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THE SCIENCE OF LAW: HOHFELD AND KOCOUREK.

I.

This paper is meant to deal only with the last two names (more particularly Hohfeld) on the long list of those whom we associate with the science of law, by reason of their contribution to its progress. However, just as it is not sufficiently comprehensive to study a cross-section of our law today, without some idea of what the cross-section was yesterday, so we must go back for a moment to see at least who were the immediate predecessors of Hohfeld and Kocourek, and what their contributions were.

The science of law is a general study which has no more nationality than mathematics or chemistry, but for our present purposes we will have to restrict ourselves to a little of the material available in the English language.

As brought to our attention by Professor Page[1]—when Bierling in 1877 (in Germany) discussed what we might call rights, powers, and liberties, he did not flatter himself with having advanced any new ideas. It was even as much as forty-five years earlier that Austin[2] had lectured on jurisprudence without boasting of originality in analysing legal problems. In 1880 Holland added the results of his thorough studies of jurisprudence.

Then all by himself in far-off Japan, Terry had a great deal of time to ponder over jurisprudence, and the results of his thinking were published in 1884.[3] After another long lapse, in 1902 came Salmond with some further analysis and crystallization.[4]

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[1] Page, "Terminology and Classification in Fundamental Jural Relations" (1921) 4 Am. L. Sch. Rev. 616; cf. Kocourek, "Jural Relations" (1st ed. 1927) pp. 40, 363.

[2] Austin, "Lectures on Jurisprudence", 1832.

[3] Terry, "Leading Principles of Anglo-American Law", 1884.

[4] Salmond, "Jurisprudence", 1902.

There were also many others who discussed jurisprudence, but even by looking for a moment at only the last two mentioned above, we find that they both pave the way for Hohfeld.

We are only now, after half a century has passed, beginning to catch up with Terry who was far in advance of his time—as leaders of science always are. Terry's objective was towards an arrangement and codification of law, and the means of arriving at this were through analytical jurisprudence.[5] With duty as a starting point, he comes to rights in their different varieties as the necessary basis for analytical work.[6] Correspondent, permissive, and facultative rights, may roughly be compared with claims, privileges, and powers. Terry also appreciated the correlation between right and duty, and he was amongst the earlier writers who used the phrase "jural relations".[7]

With all that, Terry did not claim any unusual originality because at his own statement, he drew much from Austin and Holland.[8] It is very seldom that one scientist's originality completely replaces the works of his predecessors,[9] but based on their achievements, it is a sufficient contribution to be able to go at least one step further in the progress.

Salmond[10] emphasizes the necessary correlativity of rights and duties. He adds, however, that there is no generic term correlative to right in a wide sense and for this it is necessary to include duties, disabilities and liabilities. In what by no means pretends to be a complete list of opposites and correlatives, Salmond includes the term liberty which is given several meanings.[11] Salmond added another point in discussing positive and negative rights corresponding to positive and negative duties.

[5] "The purpose of this book is to analyze such of the fundamental principles and notions of our own law and to present such an enumeration and outline description of the rights and duties created by it as will make it possible to explain intelligibly a scheme for the arrangement of the whole of it". Terry, op. cit., supra note 3, preface p. vii.

[6] Terry, op. cit., supra note 3, p. 84 et seq.

[7] Savigny (about forty years before Terry) was probably the first to speak of jural relations. Kocourek, op. cit., supra note 1, p. 30.

[8] Terry, op. cit., supra note 3, pp. 85 n. 1, 88.

[9] One of the few possible instances was the Copernican system of astronomy replacing the Ptolemaic.

[10] Salmond, "Jurisprudence" (8th ed. 1930), pp. 240-257.

[11] Kocourek, in "The Hohfeld System of Fundamental Legal Concepts" (1920) 15 Ill. L. Rev. 24, 39, thought that this was probably the source of Hohfeld's privilege. But in "Jural Relations" p. 399, n. 11, (reprint of article written in 1922), Kocourek seems to think that Hohfeld, in formulating this concept, probably based his analysis on Terry's discussion of permissive rights.

It took another decade for all this to be absorbed, and only in 1913 did Hohfeld come out with his "Fundamental Legal Conceptions". If Hohfeld or anybody else considered this to be the first pioneering in virgin territory, such a belief is as erroneous as saying that solid geometry has nothing to do with plane geometry. It is, in scientific progress, going a step further.

Hohfeld was not original in speaking of legal conceptions, but to say that here were all the fundamental ones was an act of bravery of antagonising stimulation.

When a man, after much careful thought and research, advances a new idea in a field of scientific endeavor, what he first meets is the conservative nature of the rest of the world. This makes it more difficult for the innovation to be taken up. Of course, even if, and when, a new idea or a new approach has been satisfactorily established, its practical applications may not yet have been worked out well on a large scale.[12]

On the other hand, a new idea may just land in the midst of some hungry minds, and grow like seed scattered in very fertile soil. That is, occasionally the reaction is to stretch out and take up the proposal and sometimes even carry it further than its mental parent would have done. Then the conservative nature sets in again and the proponents show a doggedness and a tenacity that surprise and seem inexplicable to the one who has observed their earlier hunger for something new.[13]

Remembering the natural conservatism based on long-existing institutions, and keeping in mind the impossibility of immediate practical application, it is consequently not surprising that such a new departure as that of Hohfeld might be severely criticized as useless, or even totally ignored from failure to comprehend. At the same time, it may be noted that after 1900 there was a great extension of and very widespreading interest in legal study and education. By 1913 there had been formed quite a number of hungry minds ready to start working on new developments. When such developments came with promise of improved methods of study and more comprehensive understanding, of better application, and greater facility for research, then the avidity of its reception is not to be wondered at.

[12] Thus, we find that physicists have long established the unusual qualities of liquid air, but have not yet found its use to be of much practical application. Similarly the electrical scientists have conclusively shown with absolute accuracy that light can be expressed in terms of sound, and vice versa, and that sound can be expressed in terms of motion. However, while these achievements are accepted as scientific truths, no practical application has as yet been found. Science and research in all fields of interest, have always been and must always be, ahead of the times.

In the light of some of the pre-existing developments above indicated, it can hardly be said that Hohfeld was a pioneer in analytical jurisprudence. His jural concepts had no real new content, but he did (or thought he did) indicate the boundaries of each one so that there would be no overlapping. He went a step further in saying that his concepts were fundamental, and that as such, they were all necessary elements. His tables also go a step beyond preceding enumerations in that they are supposed to be complete, as well as being symmetrically arranged. Hohfeld was thus a further extension of the already existing and probably never-ending graph of progress in the science of law.[14]

The detailed examination of Hohfeld's part of that graph shows that it is made up of several high notes as well as several low notes. The high ones are his stimulus in making so many others think and in the tabular arrangement of concepts for working purposes. The lowest note is his concept "privilege" with all the difficulties it brings in.

Hohfeld observed and analysed law and its processes. He showed that the elements—called jural concepts—can be separately isolated. The test of his results was demonstrated in his practical illustrations (and those of his followers) which show how the method of approach should be applied in judicial reasoning.

If Hohfeld had not been cut short in his work,[15] and had lived to go through the argument with Kocourek, there would no doubt have been some extraordinarily fine results. As it is, we have to deal with them separately, with Kocourek representing the subsequent and most recent progress in our continuing graph.

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[13] In the field of law there has been more discussion and argument but less scientific approach than in other fields. "Reason" and "logical chain of thought" have been its most important weapons, together with a growing terminology of too-general or ambiguous tools, vehicles of thought that are too vague and confusing.

If a person could isolate a small number of good working instruments of some common basis, which could be used to convey and exchange thoughts in law with accuracy, even if not as minutely as the Chinese symbols express sounds, his scheme would be eagerly welcomed by those whose work it would facilitate.

[14] As long as there continues to be evolution in human society, there will continue to be evolution in law. (Cf. "Law is part of life....." Page, op. cit., supra note 1, at p. 623).

[15] Numerous tributes to his memory appeared in the different law reviews, and elsewhere; and while most of them refer to his work with profound admiration, some almost reach poetic heights, e.g., 28 Yale L. J. 795 (1919).

Kocourek took Hohfeld's concepts and his tables and put them through as thorough a criticism as anything ever received, and in the controversy which followed Kocourek left not a stone unturned.

By his own statement,[16] Kocourek was stimulated to write as a result of Hohfeld's work. There was a starting point. Following his criticism of the Hohfeld system, Kocourek was able to figure out the ways to stop up the holes, to bridge the gaps and to make it all more comprehensive and logically consistent.[17] Kocourek's plan for analytical jurisprudence is consequently free from all the weaknesses criticized in preceding systems and, as far as can now be seen, his contribution to the graph of progress is the most accurate and complete.[18] How far Kocourek may have gone beyond the needs of the purpose in creating as much mystifying terminology and formulating tables of sub-contraries, and so forth, the present writer is not prepared to say.[19]

It would be in place, however, to point out that Kocourek's book "represents the view that the science of law is conceptual in all of its elements and operations and that the basis of this conceptual structure is one of purely objective facts."[20]

Fundamentally, both Hohfeld and Kocourek are working for the same purpose and on the same principle. What is more, they both use the same means. It is incidentally, however, when it comes down to the details of these schemes and their application that the differences become greater and greater. Consequently, when we get to the actual working out of the problem, we really have two systems. However, in dealing with them as two separate and distinct systems, we must not at any time forget that we are contrasting not two different trees, but two branches of the same tree.

"Hohfeld came with genuine originality and a forecast of the true method. Kocourek followed with a complete grasp of the entire problem and a real science of legal ideas . . . ." His book gives the first presentation of an applied science of law.[21]

[16] Kocourek, op. cit., supra note 1, preface p.x.

[17] Cf. "the criticism of Hohfeld was the nucleus of Kocourek's system." Philbrick, Book Review, (1930) 78 U. of Pa. L. Rev. 1044.

[18] Cf. John H. Wigmore's Introduction to "Jural Relations"..pp. xxi, xxiii.

[19] Cf. Page, op. cit., supra note 1, at p. 623; Radin, Book Review, (1928) 16 Calif. L. Rev. 559.

[20] Kocourek, op. cit., supra note 1, preface p. ix.

[21] John H. Wigmore, loc. cit.

II.

Before proceeding to the discussion of some of the details of Hohfeld's system, it is well to reproduce his tables for convenient reference.

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

These tables are made up of the eight fundamental legal conceptions. But Hohfeld does not prove either that there are no more than eight, or that these are all fundamental. Furthermore, Hohfeld makes no attempt to indicate the legal history of jural relations.[22]

At the very outset, Hohfeld insisted on the importance of isolating purely legal conceptions from all other non-legal conceptions because of "the inveterate and unfortunate tendency to confuse and blend the legal and the non-legal quantities in a given problem."[23] That he himself did not completely succeed in doing so was best demonstrated by Kocourek,[24] but on the other hand it must be granted that he went much farther in that direction than previous jurists had reached.

The first thing which is pounced upon by critics[25] is Hohfeld's statement that "fundamental jural relations are sui generis and attempts at formal definition are unsatisfactory."[26] Would it not be more in keeping with its importance to pay less attention to that statement?[27] Did Hohfeld not mean that instead of starting off with a synthesis of the results into a one-sentence formal text-book definition, to enter into the discussion and see what these results are?[28] Had he taken the trouble of clearly

[22] This gap is filled by Kocourek in his "Jural Relations", Chap. III, p. 29 et, seq.

[23] Hohfeld, "Fundamental Legal Conceptions" (New Haven, 1923), p. 27. (The principal article was first published in 1913, 23 Yale L. J. 16).

[24] Kocourek, op. cit., supra note 1, p. 381, App. IV and V, pp. 393 et seq.

[25] Page, op. cit., supra note 1, at p. 618; Kocourek, op. cit., supra note 1, p. 368; Husik, "Hohfeld's Jurisprudence", (1924) 72 U. of Pa. L. Rev. 263, 265.

[26] Hohfeld, op. cit., supra note 23, p. 36.

[27] Does Page himself not say (op. cit., supra note 1, at p. 623) that "the ideas and standards of law are too big to be caught in a net whose stakes are definitions and whose meshes are logical syllogisms"?

A serious weakness in Prof. Page's comment is his failure to keep a clear distinction between a concept and a relation, so that his use of the terms interchangeably is confusing.

[28] Although definitions are usually the starting points for students, they are really the conclusions of those who formulated them. It is like the introduction to a book which can only be written after the book is completed but is then placed in front of it.

enunciating definitions, his own manipulation of the terms might probably have been more accurate.[29] That Hohfeld did not arrive at the perfect results which he anticipated—or even thought he reached—is quite another matter, and it is in this field that issues should be raised.

Right and *duty* are the two correlative concepts that constitute the first jural relation in Hohfeld's table.[30] The acceptability and fundamental nature of this relation and its component concepts have never been attacked. There was nothing new in this presentation, except perhaps in giving it a more precise application. It is consequently unnecessary to repeat a good deal of non-contentious and unanimously accepted ideas of long standing.

Privilege and *no-right* are the two correlative concepts that constitute Hohfeld's next jural relation. This brings us right into the pitching and rolling on the high seas of controversy.[31] Hohfeld must have had some good ideas for this relation but they were either excessive or incomplete, because they are not sufficiently crystallized and his usual accuracy and precision are not prevalent. This is probably the weakest part of his whole system,[32] and despite all efforts it is impossible to pin down just what he meant. From his explanation and illustrations, a number of different meanings are possible—yet this is exactly what he was trying to do away with.

In narrowing down the meaning of right (claim) Hohfeld was quite justified in referring to its correlative duty. But then he took as a starting point for privilege the indication that it is the opposite of duty.[33] This approach is not only lacking in strength itself, but it also weakens the very first characteristic

[29] E.g., the multiple meanings of privilege would not have come in so easily.

[30] The term "rights" has usually been employed in a generic sense as well as in several specific senses, and although Hohfeld also uses it in a generic sense, he suggests the term "claim" as a substitute (op. cit., supra note 23, p. 38) for the specific sense referred to in his table. It would have been clearer to make this substitution absolute, in the way that Kocourek did later.

Husik, in his comments on "Hohfeld's Jurisprudence" seems to have missed this distinction altogether. Husik, op. cit., supra note 25, at p. 265.

[31] This controversy is well indicated and citations given, in Appendices in Kocourek's "Jural Relations". See also Goble, "Affirmative and Negative Legal Relations", (1922) 4 Ill. L. Q. 94, n. 1.

[32] Cf. Husik, op. cit., supra note 25, at p. 266.

[33] It has been pointed out by several critics—most ably by Kocourek (op. cit., supra note 1, p. 364 et seq.)—that Hohfeld's opposites are really contradictories or negatives. Hohfeld himself substantiates this criticism by explaining privilege as the negation of duty (op. cit., supra note 23, pp. 39, 45). However, if Hohfeld can derive any usefulness from his table of opposites, it should be retained in his system.

of his table which is supposed to deal only with fundamental conceptions.

Having deduced privilege as the opposite (negative) of duty, it is to be expected that the correlative of privilege would be the opposite (negative) of right. Thus we get the so-called new jural relation (privilege-no-right) which in reality is nothing more than an inverted negative of the first relation (right-duty).[34]

The first meaning which Hohfeld gives to privilege is liberty[35] (to earn a living). In the illustration about self-crimination in evidence,[36] the concept is that of the privilege in the strict legal sense. When Hohfeld adds the illustration of the privilege to put the law into motion against a wrongdoer, he is really thinking in terms of legal power. The house-holder's privilege of ejecting the trespasser[37] seems to be a confusion of liberty and power.[38] The privilege to eat one's own salad, or to enter one's own land seems to be a combination of operative facts and other elements —some of which would be legal—but using Hohfeld's concepts, it is impossible to get a correct simple analysis.

Looking through these various applications of the term privilege, there is really one common denominator emphasized throughout—the negation of duty. This is the clue to the explanation of where Hohfeld went off the track, namely, in his starting point for privilege. It has been indicated above that he started out from the opposite (negative) of duty, and with that idea in mind he grouped together those conceptions which showed a negation of duty.[39] On this basis, Hohfeld comes to the conclusion that "the closest synonym of legal privilege seems to be legal liberty or legal freedom",[40] that is, freedom from duty.

[34] Kocourek makes use of the term privilege for one of his basic concepts but he gives an entirely different meaning to it. More accurately and more logically Kocourek places his privilege-inability relation in a secondary position, being derived by reciprocation from the fundamental power-liability relation. Kocourek, "Introduction to the Science of Law" (1930) p. 354.

[35] Hohfeld, op. cit., supra note 23, pp. 42, 43; but unfortunately Hohfeld passes through the red light signal of Lord Lindley—that the correlative must be the general duty of everyone not to prevent. . . .

[36] Idem, p. 46.

[37] Idem, p. 41, n. 39.

[38] Kocourek, op. cit., supra note 1, p. 370.

[39] Cf. "The basic defect in Hohfeld's method is his failure to search for and to proceed from the fundamental concept of jural relation. Without a clear understanding of this primary juristic idea, it was nearly inevitable that no table of jural relations could be constructed which would not disclose objections, however symmetrical it might turn out." Kocourek, "The Hohfeld System of Fundamental Legal Concepts" (1920) 15 Ill. L. Rev. 24, 39. See also Husik, op. cit., supra note 25, at p. 267.

[40] Hohfeld, op. cit., supra note 23, p. 47; however, for reasons of convenience (at p. 49) Hohfeld prefers to use the term privilege.

Having established his concept privilege on this principle, its correlative in his table (no-right) follows of its own accord, and answers perfectly to the test of all his illustrations. As a proposed fundamental concept, it is open to much of the same criticism as privilege. In order to avoid repetition, it will suffice to add that once Hohfeld derived his concept privilege in the manner indicated above, there was no choice but that its obvious correlative no-right should follow. Thus, there is really only one root of contention, namely, the derivation of privilege.

Of course, Hohfeld and more keenly his followers (Cook, Corbin, Goble) put up a strong fight and continue to maintain their position on this point. This was evidenced by their lengthy participation in the controversy,[41] and their present refusal to budge from their ideas.

It is not surprising that vehement criticism and endless controversy should have been called forth by Hohfeld's concept of privilege. Coming from a mind that was so keen and precise, it is impossible to pass it by without absolute assurance of its inaccuracy. However, we cannot here indulge in a review of this famous battle of wits. Only when the rest of the legal profession has caught up with these advance-leaders, will we get a final decision on the merits of the whole question.

As a result of its varied meanings,[42] Kocourek criticized Hohfeld's privilege, by showing that strictly speaking it was not a legal concept at all.[43] At best, and even if it can be used to serve a very convenient purpose, it is not scientifically fundamental, because the concept denoted by it is composite and derivative and not elementary and original.[44]

Power and *liability* are the two correlative concepts that constitute the third jural relation in Hohfeld's table. For the concept of (legal) power, something approaching a definition is given, namely, the volitional control to effect a particular change of legal relations.[45] Hohfeld's short indications about its cor-

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[41] See note 31 supra.

[42] Cf. Husik, op. cit., supra note 25, at p. 267.

[43] Kocourek, op. cit., supra note 1, pp. 371, 405: nos. 1, 8; see also Husik, op. cit., supra note 25, at pp. 267, 268. However, Llewellyn adds that "Kocourek's criticism that the privilege concept is not legal but extra-legal, leaves the pragmatic value of the analysis untouched". "Hohfeld", 7 Encyc. Soc. Sc. 400.

[44] Husik, op. cit., supra note 25, at p. 267.

[45] Hohfeld, op. cit., supra note 23, p. 51. The definition given by Kocourek is along the same lines—cf. "Jural Relations", p. 7.

relative liability are not nearly as clear or as concise.[46] A better understanding is derived from the fact of its necessary relation to power than from these articulated attempts at explanation.[47]

This jural relation and its two component concepts have not given rise to so much controversy. As a matter of fact, they are more or less accepted.[48] The examples of legal powers which Hohfeld gives as illustrations of this concept and its correlative concept liability,[49] are numerous and clarifying. One might got to the trouble of splitting hairs with Hohfeld over some of these cases, but that would be metaphysical rather than practical.[50]

Immunity and *disability* are the last two terms in Hohfeld's table of correlatives, forming the fourth relation. This is the other ground of serious contention, but in many respects the difficulties are similar to those discussed under the privilege-no-right relation.

As Hohfeld himself pointed out (and it follows from the symmetry of his tables), "a power bears the same general contrast to an immunity that a right does to a privilege."[51] Carrying the similarity (privilege is absence of duty) one degree further, Hohfeld arrived at immunity as being the absence of liability (freedom from power or control of another as regards some legal relation). "Immunity is the opposite, or negative, of liability."[51]

[46] The first criticism of Hohfeld's concepts was made by Roscoe Pound. He pointed out that the concepts representing the correlative and opposite of power (liability and disability) were without independent jural significance. Similarly, and in the face of this very objection, Pound did not take exception to Hohfeld's concept privilege, but refused to accept no-right. Pound, "Legal Rights" (1916) 26 Int. J. Ethics 92, 97.

An interesting reply to this criticism is given by Walter Wheeler Cook. A jural relation exists between two persons, and there is a necessary correlativity which must exist between the two concepts which represent the two respective sides of this relation. Thus if it is accepted that there is a relation, and one concept is satisfactory, then there must be another concept as well. Consequently, it does not matter what term is used to express it, but there is a correlative of power, and its nature is determined by the meaning of power. Cook, "Hohfeld's Contributions to the Science of Law" (1919) 28 Yale L. J. 721, 728. See also Randall, "Hohfeld on Jurisprudence" (1925) 41 L.Q. Rev. 86, 92.

[47] Hohfeld, op. cit., supra note 23, pp. 58-60.

[48] Even Husik, who prefers to go back to Holland's basis of right as the one generic concept, concedes that power should be included as a species of right. Husik, op. cit., supra note 25, at p. 268; cf. Kocourek, op. cit., supra note 1, p. 368.

[49] Hohfeld, op. cit., supra note 23, pp. 51-58. Much credit is due to Hohfeld for clearing up the meaning of this conception better than it had previously been understood.

[50] Thus, the case of abandonment of a chattel does not contain as much precision and utility as the cases of the powers and liabilities created by an offer or by an option, or by the conditional sale of realty.

[51] Hohfeld, op. cit., supra note 23, p. 60.

Disability is explained as "the absence or negative of power", in the descriptive term no-power.[51]

When Hohfeld indicated that the best synonym for immunity was exemption,[51] he committed the same error as he made with the term privilege,[52] of proposing for a specific purpose a term which has more than one meaning. Even if we use Hohfeld's own comparison, privilege is as much an exemption (from duty) as immunity (is an exemption from liability).[53]

The new relation is thus no more fundamental than the privilege-no-right relation. Furthermore, it is subject to the same criticism, especially the demonstration that it is an inverted negative of the power-liability relation.[54] It is not necessary to go over all this criticism again.

III.

After this examination and criticism of the Hohfeld system, it might seem that the appreciation of it is lessened. On the contrary, it is necessary to explain that while the weaknesses and openings are being criticized, the useful attributes are not being overlooked; all must be taken together in order to evaluate what Hohfeld furnished in the progress of the science of law.

It might be in order, as well as illuminating, to make some comparisons between the two so-called systems. For convenient reference, Kocourek's table of correlatives is reproduced.

Rights	authorities	claim-duty power-liability	responsibilities	Ligations
	exemptions	immunity-disability privilege-inability	debilities	

Before going into the details of comparison and contrast—lest the differences be over-estimated—it is well to repeat and to keep in mind that we are not discussing two different trees, but rather two branches of the same tree.

1. The first observation is with regard to the respective starting points of the two systems. Hohfeld starts with eight fundamental concepts, arranged in pairs of correlatives to form four legal relations. Kocourek starts with two fundamental

[51] Hohfeld, op. cit., supra note 24, p. 60.

[52] Cf. Kocourek, op. cit., supra note 1, pp. 398, 404 n. 8 par. 3, 405-6.

[53] This point is made very clear in Kocourek's table which places exemption in the position of a common denominator for both privilege and immunity. Kocourek, op. cit., supra note 1, pp. 21, 25.

[54] Cf. Husik, op. cit., supra note 25, at p. 265; Kocourek, op. cit., supra note 1, pp. 272, 273, 275.

jural relations, each composed of two correlative concepts.[55] By reciprocation, two other jural relations are established as derivative from the first two. These two resultant tables are alike with the exception of one term, and superficially, it might seem unnecessary to make any issue here.[56]

That some of Hohfeld's terms seem to lack legal-content and are otherwise also open to some criticism (as discussed above), may demonstrate serious imperfections in his conceptions, but it does not take away from the general purpose which he meant to serve. However, law exists and comes into action only where there are relationships between individuals. Between two individuals there can be only two possibilities, namely, either the first affects the second by acting (positive or negative act), or the second affects the first by acting.[57] Consequently, it seems preferable to adopt Kocourek's method of approach.

2. In both systems, the backbone is a table of correlatives. There evidently were, in addition to those which constituted the two fundamental relations, some other concepts that needed to be brought into the scheme. It is our belief that Hohfeld worked backwards in order to accomplish this purpose. Using his table of opposites[58] as a point of departure for the purpose, and by a symmetrical process of bringing together the respective opposites (negatives) of the first four concepts, Hohfeld derived his two new relations. These are consequently no more than inverted opposites (negatives) of the two original relations.

When Kocourek came, he saw these weaknesses very keenly. Although he attacked the meanings given by Hohfeld to some of these additional concepts, there still remained the need, at least for reasons of convenience, to supplement the four original ones. Proceeding by reciprocation from a more generalized and stable point of departure, namely, the jural relations, Kocourek was more successful in bringing such additional concepts into his scheme. Thus the four new concepts cause no difficulty and all the eight function well.[59]

[55] The four fundamental concepts (right, duty; power, liability) were long accepted, and discussed in various ways. Even as early as two decades before Terry, the distinction between claims and powers had been made clear by Windscheid (Kocourek, "Jural Relations" Chap. III, p. 35).

[56] Husik would eliminate all this completely and go back to Holland's single basis of "right", or to a single relation of right-duty., Husik, op. cit., supra note 25, at p. 264. But Husik is missing the point, because nobody disagrees with the generic term "right".

[57] Kocourek, op. cit., supra note 34, p. 246.

[58] It was probably in this process that Hohfeld created his table of opposites in order to use it as a point of departure. This may offer some explanation for the criticized weaknesses of his results.

[59] See table of jural relations; Kocourek, op. cit., supra note 1, p. 7.

3. Hohfeld has further a table of jural opposites (or negatives, as discussed above), and there is a mathematical symmetry in his tables.[60] This must not be interpreted as corroboration because both tables together form only one unit.

Kocourek, on the other hand, has an elaborate table of jural opposites,[61] with contraries, reciprocals, sub-contraries, and negatives. To say the least, this table looks very puzzling. It is a remarkably clever compilation into one symmetrical diagram of all the incidental classifications and manipulations of the eight terms which make up the table of correlatives.

It is of interest to note that whereas Hohfeld used his table of opposites as a preliminary basis for the establishment of his table of correlatives, Kocourek added his table of jural opposites as a subsequent explanation of the relationships existing between the terms in his table of correlatives.

4. Common denominators are a very useful feature in any kind of work. Hohfeld considered his eight fundamental legal conceptions as the common denominators for analytical jurisprudence and for the solution of legal problems. Kocourek uses this feature to simplify his basic concepts by showing what the common denominators of these concepts are. There is no conflict here, because the fields of application are totally different.[62]

5. The Hohfeld system is very attractive and inviting by reason of its brevity and simplicity. Kocourek's table of correlatives is just as brief and simple as Hohfeld's. But whereas Kocourek developed a complete elaborate system, Hohfeld did not, strictly speaking, get much beyond his tables.[63] Kocourek's whole system, as such, is not adapted for nearly as much popularity. On the contrary, it is very discouraging because of its apparent inverted pyramiding of complications. What with very extensive coinage of new terms, and the introduction of symbology carried to the stage of what might be called jural

[60] A useful method of getting at some of the conceptions which have been confused and are still confused too often under the term right, is to work out the correlative and the opposite respectively of each idea. Pound, op. cit., supra note 46, at p. 96. Although approving the method of approach, Pound disagrees about some of Hohfeld's results. (See note 46 supra).

[61] Kocourek, op. cit., supra note 1, p. 85.

[62] A question might be asked about Hohfeld's statement that his eight fundamental conceptions are the "lowest common denominators of the law" (Hohfeld, op. cit., supra note 23, p. 64). However, there does not seem to be any useful purpose in raising the issue.

[63] Perhaps our comparisons should stop at this point, but it seems advisable to give a few of the more generalized comparisons as well as some of the detailed ones.

trigonometry, the system as a whole looks terribly mystifying. As a matter of fact, all this mysterious material can really be of exceedingly great usefulness.

6. Despite its brevity and simplicity—or perhaps as a result of these characteristics—Hohfeld's tables are not altogether logically consistent if we insist on giving a very narrow, single meaning to each concept. Hohfeld might have reached the further refinement and separation of multiple meanings by overcoming certain basic prejudices (e.g. privilege). Unfortunately, we have to take his work as he left it.

Kocourek covered up all the pitfalls, so that the terms of his tables have much greater accuracy and precision. Taken as a whole, the system is complete and logically consistent. Its complications and refinements may go to the excess of overdevelopment (on that point we are not prepared to debate) but the keen and careful mind behind it all has not permitted any logical fallacies.

7. The first and only extension of his tables that Hohfeld completed was in the classification of rights (claims) in personam and in rem. It may be in place to make brief mention of this. Hohfeld first replaced the old terminology with the new terms paucital and multital.[64] He considered that it would be necessary to apply this classification separately to each of the eight fundamental concepts, but he only completed the first.

Kocourek also felt the need to discard the traditional terminology but in replacing it, he shifted the basis from the ever-uncertain right to his real fundamental relation. Thus he chose the terms, polarized and unpolarized relations, and as a basis for distinction he uses the test of identification.[65] For all relations in general, there is only one classification and all the aspects of the system are kept on the fundamental basis of the jural relations. In this way, not only is the description more accurate, but it also adds to the accuracy and simplicity as well as to the logical consistency of the whole system.

8. For some reason or other, Hohfeld's ideas became very stimulating. In a surprisingly short time, they were taken up all over the country—like blood pumped into the arteries from the heart at Yale. Where Hohfeld was cut short, his followers

[64] A paucital right is one that is unique or is one of a few fundamentally similar rights residing in a single person, and availing against a single person or respectively against a few definite persons. A multital right is one of a large class of fundamentally similar rights residing in a single person but availing respectively against persons constituting a large and indefinite class of people. (Hohfeld, op. cit., supra note 23, p. 72).

[65] Kocourek, op. cit., supra note 1, Ch. XIII, pp. 189, 201.

carried on, and there were any number of articles written to show the actual application of the Hohfeld system to practical problems.[66]

Kocourek's system is much more recent, and instead of finding a fertile field ready for seed (like Hohfeld found), the field is already grown with the harvest of the other seed. Kocourek has had comparatively little acceptance, and even less application, but no significance should be attached to that. The system can stand all the tests and trials to which it may be subjected.

Glancing over the foregoing comparisons,[67] there is evident a tremendous similarity in the nature and quality of the work done by these two men. Yet on almost every item there is observed a difference in degree of perfection. Neither Hohfeld nor Kocourek makes any pretense at creating or changing law; they merely observe, analyze and formulate their ideas of the best set of what might be called legal instruments or tools. While both work in exactly the same direction, Kocourek is the one who advances much the further in the science of law.

While we steep ourselves in such a discussion of analytical jurisprudence, and appreciate its very great usefulness, we must stop to wonder whether we are not over-estimating its value.[68] Even if we agreed that this work is as fundamental to law as analysis is to chemistry, it is to be questioned whether the possible accuracy of the two fields can be compared.[69] The elements of chemistry are limited and unchangeable. In law there is always present, the forever-changing human element,[70] which may at any time modify and abolish the existing or create new basic foundations on which the whole structure of our jurisprudence is built.[71]

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[66] See references in Goble, op. cit., supra note 31, at p. 94 n. 1; Kocourek, op. cit., supra note 1, p. 413 n. 1, p. 426 n. 26; see also Heilman, "The Correlation between the Sciences of Law and Economics" (1932) 20 Calif. L. Rev. p. 379 n. 2.

[67] There are also other points of comparison and contrast which might be made. For example, Hohfeld's explanation of legal personateness is that of the realist, making its association with a human person necessary (Hohfeld op. cit., supra note 23, p. 228). On the other hand, Kocourek maintains a conceptual explanation which is quite a different approach (Kocourek, op. cit., supra note 1, pp. 291, 304). However, such discussions would lead us beyond the scope of the present article. Accordingly, the points of comparison and contrast must be restricted to those enumerated.

[68] Cf. Goodhart, "Precedent in English and Continental Law", (1934) 50 L. Q. Rev. 40.

[69] Cf. Patterson, Book Review, (1930) 30 Col. L. Rev. 1077.

[70] Cf. T. W. Arnold, Book Review, (1928) 35 W. Va. L. Q. 98, 99.

[71] "Law as a whole will of necessity burst any system of categories that is imposed on it". Dickinson, Book Review, (1929) 42 Harv. L. Rev. 448, 453.

Thus, it is to be questioned how far analytical jurisprudence —while it simply takes law in its status quo—is trying to impose an ex post facto rationalization of constituent elements and fundamental concepts. It is very difficult to say that these consistent networks of elements and concepts had any existence either in the previous legal systems as they were being developed, or in the minds of those who were causing their development.[72]

Under reserve of the foregoing questions, it is not out of place to estimate some of Hohfeld's contributions to the science of law.

By many practical men, he was considered an idealist and a theorist, but Hohfeld demonstrated the utility of his analysis in many fields of legal study. With his eight fundamental concepts as the common denominators, he thought he could state legal problems in such terms as would bring out their greatest distinctness.

Hohfeld considered that when relations are reduced to their lowest generic terms, the legal conceptions are seen to be dominantly applicable throughout. By such a process it becomes possible not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various jural problems involved. An indirect, yet very practical, consequence is that it frequently becomes feasible, by virtue of such analysis, to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant. The deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law.[73]

Some jurists give Hohfeld credit for the logical completion of a scheme of classification, and the recognition of the impor-

[72] It is hardly possible to say that the Romans had any preconceived plan of uniformity, or a series of common denominators, or a set of fixed principles, throughout the course of the development of their law pertaining to possession or their law of damages (lex Aquilia). Yet the subsequent students of Roman law, and particularly the Germans in the last century (Savigny, Ihering) have been trying to read into that Roman law consistent basic elements and fixed principles which in fact never did exist. That particular development in Roman law was more a matter of haphazard praetorian personal equity in individual sets of facts. The ex post facto attempts at consistent rationalization may be excellent exercises in legal philosophy, but they cannot be accepted as explanatory analyses. Cf. Winfield, "Duty in Tortious Negligence", (1934) 34 Col. L. Rev. 41, 58. But Winfield misses the point of the need for and the utility of the duty concept in modern law. This is suggested on p. 61 in note 92 prepared by the editor.

[73] This whole paragraph is taken from the conclusion of Hohfeld's principal article; op. cit., supra note 23, p. 64.

tance of each element in it.[74] Correct solutions of legal problems become easier and more certain.[75]

That a legal relation exists only between two persons was one of the most important demonstrations that the Hohfeldians made.[76] Adding to this, the conclusion that we invariably find any issue centered around one of the categories of concepts, larger sections can then be built together into a clearcut whole.[77] Better understanding of problems and simplified analysis of issues are then possible.

Another important statement first formulated by the Hohfeldians was to the effect that the content of one legal relation may be the same as the content of another legal relation.[78]

There is no doubt that Hohfeld and his colleagues brought about the spreading insistence upon the technique of legal relations as the operative link between legal rules and juridical phenomena. Even the imperfect tools of the Hohfeld system provided an insight into legal problems. The true insight is to the process.[79]

Hohfeld's insistence, in precept and example, in striving towards extreme precision in nomenclature and analysis, was the greatest stimulus to others in the same direction. This enables great progress in clear thinking and fair judging.

There was no pretention at discovery, but merely the addition of a few stones to the ever-growing edifice which science is rearing. Thus anybody must start with a restatement of the former work, and then be fortunate if he can add a little—if only in rearrangement of data so as to throw new light upon the subject—a light which will serve to illuminate the pathway of those who follow and enable them to make still further progress.[80]

That to Hohfeld belongs a place in the progress of the science of law is unanimously agreed. That his contributions were very important is an accepted fact. It is in estimating the relative importance and usefulness of his contributions that differences arise.

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[74] Cook, op. cit., supra note 46, at p. 728.

[75] Idem, at p. 721.

[76] Kocourek, op. cit., supra note 1, p. 425. Prof. Page made a bad choice for an unnecessary illustration in refuting the statement that a thing cannot hold one end of a relation. (Page, op. cit., supra note 1, at p. 618). In Roman law, in explaining the "hereditas jacens" it is quite satisfactory to accept the theory of interim personality. (Buckland, "Text Book of Roman Law", pp. 175, 305). Cf. Kocourek, op. cit., supra note 1, p. 300.

[77] Llewellyn, "Bramble Bush", p. 88.

[78] Kocourek, op. cit., supra note 1, p. 425.

[79] Ibid.

[80] Cook, op. cit., supra note 46, at p. 723.

If a man has been great enough to stir up considerable discussion, it is primarily an indication that there is something worth discussing. In the second place, it is a further indication that complete agreement about his relative values in detail will never be reached. Hohfeld was such a person, and such was his work.

On the one hand, we do not agree with Hohfeld's followers who go to the extreme of maintaining that Hohfeld produced the alchemist's elixir or the universal solvent. On the other hand, we do not join Kocourek when he insists that "The Hohfeld tables are juristically and logically sound or they are not. On that issue they must be annihilated or they must by their own logical merit annihilate the opposing view."[81]

It seems more in keeping with the progress of the science of law to retain Hohfeld and his work in their proper place, giving proper evaluation to the weak and strong attributes. From that point, it is then in order to proceed to Kocourek for the improvements on the system which he so arranges as to be the closest approach to completeness and logical perfection.[82]

A more detailed discussion of Kocourek's system is reserved for another occasion.

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[81] Kocourek, op. cit., supra note 1, p. 420. In the light of Kocourek's criticism as a whole, his attack must be taken as directed only against those parts of the Hohfeld scheme which Hohfeld himself added to the previously accepted concepts. (The discussion on these issues is more fully indicated earlier in this paper). But even at that, the word "annihilate" is very powerful, and we do not feel its present appropriateness any more than one would say that with the advent of the new streamlined railway train all other existing equipment must be scrapped. Time generally rules the survival of the fittest. It is of interest to note that Kocourek himself is the one who shows how the Hohfeld system could be reformed by a single substitution (at p. 426).

[82] Cf. "The most ambitious attempt in the United States to construct a complete analytical system for use in legal thinking." Rottschaefer, Book Review, (1928) 12 Minn. L. Rev. 560, 562.