarily involves two persons. Correlatives in
Hohfeld's scheme merely describe the situation viewed first from the
point of view of one person and then from that of the other."20

Any legal interest can be broken down into an aggregate of legal
relations. So, Hohfeld takes the interest of property and reduces it to
a complex aggregate of rights, privileges, powers and immunities—
together with their correlatives.21 Hohfeld believes that to talk of the
right of property is an oversimplification which leads to error: "the
tendency—and the fallacy—has been to treat the specific problem as
if it were far less complex than it really is."22

When an analysis is made in terms of legal relations, any sanction
is ignored, as stated in feature (3). It should be noted that the
existence of legal sanctions is not being denied by Hohfeld. He does
not find it necessary to bring them into the analysis of a legal relation;

19 Features (1) and (3) correspond to Finnis's axioms (1) and (3). Finnis only deals with the first
two of Hohfeld's fundamental legal conceptions in his paper. His axiom (2), that A's claim-right
is never that A do or omit something but that B do or omit something, is based on the otherwise
impossible situation of having a claim-right without a correlative. Feature (2) generalizes this
point for all of Hohfeld's conceptions.
20 Wheeler Cook, FLC Introduction, p. 10. See Finnis, for a critical account of eminent examples
of failing to respect this point.
21 FLC, pp. 96f.
but rather indicates that the application of a sanction may itself be separately analysed in terms of legal relations.\(^{23}\)

Feature (4) stresses the point that the fundamental legal conceptions are meant as "mental tools for the comprehending and systematizing of our complex legal materials."\(^{24}\) The legal relation does not present the raw material of the legal sources, statute or whatever, but the net effect of that material on the two persons and one activity in question. It is not, therefore, necessary for a particular legal relation, as such, to appear in any source of law. It may be the result of applying a number of laws to a particular situation; it may be the result of discovering that a law does not apply to a particular situation.

In order to challenge Hohfeld's analysis, it is necessary to deny his eight conceptions the attributes, "legal" and "fundamental." It is not enough to produce other legal conceptions to compete with Hohfeld's. These contenders might have some value, but they can always be criticised for not presenting the law in its fundamental conceptions, and for so proving to be "a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems."\(^{25}\)

**OPPOSITES**

Hohfeld's analytical framework has an apparently symmetrical foundation in the eight conceptions arranged as correlatives and opposites. But there is a crack in the foundation. The symmetry is broken in Hohfeld's explanation of his conceptions, and can be traced to his ambiguous use of "opposite."

Opposite is itself an ambiguous term. At the dining table, we make a distinction between the person sitting directly opposite another and the person sitting diagonally opposite him. If we turn from the diners to the food, the different uses of opposite can be further illustrated. The vegetables may be assessed as "fresh or stale." Or, with regard to a gourmet concern for eating vegetables picked on the same day, the option may be simply, "fresh or not fresh." Yet another possibility is to query whether the vegetables are "fresh or frozen." Each of the three pairs of options provides us with a different opposite to "fresh": "stale," "not fresh," "frozen."

Different types of opposites were noted by Aristotle who gave as four paradigms: half, double; good, bad; blindness, sight; sitting, not

\(^{23}\) This is most clearly stated at FLC, p. 41, n. 39, where Hohfeld criticizes Gray for confusing a householder's privilege of ejecting a trespasser with the potential rights, etc. which may arise in an action by the trespasser for assault. Cf. FLC, p. 102, where the duty of Y to return X's horse is treated quite separately from his prior duty not to take it, which has been transgressed.

\(^{24}\) FLC, p. 67.

sitting. I shall not attempt an exact taxonomy of opposites here, but it is worth pointing out, for our present purposes, that there are not only different types of opposites, but also that different opposites can exist in relation to the same term. And if a limited classification of opposites can help to make this clear, we should return to the vegetables paradigm, and note that in relation to “fresh”: “stale” is an opposite of extreme; “not fresh” is an opposite of negation; and “frozen” is an opposite of alternative.

An opposite of extreme involves the utmost progression or regression of a common quality. An opposite of negation simply involves the absence of the term. An opposite of alternative involves the presence of another term which is mutually exclusive with the first term, without the relationship of common quality existing in an opposite of extreme.

**Hohfeld’s Privilege—as Opposite of Duty**

Kocourek criticized Hohfeld for being inconsistent in his use of opposite, and himself suggested other possible opposites for Hohfeld’s conceptions. The charge of inconsistency concerns a vacillation between opposite in the sense of negation and some other sense of opposite. Unfortunately, Kocourek does not recognise an opposite of negation and, through indulgence in logical surrealism, concludes that the negation of a duty is no more a privilege than an elephant—since the negation of one thing involves the presence, or possible presence, of everything else in the universe. Taking opposite to have some sense other than negation, Kocourek posits other opposites for Hohfeld’s conceptions, including the suggestion that right should be considered to be the opposite of duty. In doing this, Kocourek strays beyond the confines of Hohfeld’s analysis. Kocourek thus concludes “that ‘privilege’ (liberty) and ‘duty’ are neither opposites nor negations,” but it is a conclusion reached with little reference to Hohfeld’s use of these terms.

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27 The classification is limited, in that, for example, it does not deal with the spatial opposites of the dining table mentioned above. However, it does provide us with three distinct types of verbal opposites which will be helpful when dealing with Hohfeld’s analysis.

28 Kocourek, pp. 364ff.

29 Kocourek, pp. 367 and 378; cf. Kamba, (1974) Jur. Rev. 249, at p. 256. Kocourek confuses the two propositions: (∃x) ¬m, “there is something which is not an m”; and, ¬¬m, “not an m.” Put less formally, it is the distinction between: “Alice has a pet which is not a dog”; and, “Alice has not got a dog.”

30 Kocourek, pp. 364ff.

31 This is aided by a truncated statement of Hohfeld’s view of opposite. At p.364, Kocourek refers to Wheeler Cook’s Introduction (FLC. p. 10, n. 13) where he states that opposites look at “two different situations from the point of view of the same person.” Kocourek ignores the continuation: “i.e. in one situation he has, for example, a right, in the other, no-right.”

32 Kocourek, p. 365.
Hohfeld's inconsistency in his use of opposite can be pinpointed to his illustration of the privilege of the landowner to enter his own land. Concerning this case, he states:

As indicated in the above scheme of jural relations, a privilege is the opposite of a duty . . . X . . . himself has the privilege of entering 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. . . . when it is said that a given privilege is the mere negation of a duty, what is meant, of course, is a duty having a content or tenor precisely opposite to that of the privilege in question . . . X's privilege of entering is the precise negation of a duty to stay off.33

The first thing to note is that Hohfeld is not simply switching from privilege to duty in order to reach his opposite. He also changes the content governed by the legal concept from the positive action of entering to the negative action (or rather, omission) of staying off the land. Hohfeld openly admits this in his text, but it is not evident in the general table of fundamental conceptions, where "privilege" is baldly stated to be the opposite of "duty."34 For this reason, Glanville Williams suggests that the table should be amended to read "privilege not" as the opposite for "duty", or "duty not" as the opposite of "privilege"—i.e. the opposite of being under a duty to do something is a privilege not to do that thing, or, of being under a duty not to do it is a privilege to do it.

Williams considers that this amendment to the table reflects Hohfeld's explanation of his conceptions, and is not worried by the ensuing asymmetry, produced by the addition of a negative suffix to one of the first four conceptions:36

```
RIGHT  PRIVILEGE NOT
       |           |
DUTY   NO-RIGHT
```

Even if the suffix is only a visual irritant, it prompts us to ask why the offending "privilege not" can not be replaced by a "no-duty," in order to restore the symmetry. According to Hohfeld's text, a privilege of entering (i.e. not staying off) the land is equivalent to no duty to stay off the land. And Williams reiterates that a "liberty not" is equivalent to "no duty."37

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33 FLC, pp. 38f. Original emphasis.
34 Above, p. 438, (FLC, p. 65).
36 Williams, p. 131. It should be noted that no such suffix is required for the no-right.
37 Williams, p. 130.
If it really is the case that "a given privilege [albeit a privilege not] is the mere negation of a duty" a more fundamental point can be raised. There is no need to adapt the offending eyesore on aesthetic grounds; it can be demolished. If privilege is the negation of duty, then it cannot be retained as a fundamental conception. It may be argued that it is a matter of convenient terminology to retain it, but this is not sufficient to give it the status of a fundamental conception: it can be reduced to the negation of another conception, and is therefore, strictly speaking, superfluous.

The enthusiasm for the use of privilege as a term to describe "no duty" serves to obscure this point. In Hohfeld's table, "no right" borrows some respectability as a fundamental conception from being correlated to "privilege," a respectability it could hardly maintain on the ground of being merely the negation of a right. But if "no duty" is substituted for privilege, we are then presented with "no duty" and "no right" as the second pair of correlatives.

\[
\begin{array}{c}
\text{RIGHT} \\
\text{DUTY} \\
\text{NO-DUTY} \\
\text{NO-RIGHT}
\end{array}
\]

Hohfeld could not then claim to have identified two further fundamental conceptions, simply by stating the negations of the first pair. It would be like a zoologist discovering a new animal by coining the term "no-cow."

However, to accuse Hohfeld of counterfeiting fundamental conceptions in this abstract way is to ignore the fact that his conceptions are circulated in practice. Privilege and no-right are used to analyse a number of concrete situations: a privilege to enter land, a privilege to publish defamatory material, etc. It is as though the "no-cow," whose existence we have just ridiculed, is now to be found actually eating grass.

When speaking of a privilege to enter land, enjoyed by the landowner, Hohfeld is stating more than that the landowner is under no duty not to enter the land, he is speaking of a position positively protected by the law, in that, for example, the landowner cannot be lawfully ejected from the land, for trespass. Without such positive protection, the privilege of the landowner is meaningless. If X's privilege of entering the land, in relation to Y, consists only in X being under no duty to Y not to enter the land, this means solely that X is not in breach of a duty to Y if he enters the land; nothing is implied by this to prevent Y making it impossible for X to enter the land—by using threats, or violence, by building walls, constructing

\[38\] Cf. Williams, p. 132.
moats filled with piranha fish, etc; nor does X being under a duty to Y not to enter the land mean that Y cannot throw X off the land once he has managed to enter it. The privilege of a landowner, X, to enter his land in fact involves not only that Y may not lawfully prevent him from entering the land, but also that Y may not lawfully eject him once he has entered.

In this sense, privilege is a distinct conception, since apart from entailing the absence of a duty not to do the privileged act, it additionally involves recognition and protection by the law in doing the act: it is more than the mere negation of a duty.

There are, accordingly, three distinct terms:

(a) duty: X is under an obligation to Y to act in a certain way;
(b) no-duty: X is under no obligation to Y to act in a certain way;
(c) privilege: X is protected from Y preventing him acting in a certain way.

Privilege, (c), as used in Hohfeld’s practical illustration of the landowner’s privilege to enter his land, is not the same as the privilege that is equivalent to a no-duty, (b), which appears in Hohfeld’s general definition.

The inconsistency is facilitated by the ambiguity of opposite, noted above. Both (b) and (c) are opposites of (a), but whereas (a) and (b) are opposites of negation, (a) and (c) involve opposites of extreme: being obliged to do something (duty) and being positively allowed to do something (privilege) represent the two extremes of bound and free under the law.

Hohfeld’s use of opposite in the text quoted above is even more convoluted. This is due to the fact that he is engaged in constructing the opposite of a phrase with two terms, and he does so by tinkering with both terms. The phrase, “a duty to stay off the land,” is composed of the concept, “a duty,” and a content, “to stay off the land.”

First, Hohfeld deals with the concept: “a privilege is the opposite of a duty.” Given the illustration used by Hohfeld in this context of contrasting the privilege of a landowner to enter his land with the duty of staying off the land, we have seen that this appears to involve an opposite of extreme. Yet Hohfeld proceeds to assert that “the privilege of entering is the negation of a duty to stay off,” and explains this on the basis that the duty has “a content or tenor precisely opposite to that of the privilege.” But Hohfeld is dealing here with the content, not the concept. The content of the privilege to enter land, and the content of the duty to stay off land (not to enter land), are opposites of negation.

Moreover, an opposite of negation, here, would mean that
privilege amounts to no-duty. But we have seen that this does not fit Hohfeld’s analysis which requires a “privilege not” to amount to “no-duty,” or a privilege to amount to “no-duty not.”

Hohfeld’s opposite is a hybrid, formed by taking the opposite of extreme for the concept and the opposite of negation for the content, in arriving at “a privilege of entering land.” It is rather like saying that the opposite of “a black cat” is “a white dog.”

Such hybrid opposites can best be classified as opposites of alternative, since the net effect is to produce something which is neither the negation nor the extreme of the complete original, but which is mutually exclusive with it. A privilege to enter land implies that there is no duty to stay off the land. This falls short of Hohfeld’s assertion that it is the “equivalent” of no duty to stay off.

The asymmetry in Hohfeld’s table of conceptions, revealed by Williams’ amendment of “privilege” to “privilege not,” can be regarded not merely as a visual irritant but as a manifestation of the underlying inconsistency in Hohfeld’s use of opposite. “Right” and “no-right” are straightforward opposites of negation; but “duty” and “privilege not” are opposites of alternative. The awkward negative suffix appended to privilege is the result of it being constructed as a hybrid opposite of alternative, rather than as “the precise negation” it is represented as.

HOHFELD’S PRIVILEGE—AS PROTECTING RIGHTS

If a privilege is not simply the negation of a duty, this avoids the criticism that it is reducible to the negation of another conception. Yet if a privilege consists rather of the protection afforded by the law to permit X to do some act, this protection can be broken down into a set of rights with correlative duties: rights in X that Y does not do all those acts which would amount to interfering with X doing the permitted act. For example, if we take X’s privilege to enter Y’s land by using a right of way, the permitted act of entering Y’s land is protected by duties owed by Y to X such as a duty not to physically eject him, a duty not to obstruct the right of way, a duty not to keep a fierce bull in the vicinity of the right of way, etc. Again privilege is denied the status of being a fundamental conception on the ground that it is reducible.

The idea that a legal privilege, or liberty, consists of a set of protecting rights has been widely held, both before and after

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39 A strict parallel would be “a white no-cat” (involving an opposite of extreme for the first term, and an opposite of negation for the second). Not every conceivable opposite is useful for making practical comparisons.
Hohfeld’s analysis. It is, accordingly, a criticism of his analysis that both Hohfeld and his apologists have had to answer.40

The defence of Hohfeld’s concept of a privilege consists of admitting that protecting rights often accompany the holding of a privilege whilst denying that the privilege can be identified with such protecting rights. The privilege to do the permitted act is considered to be quite distinct from the right not to be interfered with in doing the permitted act. The final proof of this contention is provided by identifying a case of a privilege with no protecting rights.

Hohfeld himself purports to give such an example in the case of the shrimp salad. He cites Gray’s example of the owner of a shrimp salad, and analyses his legal position with regard to eating the salad as consisting of privileges and rights against other parties (who are under the correlative no-rights and duties): privileges41 to eat the salad, and rights that the other parties do not interfere with his doing so.

Hohfeld then states that in another example the privilege of eating the salad could exist without the protecting rights. The example, together with his analysis, is as follows.

A, B, C, and D, being owners of the salad, might say to X: “Eat the salad if you can; you have our license to do so, but we don’t agree not to interfere with you.” In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn’t eat the contents, no right of X would have been violated.42

All that is established by Hohfeld’s analysis of this example is that X does not enjoy the same rights to protect his privilege of eating the salad as those rights enjoyed by the owner of the shrimp salad in Gray’s example; in particular, a right that A, B, C, and D do not hold on to the plate in order to deter X from eating the salad. This is far from establishing that the privilege to eat the salad can exist without any protecting rights.

Perhaps X is taking part in some sort of trial of strength, or eating competition—he may only eat the salad if he can free the dish out of the hands of the others and consume the contents before the others do. In this case, he will certainly lack rights that A, B, C and D do not interfere with his eating of the salad in the ways allowed by the rules.

40 Pollock, writing before Hohfeld, in Jurisprudence, 2nd ed., (1904), p. 62 states: “Sometimes it is thought that lawful power or liberty is different from the right not to be interfered with; but for the reason just given this opinion, though plausible, does not seem correct.” A statement considered by Hohfeld at FLC, p. 48, n. 59—discussed below at n. 48. Subsequently, the same point has been raised as a criticism, or even misrepresentation, of Hohfeld’s theory. As the former, it is dealt with by Williams, p. 137; as the latter, it is dealt with by Finnis, p. 379, n. 5.

41 It should be remembered that a different privilege exists in relation to each party, albeit there is a common content: to eat the salad.

42 FLC. p. 41.
of the competition, or the conditions of the test. But to say that his privilege of eating the salad is not protected by any rights is to erode the privilege of all content.

Suppose that X manages to take the plate out of A's hands, take a forkful of the salad before anyone else can do so, and empty the contents of the fork into his mouth. Can A, B, C and D continue to interfere with X's eating, by holding his nose, dealing a blow to his solar plexus, etc? Or, should a morsel of shrimp enter A's stomach, can A, B, C and D then detain him until he pays for the salad?

There is a whole catalogue of activities that are open to A, B, C and D to discourage X from taking the salad, to impede X in the act of eating the salad, and to harass X should he eat any of the salad; and each is capable of being prohibited by forming the subject of a duty with a correlative right in X. If X is to have no protecting rights to prohibit any of these activities his licence to eat the salad is wholly nugatory, and the privilege that this is meant to constitute has no significance whatsoever.

In the assumed eating competition, X will have the right that A, B, C, and D do not interfere with his eating of the salad once he has got it to his mouth, and also that they do not prevent him from taking the food by methods not permitted by the rules of the competition.

Hohfeld claims that the significance of the privilege lies in X having no duty: "if X succeeds in eating the salad, he has violated no rights of any of the parties." But a "licence," although implying no duty not to do the permitted act, cannot be constituted by the no duty. However qualified the licence may be, inasmuch as a licence is given there must be some permission that is recognised and protected by the law—and this protection is constituted by a number of rights, which will vary with the extent of the permission granted by the licence.

Hohfeld's confusion arises out of treating the privilege of the owner as the same as the privilege of X, and classifying both as "a privilege to eat the salad." This is inaccurate. The owner may eat the salad, on his own terms, as, when, and how he wishes; X may only eat the salad on the terms of the permission granted him. The owner of the salad has a privilege to eat it that is constituted by a whole plenum of rights protecting every aspect of his ownership. X's privilege is constituted by a lesser number of rights which protect his qualified permission to eat the salad. The privilege of X may exist without all of the protecting rights enjoyed by the owner, since it is a lesser privilege, but it cannot exist without any protecting rights.

Glanville Williams also purports to identify a privilege (or liberty) existing without protecting rights, in order to establish that Hohfeld's concept of a privilege is distinct from the right not to be interfered
with in doing the permitted act. In all, he suggests six examples: (1) liberty of passage along the highway; (2) liberty to pick up an abandoned gold watch; (3) liberty to employ a good cook; (4) liberty of a licensee of land; (5) liberty to erect a house; (6) liberty of speech.43

In examples (1) and (6), Williams concedes that there is a right not to be physically interfered with in exercising the liberty, but dismisses this on the ground that it is part of the ordinary law of assault. This argument overlooks an important feature of Hohfeld’s analysis—cardinal feature (4), above44—namely, that the analysis is concerned with stating the effect of all legal material on a particular situation. It is accordingly irrelevant whether a pertinent part of the legal material appears under the guise of the law of assault in the sources.

In examples (1), (4), (5) and (6), Williams argues that the right not to be interfered with does not exist by specifying a particular right that does not exist to protect the given privilege. For example, in (4) Williams mentions that the licensee does not have a right not to be interfered with by third parties. This is to repeat Hohfeld’s error: identifying one right that the liberty holder does not enjoy is not to show that his liberty is unprotected by any rights. In (4), the licensee has rights not to be interfered with by the licensor, in accordance with the terms of the licence. Again, the error can be traced to a failure to define clearly the nature of the privilege. The privilege of a licensee is not the same as the privilege of an owner. The basic error is to state the privilege (liberty) in terms that are too loose, which do not properly reflect the legal position being analysed: a licensee does not have an unqualified privilege over land, but a privilege that is limited by the terms and nature of his licence.

Examples (2) and (3) betray an even looser use of language. Both examples deal with the situation where A and B have a lawful opportunity to do something, in which only one of them can actually succeed—picking up the abandoned watch, employing the good cook. Williams analyses A’s position as having a privilege to do the act, picking up the watch, say, whilst having no right that B does not interfere with this by doing the act, picking up the watch, himself. He thus concludes that the privilege exists without the right not to be interfered with.

However, the privilege in such an example is not a privilege to do the act, but a privilege to endeavour to do the act. The law does not give A the privilege of taking the watch, to the extent that it will protect him from others taking the watch instead of him—this is the

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43 Williams, pp. 137ff.
44 At p. 439.
privilege given to the owner of the watch (or, *mutatis mutandis*, the person for whom the cook is already contractually bound to work). The law simply gives A the lawful opportunity to pick up the abandoned watch (to employ the unemployed cook) if he manages to do so before B, or anybody else.

This lesser privilege will be protected by A’s rights not to be interfered with in his attempt to do the act—to the extent that the law protects his opportunity to do it. For example, in the race to pick up the watch, B may not trip A up; B may not threaten A’s life in order to deter him from employing the cook. The dividing line between lawful competition (B running faster than A; B offering the cook a higher salary than A) and unlawful competition, which A is protected from by rights that B does not engage in it, will define the scope of the opportunity that the law gives A to do the act in question.

None of Williams’ examples represents a privilege without protecting rights, any more than does Hohfeld’s variation on the shrimp salad affair. For the sake of completeness, we should consider one other case. It is possible that instead of a privilege to do something, we may come across a privilege not to do something. This type of privilege features among Hohfeld’s examples. Again, a distinction can be drawn between a privilege existing as the opposite of extreme of a duty and a privilege as a mere negation of a duty. To take the example of a privilege against self-incrimination in the law of evidence, Hohfeld says of this, “the privilege against self-incrimination signifies the mere negation of a duty to testify.”

That this is not so can be shown by the same approach as adopted above:

(a) duty: X is under an obligation to Y to testify;
(b) no-duty: X is under no obligation to Y to testify;
(c) privilege: X is protected from Y compelling him to testify.

There is a similar switch here from the law being unconcerned if X does not do an act, in (b), to the law positively permitting X not to do the act, in (c).

It is evident that the privilege of not incriminating oneself is one that only exists as a significant legal position where it is actually protected by legal rights—that Y does not apply a truth drug to X, threaten X, assault X, or imprison X if he fails to give evidence, etc. Indeed, Wheeler Cook acknowledges the need for “a right *stricto sensu*” here.

**HOHFELD’S PRIVILEGE—CONCLUSION**

We may conclude that Hohfeld’s concept of a privilege, if it is to have any legal significance, represents the protection afforded by the law

**FLC**, p. 46.

**FLC**, p. 7, n. 3.
to permit A to do, or refrain from doing, some act. As such, a privilege may be further broken down into a set of protecting rights. And, on this ground, it can no longer be accepted as a fundamental conception.

This conclusion, in itself, does not present a novel criticism of Hohfeld's theory. As already mentioned, the idea that a legal privilege, or liberty, is constituted by a set of protecting rights has been widely held. Accordingly, it might reasonably be asked how Hohfeld's theory has managed to withstand the repetition of this criticism, if the criticism is valid.

In reply, it is perhaps worth summarising the main points of the argument used above, in order to demonstrate how the criticism has not been so much met as avoided.

We commenced by noting the ambiguity of the term "opposite," and pointing out that it is possible for a number of opposites to exist in relation to the same thing. For convenience, three particular types of opposite were identified: an opposite of extreme; an opposite of negation; and an opposite of alternative.

I argued that Hohfeld is inconsistent in his definition of the concept of a privilege as the opposite of a duty in his table of conceptions, and suggested that this inconsistency is facilitated by the ambiguity of opposite.

The inconsistency essentially concerns using two distinct conceptions of a privilege. The first, which appears in the general definition of a privilege, equates this concept with a no-duty—this is an opposite of negation. The second, which is derived from the practical illustrations given of a privilege, amounts to a positive protection given by the law to do a permitted act—this is an opposite of extreme.

If we examine the first definition, equating privilege with no-duty, then the concept of a privilege can be reduced to the negation of another concept, and on the ground of being reducible can be denied the status of a fundamental conception.

Against the adoption of the first definition are the points that it fails to account for the negative suffix identified by Glanville Williams as required by Hohfeld's use of privilege, and also that privilege is used to describe actual legal positions.

If we examine the second definition, whereby a privilege amounts to a positive protection given by the law, then that protection can be broken down into a set of right-duty relations, and again the concept is reducible, and therefore not fundamental.

In considering the practical illustration of a privilege, from which the second definition is derived, we also examined the possibility of a counter-example, of a privilege existing in practice with no protecting rights. The suggested counter-examples of Hohfeld and Williams...
were dismissed as fallacious. In particular, the confusion between different types of privilege concerned with the same act was noted.

In order to avoid this confusion, it would be more appropriate to speak of the rights not to be interfered with in doing the privileged act, rather than the singular right not to be interfered with, which may misleadingly stand for a variety of different sets of rights, varying according to the extent of the privilege in question.

We concluded that the second definition of a privilege was to be accepted, if the concept was to have any legal significance, and that a privilege was constituted by the set of protecting rights. This lays the concept open to the charge of being reducible and therefore not fundamental.

Hohfeld avoids this conclusion, not simply by inconsistency in his use of opposite, reflected in the two definitions of privilege, but by what amounts to a strategic vacillation between the two definitions.

If we suspect that privilege is redundant, because it is simply the negation of a duty, we are presented with a practical illustration where the privilege is something more than that: being given positive permission by the law to do some act. If we then look at this idea of a privilege as a positive permission, and argue that this can be broken down into a set of protecting rights, we are faced with Hohfeld's claim that the privilege consists not in the protection given by the surrounding rights, but in the negation of a duty. It is a sort of conceptual three card trick: we need to turn over both definitions at once to show that there is no fundamental conception there.

I have argued that the verbal sleight which Hohfeld uses to bring off his illusion of a fundamental conception is to combine the two definitions of a privilege, based on opposites of extreme and negation, in a hybrid opposite of alternative: using the extreme of the concept and the negation of the content. And I have suggested that this is betrayed by the asymmetrical "privilege not," which on closer examination, appears in Hohfeld's table of conceptions.

Finally, it is interesting to note that when Hohfeld himself does attempt to meet Pollock's assertion that a lawful liberty is no different from the right not to be interfered with, he steps outside the framework of his own analysis. He states, "A rule of law that permits is just as real as a rule of law that forbids; and, similarly, saying that the law permits a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law forbids a certain

47 This sidestep is used by Hohfeld's apologists: Williams, p. 137; Finnis, pp. 378f. It is also interesting to compare the problems faced by Von Wright in dealing with the question whether "permissive norms" are definable in terms of "obligation norms"—Norm and Action (Routledge and Kegan Paul 1963), pp. 85ff; and in his use of negation—op. cit. p. 140. Mullock suggests that Hohfeld's theory can be regarded as an "informal and legal precursor of Von Wright's deontic logic"—(1971) 13 Ratio 158, at p. 160.

48 FLC, p. 48, n. 59.
act to X as between himself and Y." Hohfeld is not presenting here an analysis in terms of fundamental legal conceptions, but a description of legal material as it is found written in the sources. (See cardinal feature (4), above.)

The wording of a statute may predicate "a genuine legal relation," but that is not necessarily a relation of fundamental legal conceptions. If it were, then anything could be a fundamental legal conception, provided only that it were found expressed in the words of a statute—or other "rule of law." So, a property right would be a fundamental legal conception, if only we could find a statute speaking of the interest of an owner in his property. This is clearly not what Hohfeld intended. Hohfeld's difficulty in meeting Pollock's point is indicated by his transgression of the principles upon which his own system is founded.

**HOFHELD'S OTHER CONCEPTIONS**

The rejection of a privilege and its correlative, a no-right, as fundamental legal conceptions raises doubts about whether the remaining four conceptions can maintain their status.

The power-liability correlatives describe a relation where A is in a position to change B's legal situation.

This relation may be considered inadequate to explain all the facets of a legal power, but I am only concerned here to examine the concept proposed by Hohfeld. He himself considered his definition to be limited to the practical problem of analysing legal positions: "too close an analysis might seem metaphysical rather than useful; so that what is here presented is intended only as an approximate explanation, sufficient for all practical purposes."

In Hohfeld's words, a power exists where "a given legal relation may result . . . from some superadded fact or group of facts which are under the volitional control of one or more human beings." That is to say, A has a power in relation to B (who is under a liability) where:

(i) A may do (has "the volitional control" over) something ("some superadded fact or group of facts"), and,

(ii) a legal relation of B results.

The first constituent reflects the truism that the law deals with actions

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49 A no-right is only properly a correlative of a privilege which is equivalent to a no-duty; as such it is reducible to the negation of another concept (in substance, as well as name). As remarked above, it borrows some status from being correlated to a privilege in the stronger sense of a positive permission to do an act. This privilege has been broken down into a number of protecting rights—whose correlatives are not a no-right but a corresponding number of duties.

50 FLC, p. 50. Contrast Hart, *Essays on Bentham* (Oxford 1982), p. 195: "But much more than Hohfeld gives us is needed to display the notion fully and to analyse legal powers in their variant forms, and to exhibit the character of the laws which create or confer them."

51 FLC, pp. 50f.
rather than mere states of the mind: if A wishes to execute a power to change B's legal position, it is not enough that he makes the decision to do so; he must express his decision by some act—even if it is only the act of speech.

For example, if B has already made an offer in contract to A, then A is said to have the power to impose a contractual obligation upon B, by posting a letter of acceptance. The action of A (posting the letter of acceptance) brings about the legal relation of B (being under a contractual obligation).

Yet if the first constituent of Hohfeld's power is the law permitting A to do some act, this will amount to A having a privilege, which, as we have seen, can be further broken down into a set of protecting rights. Hohfeld himself links a privilege of entering land with the power to divest an estate by entry, but does not acknowledge that the privilege is a constituent of the power.

The second constituent is a potential legal relation, contingent upon the exercise of the privilege. In the example above, the potential legal relation amounts to B having a duty, to fulfil his contractual obligation. Other examples of powers may involve the possibility of placing B under other legal relations. If A has the power to make B his agent, this is a power in A to place B under a power.

In this latter example, the potential legal relation of B involves a power which itself will have two constituents: (i) a privilege in B to do some act, and (ii) a legal relation resulting from the exercise of the privilege. Although there may be a succession of powers created by powers, ultimately the potential legal relation forming the second constituent must involve permitting N to do something or obliging N to do something—since a power to give a power cannot mean anything in itself: there must finally be a power to do something either permitting of obliging some act(s) and/or omission(s), by some person(s). The second constituent of the final power will accordingly involve potential privilege(s) or duty(ies), respectively. The succession of powers can accordingly be analysed in terms of a privilege, plus potential privileges in the successive possible power holders, culminating in potential privilege(s) and/or duty(ies).

As a corollary, it should be pointed out that if a liability features in the analysis, this too may be analysed in terms of (privileges) rights and duties, such as are correlative to those forming the power—to the extent that liability is the correlative of a power.

52 FLC, p. 55.
53 It will also bring about a corresponding contractual obligation in A himself.
54 FLC, p. 55.
55 Potential legal relations are recognized by Hohfeld, in relation to sanctions—n. 23, above.
56 FLC, p. 52.
57 Together with a correlative right; or, a right with a correlative duty.
Since privileges have been analysed as amounting to a set of protecting rights and correlative duties, a power can be broken down into right-duty relations: actual rights forming the privilege of the first constituent, and potential rights and duties forming the second constituent. This will be the case whether the potential legal relation involves rights, duties, privileges, or powers and liabilities.

It may be argued that this analysis overlooks immunities, and disabilities, but if these are to be regarded as the negations of liabilities and powers, it follows that these too may be expressed in the constituents which powers and liabilities have been broken down into.

A further criticism of Hohfeld’s conception of a power must be made before the full picture can be given. Hohfeld’s attempt to contain the power-liability relation in an analysis involving only the two parties to the relation is an oversimplification. This becomes apparent once we reduce the power-liability relation to its constituent right-duty relations. A clear demonstration of the point is furnished by the following example.

Suppose A has the power to vest a legal estate in land in B. This involves a change in B’s legal relation not only with A, but also with X, Y, Z, etc., since a legal estate in land gives B rights with correlative duties in these parties, as well as in A. If one were to set aside the relations with X, Y, Z, etc., A’s power would be something less than a power to vest a legal estate in land in B: it would, at the best, be a power to give B a contractual right to the land, enforceable only in person against A himself.

The second constituent of a power, the potential legal relation, should accordingly be regarded as comprising potential right-duty relations in B and possibly other parties as well. The number of these potential legal relations will reflect the scope of A’s power—for example, whether it is a power to give B a contractual right against himself, or title to land good against third parties.

Moreover, the first constituent of the power, A being permitted to do some act, cannot be regarded exclusively as a privilege in relation to B, the person whose legal position is to be changed. It is possible that a third party, X, may be able to prevent A doing the act, in which case, if A is to retain the power, he must have a privilege to do the act in relation to X, as well.

An example to illustrate this point is where A is the agent of X,
and has a power to sell X's goods to B,\textsuperscript{61} thus making B the owner of the goods. This power can only exist where A has the privilege, in relation to X, to hand over the goods. More generally, even where A is purporting to sell his own goods to B, this will only be a valid power where A has the privilege of handing the goods over, in relation to parties other than B—\textit{i.e.} nobody else has a legal interest in the goods (X has a charge over the goods, Y is in fact the owner, etc.) which can prevent A handing them over to B.

A full analysis of a power will accordingly be constituted by:

(i) a privilege of A to do an act, which will amount to protecting rights in A and correlative duties in B, X, Y, Z, etc;

(ii) potential legal relations of B, which will amount to rights and duties in B with correlative duties and rights in A, X, Y, Z, etc.

It follows from this analysis that the liability of B (consisting of duties, and potential rights and duties) is only a partial correlative to the power of A, since it does not account for the legal relations with X, Y, Z, etc., which are involved in A's power to change B's legal position.

The number of right-duty relations of the first constituent will determine the \textit{strength}\textsuperscript{62} of A's power, and the right-duty relations of the second constituent will determine the \textit{scope} of A's power—\textit{i.e.} the extent of its effect on B's legal position.

Since a power has been analysed to be an aggregate conception, covering legal relations extending beyond the power holder and the person under the liability, the concepts of immunity and disability cannot be simply represented as negations of liability and power.

If A has no power (a disability) to change B’s legal position B is said to have an immunity in relation to A. The concept of an immunity must be capable of reflecting the complexity found in the concept of a power. In particular, an immunity must be able to cover both constituent elements of a power. So, for example, if B has an immunity against A divesting him of his title to land,\textsuperscript{63} the immunity may consist of:

(i) B has rights that A does not do an act which purports to divest his title; and, if A does so act,

(ii) B has potential rights as against A, X, Y, Z, etc., that they do not act upon A's purported act of divesting as valid.

The exact nature of B's immunity will be determined by the

\textsuperscript{61} An example of a power given by Hohfeld—FLC, p. 52.

\textsuperscript{62} A feature of a legal power which should not be lost on land lawyers. For example, A, a squatter of 10 years, may have the power to vest title of land in B, as far as X and Y are concerned, but not so far as Z is concerned, where Z is the absent owner of the land. Z could prevent A transferring the land to B.

\textsuperscript{63} An example given by Hohfeld—FLC, p. 60.
number of such rights, or potential rights, that he possesses.\footnote{The nature of an immunity may be illustrated by considering an immunity from being divested of a right of way over land (a privilege, in Hohfeld’s terms, to enter and cross the land). The strength and scope of the immunity will vary depending on whether the holder of the right of way is a contractual licensee, has an equitable easement, has a legal easement, or is the owner of the land.}

Without any such rights, no matter how loquaciously B may assert that A had no power to divest him of his title, the immunity is meaningless.\footnote{Wheeler Cook shows some hesitancy to disassociate an immunity from protecting rights (FLC, p. 8, n. 6a and p. 9, n. 9), but does not concede that the immunity is constituted by such rights.}

It should be noted that immunity, like power, will also extend beyond the simple bipartite relation to include relations with third parties. A’s disability (consisting of duties, and potential duties) to change B’s legal position will, accordingly, be only a partial correlative to B’s immunity, which will involve legal relations with X, Y, Z, etc.

\section*{CONCLUSION}

I have attempted to show here that six of Hohfeld’s conceptions are reducible (privilege, no-right, power, liability, immunity, disability) in terms of the other two (right and duty), and accordingly must be denied the status of being fundamental conceptions.

It is interesting to ponder why the other six conceptions should be considered for the role of fundamental conceptions in the first place. The most compelling reason is that as a matter of practical convenience, it is often more useful to talk in terms of the aggregates which these conceptions represent, rather than the right-duty relations by which they are constituted. For example, sometimes we will want to know whether A is permitted by the law to do a certain activity, rather than to know of all the acts of interference which B, C, D, etc., may not do, which have the effect of leaving A free to act.

So, a privilege becomes a basic concept of legal discourse. Likewise, a power, and an immunity, and their correlatives.\footnote{Whereas the analysis above shows that the correlatives liability and disability represent aggregate positions with a particular significance, we have seen that the same cannot be said for a no-right (n. 49, above). It is, therefore, not surprising that Hohfeld found it relatively easy to find terms for the former conceptions, but could not find an available term for the latter.}

If we recall that Hohfeld attaches his conceptions to a bipartite relation, we have a hint as to the particular context in which these conceptions have their usefulness. Two parties appear as the basic elements of litigation. The four correlative pairs of conceptions represent the four basic positions of litigants: A may claim that B should do something; A may claim that he is free to do something without B’s interference;\footnote{This represents the relation of a privilege and a duty (correlative to a protecting right of which the privilege is composed), rather than the discarded no-right.} A may claim to be able to alter B’s legal
position in some way; A may claim that B is unable to alter his legal position in some way. The aggregate conceptions are necessary in order to express the answer that the law will give to certain disputes that will arise in practice.\textsuperscript{68}

However, representing the conceptions of privilege, power and immunity, and their correlatives, as \textit{fundamental} legal conceptions results in a failure to analyse clearly the nature of the legal positions that they represent. The privilege of an owner to enjoy his property is confused with the privilege of a licensee; the power to give a contractual right to property is expressed with the same term as the power to give title to property. Such positions cannot be fully explained without referring to the right-duty relations\textsuperscript{69} by which they are constituted, and which may embrace others than the parties to a single bipartite relationship. These constituent right-duty relations will reveal the \textit{extent} of the privilege; they will reveal the \textit{strength} and \textit{scope} of the power, or immunity.

A basic concept of legal discourse should not be confused with a fundamental conception of legal analysis. This is to run the risk that Hohfeld readily recognised: to impair the analysis of legal problems by "the commendable effort to treat as simple that which is really complex."\textsuperscript{70}\textsuperscript{*}

\textsuperscript{68} I propose to consider Hohfeld's concern with litigation more fully in a sequel, together with an examination of aggregate conceptions in general.

\textsuperscript{69} I shall also further investigate Hohfeld's conceptions of right and duty in the sequel.

\textsuperscript{70} FLC, p. 26..

\textsuperscript{*} I am grateful to Dr John Finnis for his helpful criticism, and to Professor Tony Honoré for some comments on an earlier draft of this paper.