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CONTRACT LAW AND FUNDAMENTAL LEGAL CONCEPTIONS: AN APPLICATION OF HOHFELDIAN TERMINOLOGY TO CONTRACT DOCTRINE

Daniel P. O'Gorman*

I. INTRODUCTION

In 1913 a manuscript arrived at the *Yale Law Journal*.¹ It was titled *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, and its author was an obscure Stanford law professor named Wesley Newcomb Hohfeld.² In it he argued that courts used the term *right* in four different senses,³ and that a court's failure to recognize this could lead to deductive reasoning errors when deciding cases.⁴ The journal's editors brought the piece to Arthur L. Corbin, the journal's faculty advisor, for his thoughts.⁵ He immediately advised them to publish it.⁶

The article's stated goal was modest—to aid law students “in the understanding and in the solution of practical, every-day problems of the

* Associate Professor, Barry University School of Law. The author thanks the editorial staff at the *Mississippi College Law Review* for many helpful suggestions and Dean Leticia Diaz for providing, on behalf of Barry Law School, a grant for the writing of this Article.

1. ARTHUR L. CORBIN, *Foreword to Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning*, at vii (Lawbook Exchange, Ltd. 2004) (1917) [hereinafter *Foreword*].

2. *Id.*; see also N.E.H. Hull, *Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910-1919*, 45 J. LEGAL EDUC. 235, 249 (1995) (noting that Hohfeld “was not very well known among the stars of the profession”); WILLIAM TWining: KARL LLEWELLYN AND THE REALIST MOVEMENT 34 (1973) (referring to Hohfeld as “a hitherto unknown professor at Stanford”).

3. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

4. *Id.* at 19.

5. *Foreword*, *supra* note 1, at vii; see also N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 103 (1997) (identifying Corbin as the journal's faculty advisor at the time). It is possible that the law journal's editors solicited the piece. In the article, Hohfeld referred to “the invitation of the editor of this journal.” Hohfeld, *supra* note 3, at 20. Also, in a letter to Roscoe Pound, Hohfeld wrote that he had “just about completed the article and was wondering whether to send it to Harvard or to Columbia Law Review when an invitation to contribute arrived from the Yale Law Journal—a rather urgent invitation in fact, as they are doubtless ‘hard up’ for contributions.” Hull, *supra* note 2, at 256 (quoting Letter from Wesley N. Hohfeld to Roscoe Pound (Oct. 23, 1913) (on file with the Harvard Law School Library)). Years later, Corbin wrote that he did not know if the article was submitted in response to an invitation to contribute. *Id.* (quoting Letter from Arthur L. Corbin to E.V. Rostow (Aug. 10, 1957) (on file with the Yale University Library)). Professor Hull noted that Hohfeld wanted a job at Yale and submitted the article to the *Yale Law Journal* because “[h]e clearly hoped to attract Yale's attention with the piece.” *Id.* at 261.

6. *Foreword*, *supra* note 1, at vii; see also HULL, *supra* note 5, at 103 (“I was at once much interested; and I advised publication.”) (quoting Arthur L. Corbin to E. V. Rostow (Aug. 10, 1957) (on file with the Yale University Library)).

law.”⁷ It also had the air of nineteenth century formalism and conceptualism,⁸ ideas soon to be out of fashion.⁹ But underneath its modest pedagogical purpose and formalistic and conceptual aura, the piece had subversive power.¹⁰ Intentionally or not, this obscure professor’s article was a devastating critique on formalist legal reasoning—the very type of reasoning it seemed to represent.¹¹

The article’s publication in the *Yale Law Journal* led to the realization of Hohfeld’s immediate goals of teaching at Yale Law School¹² and having his system of legal terminology incorporated into the classroom. By 1916 the entire Yale faculty, save one, adopted Hohfeldian terminology for classroom use, and the students, who had at first opposed it, were ultimately converted.¹³ By the 1920s its use even spread to the classrooms in Austin and Langdell Halls at Harvard Law School, a school accustomed to setting trends, not following them.¹⁴ Despite Hohfeld’s untimely death just five years after the article’s publication,¹⁵ Corbin ensured Hohfeld’s approach to legal terminology would have a lasting impact, particularly in the area of contract law, by incorporating his terminology in a series of law journal articles and then in the *Restatement of Contracts*.¹⁶ The article’s subversive power was also used by the American legal realists in the 1920s and 1930s, as they worked to overthrow legal formalism.¹⁷

But if the success of an article is measured by its author’s goals, Hohfeld’s article was merely a short-term success. By the Second World War his work had fallen from view,¹⁸ and though it has been argued this

7. Hohfeld, *supra* note 3, at 20. As stated by one commentator, “Hohfeldian analysis . . . is simply a useful tool in keeping ideas straight . . .” Peter Linzer, *Wesley Hohfeld, Arthur Corbin and Precise Legal Terminology*, in *A CONTRACTS ANTHOLOGY* 271 (Peter Linzer, ed., 2d ed. 1995).

8. Formalism is “analysis (either in articles or judicial opinions) that moves mechanically or automatically from category or concept to conclusion, without consideration of policy, morality, or practice.” BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 69 (2004). Conceptualism is “[a] pejorative term, used most commonly by the American legal realists and their followers, against opponents accused of improperly deriving conclusions from the mere nature of abstract concepts (e.g. ‘contract’ or ‘property’) The charge of ‘conceptualism’ is often connected to, or interchangeable with, the charge of ‘formalism.’” *Id.* at 38.

9. See David Kennedy & William W. Fisher III, *Introduction to THE CANON OF AMERICAN LEGAL THOUGHT* 1, 8-10 (David Kennedy & William W. Fisher III, eds., 2006) [hereinafter *CANON*] (describing the fall of legal formalism in the early twentieth century).

10. See *id.* at 47 (noting that the article was a “manifesto for a new way of conceptualizing the ‘legal relations’ [the article] describe[s]”).

11. *Id.* at 47-48.

12. See Hull, *supra* note 2, at 260 (“Arthur Corbin . . . was so taken with the article that he decided to see if he could bring the young man to Yale. ‘Largely because of Hoh’s article, but also because of the results of inquiry, Yale offered a professorship to him, on a permanent basis.’”) (quoting Arthur L. Corbin to E. V. Rostow (Aug. 10, 1957) (on file with the Yale University Library)).

13. *Id.* at 268.

14. *Id.* at 276.

15. See *id.* at 274-75 (detailing Hohfeld’s illness); George W. Goble, *Hohfeld, Wesley Newcomb*, in 9 *DICTIONARY OF AMERICAN BIOGRAPHY* 125 (1932) (same).

16. TWING, *supra* note 2, at 35.

17. See *CANON*, *supra* note 9, at 50-51 (describing the American legal realists’ use of Hohfeld’s ideas); see also *id.* at 53 (“It would be difficult to overstate the significance of Hohfeld’s central analytical insights for the legal realists in general, all of whom borrowed from his framework.”).

18. *Id.* at 53.

was “in part because his analytic methods had been so thoroughly absorbed by the legal professoriate,”¹⁹ “in law schools today, Hohfeld is relatively unknown and [probably] seldom mentioned in the classroom.”²⁰ Hohfeldian analysis is not primarily remembered for its use as an aid “in understanding and in the solution of practical, every-day problems of the law,”²¹ but for the instrumental role it played in overturning legal formalism as the prevailing mode of legal thought.²²

The legal academy’s neglect of the article’s stated purpose is unfortunate, for today this is where it has the most to offer. As recently stated by Professor David Kennedy:

Commentators have often pointed out that judges do not, in fact, use Hohfeldian terms with anything like the precision he proposed. Hohfeldian deductive errors continue to litter the case reports. But Hohfeld’s legacy was less the elimination of the reasoning errors that troubled him than the establishment of a mode of legal reasoning that can be used to put analytic pressure on the reasoning of judges, lawyers, and law students Hohfeld’s article has become canonical not as a grammatical rule book for correct usage, but as the origin for a style of critical analysis which has become central to American legal thought.²³

Further evidence of Professor Kennedy’s critique is that judges do not use Hohfeldian terms with the precision that Hohfeld proposed. Hohfeld’s ideas, though purportedly “thoroughly absorbed by the legal professoriate”²⁴ and “central to our understanding of what it means to ‘think like a lawyer,’”²⁵ have not, in fact, been thoroughly absorbed by law students, lawyers, and judges. Hohfeldian critical analysis is a tool that few are trained to use and that even fewer employ. And, thus, law students, lawyers, and judges remain as susceptible to the deductive errors to which they were susceptible when Hohfeld wrote his article over a century ago.²⁶

In 2002, Professor Curtis Nyquist encouraged the legal academy to rediscover Hohfeld’s work, and detailed the benefits of teaching

19. *Id.*

20. Curtis Nyquist, *Teaching Wesley Hohfeld’s Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 238 (2002); *see also* CANON, *supra* note 9, at 47 (“Hohfeld’s name has largely faded from memory.”).

21. Hohfeld, *supra* note 3, at 20.

22. In fact, Walter Wheeler Cook “made Hohfeld into the first realist,” Hull, *supra* note 2, at 278, and Hohfeld has been described as an American legal realist. *See* Carl Wellman, *Hohfeld, Wesley Newcomb*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 270, 270 (Roger K. Newman ed., 2009); BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 47 (1998).

23. CANON, *supra* note 9, at 51.

24. *Id.* at 53.

25. *Id.* at 47.

26. *See id.* at 51 (“Hohfeldian deductive errors continue to litter the case reports.”).

Hohfeldian analysis to our future lawyers and judges.²⁷ This Article continues Professor Nyquist's effort, maintaining that Hohfeld's ideas should be given renewed attention for their stated purpose—as an aid to legal reasoning²⁸—and that Hohfeldian analysis should not simply serve as a footnote in the story of the fall of legal formalism. Hohfeld's role in overturning legal formalism ran its course long ago.²⁹ His system's current practical use lies in its stated purpose—to avoid errors in deductive reasoning.³⁰ By reemphasizing Hohfeldian analysis, law students, then lawyers, and then ultimately judges, will be better trained to think like lawyers, and to recognize and to avoid the errors in deductive reasoning that led Hohfeld to develop his system.

In an effort to continue the move toward better deductive reasoning skills started by Professor Nyquist, this Article analyzes the most important contract-law doctrines through Hohfeldian terminology. This area of law has been chosen not because its subject matter is necessarily better suited for Hohfeldian analysis than any other,³¹ but because it is this author's area of expertise. Part II of this Article provides a background of Wesley Hohfeld and his seminal article. Part III explains the value of reemphasizing Hohfeldian terminology. Part IV applies his terminology to the key aspects of contract law. Part V is a brief conclusion.

II. WESLEY NEWCOMB HOHFELD AND SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING

This Part provides a background of both Wesley Hohfeld and his seminal article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*. As will be seen, Hohfeld's story is one of ups and downs—from brilliant student to obscure professor; from obscure professor to wunderkind; from wunderkind to obscurity.

A. The Brilliant Student

Hohfeld was born in 1879 in Oakland, California.³² He attended high school in San Francisco and was a brilliant student,³³ and then went on to earn an undergraduate degree from the University of California, Berkeley, in 1901.³⁴ At Berkeley he was awarded a gold medal for receiving the highest possible grade in each of his courses.³⁵ As early as his freshman year in

27. See Nyquist, *supra* note 20, at 246-53.

28. Hohfeld, *supra* note 3, at 20.

29. See CANON, *supra* note 9, at 10 (noting that by the Second World War legal realism "had been successful in eliminating 'classical legal thought' as the established common sense of the legal establishment").

30. Hohfeld, *supra* note 3, at 20.

31. But see TWINING, *supra* note 2, at 35 ("[T]here is some truth in saying that this type of analysis has more value in its application to contract than to most other branches of law.").

32. Wellman, *supra* note 22, at 270.

33. Hull, *supra* note 2, at 246.

34. Wellman, *supra* note 22, at 270.

35. *Id.*

college he developed an interest in legal analysis, reading John Austin's *Jurisprudence* and heavily annotating it.³⁶ Hohfeld's interest in Austin pre-saged his own work in analytical jurisprudence.³⁷

In 1901 he went directly from college to Harvard Law School.³⁸ Hohfeld performed well at Harvard, serving as an editor of the *Harvard Law Review* and graduating *cum laude* in 1904.³⁹ While at Harvard, he assisted John Chapman Gray,⁴⁰ his favorite professor.⁴¹ Gray, much like what Hohfeld would become, was an enigma, his doctrinal treatises expressions of "classical orthodoxy" depicted the areas of law discussed in the treatises "as founded on a few fundamental principles and conceptions that were elaborated with relentless deductive logic into a myriad of binding rules."⁴² Yet Gray's jurisprudential writings

in many ways anticipated legal realism, the jurisprudence that supplanted classical orthodoxy in the 1930s. Law is not some brooding and transcendent omnipresence, according to Gray, but is simply 'the opinion of judges on matters of ethics and public policy.' In determining what the law is, judges consider a variety of sources, such as statutes, precedent, custom, expert opinion, morality, and public policy. But ultimately, law consists of the rules that judges choose to enforce.⁴³

Hohfeld's writings would one day reflect the same apparent inconsistency between classical orthodoxy and legal realism.

B. *The Obscure Professor*

After law school, Hohfeld practiced for a year at the San Francisco law firm Morrison & Cope, at which time he was offered partnership.⁴⁴

36. *Id.*; TWINING, *supra* note 2, at 35.

37. Austin "was arguably the first writer to approach the theory of law analytically (as contrasted with approaches to law grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories)." Bix, *supra* note 8, at 11. Analytical jurisprudence was (and is) "[a]n approach to the philosophy of law which emphasizes the analysis of concepts (e.g. 'law', 'right', 'property')" and in particular involves "a search for the meanings of terms and concepts." *Id.* at 6. Analytical claims "emphasize logic . . . and explorations of the surface or hidden logic of terms and concepts" and are "contrasted with claims that are primarily normative (what should be done) and claims that are primarily empirical (how things happen to be . . .)." *Id.*

38. Hull, *supra* note 2, at 246.

39. *Id.*

40. Wellman, *supra* note 22, at 270.

41. Hull, *supra* note 2, at 271-72.

42. Stephen A. Siegel, *Gray, John Chipman*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 230, 230-31 (Roger K. Newman, ed., 2009).

43. *Id.* at 231.

44. Wellman, *supra* note 22, at 270. Accounts of Hohfeld's background state that he joined the firm of Morrison, Cope & Brobeck, but this appears to be incorrect. The firm was called Morrison & Cope until 1906 when it then became Morrison, Cope & Brobeck. See Alexander Francis Morrison, *San Francisco Biographies*, <http://freepages.genealogy.rootsweb.ancestry.com/~npmelton/sfbmorr5.htm> (last visited Aug. 3, 2014). By this time, however, Hohfeld had left the firm to teach at Stanford. See Goble, *supra* note 15, at 124 (noting that Hohfeld joined the Stanford faculty in 1905).

Hohfeld declined, however, and instead joined the faculty of Stanford Law School as an instructor in 1905 and taught there until 1914,⁴⁵ rising to assistant professor of law, then associate professor of law, and ultimately professor of law.⁴⁶ But at the time, Stanford Law School did not have its present reputation, and Hohfeld did not make much of a name for himself during his tenure.⁴⁷

In 1909 and 1910 he did, however, publish a four-part article in the *Columbia Law Review* on stockholders' individual liability for corporate debts,⁴⁸ articles that included glimpses of his forthcoming article on legal terminology.⁴⁹ "[P]ortions of it announced an abiding interest in the way in which judges' and lawyers' language obscured essential jural relationships. Hohfeld charged that '[t]he law is constantly suffering from a loose, indiscriminating, and misleading terminology.'"⁵⁰ But the articles were "densely argued"⁵¹ and they "seem to have made hardly a ripple in the pond of legal scholarship"⁵²

C. The Seminal Article

In 1913, Hohfeld published three articles,⁵³ the most important of which was *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* published in November in the *Yale Law Journal*.⁵⁴ The article

45. Wellman, *supra* note 22, at 270. According to George W. Goble, "[h]e preferred the quiet and scholarly environment of the university with its opportunity for unbiased study to the usually hurried and partisan intellectual pursuits of a busy law office." Goble, *supra* note 15, at 124.

46. Comment, *Wesley Newcomb Hohfeld*, 28 YALE L.J. 166, 167 (1918). The authorship of this Comment has been attributed to Hohfeld's former student and the *Yale Law Journal's* editor-in-chief, Karl Llewellyn. See Wellman, *supra* note 22, at 270 (attributing a line from the Comment to Llewellyn). The Comment states that Hohfeld first took a position as an instructor at Hastings College of Law in San Francisco, *see* Comment, *supra* note 46, at 167, but if this is so, it does not appear in the other accounts of Hohfeld's background. That the Comment was written much earlier than other accounts of Hohfeld's background suggests greater reliability than subsequent accounts, but Llewellyn (assuming he was the Comment's author) might simply have been mistaken. Goble was surely aware of the Comment's reference to Hastings, but chose to ignore it in the biographical entry he wrote, *see* Goble, *supra* note 15, at 124, which suggests he concluded it was a mistake. A search of documents from the relevant time period by the law school's Special Collections Manager at Hastings College of Law did not disclose any documents referencing Hohfeld. See e-mail from Tony Pelcynski, Reference Librarian, University of California Hastings College of the Law, to Louis M. Rosen, Reference Librarian and Assistant Professor of Law Library, Barry University Dwayne O. Andreas School of Law (August 4, 2014, 7:34 p.m.) (on file with author).

47. See Hull, *supra* note 2, at 248-49 (noting that Hohfeld "was not very well known among the stars of the profession" and that during Hohfeld's tenure, Stanford Law School did not have its current reputation).

48. See Wesley N. Hohfeld, *Nature of Stockholders' Individual Liability for Corporate Debts* (pt. 1), 9 COLUM. L. REV. 285 (1909); Wesley N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (pts. 2-4), 9 COLUM. L. REV. 492 (1909), 10 COLUM. L. REV. 283, 520 (1910).

49. Hull, *supra* note 2, at 246-47.

50. *Id.* at 247 (quoting Wesley N. Hohfeld, *Nature of Stockholders' Individual Liability for Corporate Debts* (pt. 1), 9 COLUM. L. REV. 285, 290 n.14 (1909)).

51. *Id.* at 246.

52. *Id.* at 249.

53. See Wesley N. Hohfeld, *The Need of Remedial Legislation in the California Law of Trusts and Perpetuities*, 1 CAL. L. REV. 305 (1913); Wesley N. Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537 (1913); Hohfeld, *supra* note 3.

54. Hull, *supra* note 2, at 255.

was a work of analytical jurisprudence, analyzing and seeking to clarify the use of eight legal concepts—right, privilege, power, immunity, duty, no-right, liability, and disability.⁵⁵ Hohfeld, in a sense, was completing the project of the eighteenth and nineteenth-century analytical jurists, including John Austin, who had sought to “unify the common law by identifying its basic analytic components.”⁵⁶

Before Hohfeld discussed these eight legal concepts, he contrasted legal conceptions with non-legal conceptions.⁵⁷ Non-legal conceptions, he asserted, include “the physical and mental facts that call [legal] relations into being.”⁵⁸ For example, a man saying to a woman, “I want you to have my pocket watch,” then handing it to her, and her taking possession of it, are all physical facts. If the man intended the pocket watch to be a gift, that intention is a mental fact. The uttering of the words, the intention to give a gift, the handing over of the watch, and the woman taking possession of it, are thus all non-legal conceptions. (They are the types of conceptions that should be included in a factual portion of a judge’s legal opinion, a lawyer’s appellate brief, or a law-student’s case brief, assuming the facts are relevant to the legal issue involved in the controversy.)

Legal conceptions include the legal relations that arise upon the occurrence of physical and mental facts.⁵⁹ Thus, when the owner of the pocket watch handed it to the woman with the intent to transfer ownership, and the woman took possession of it (all physical and mental facts, and thus non-legal conceptions), the woman becomes the owner of the watch (i.e., the legal relationship between the man and the woman with respect to the watch changes).⁶⁰ The resulting legal relationship that arose out of the physical and mental facts is a legal conception.

Hohfeld argued that courts and lawyers often confuse legal conceptions and non-legal conceptions⁶¹ because of “the ambiguity and looseness of our legal terminology.”⁶² For example, the word *property* is a legal conception that is often used to refer to the physical item owned by a person,⁶³ thus confusing a legal conception (property) with a non-legal conception (a

55. See Hohfeld, *supra* note 3, at 58 (“In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation.”).

56. CANON, *supra* note 9, at 50; see also CANON, *supra* note 9, at 52 (“Hohfeld’s effort to analyze legal terminology in systematic terms built on the work of earlier analytic jurists, including Austin, Salmond, and many others.”); TWINING, *supra* note 2, at 35 (“Hohfeld built on the work of English analytic jurists such as Holland, Markby, Salmond and above all Austin, whom he first read while an undergraduate at college.”).

57. Hohfeld, *supra* note 3, at 20–25.

58. *Id.* at 20.

59. *Id.*

60. See *Kelly v. Huplits*, 157 A. 704, 704 (Pa. Super. Ct. 1931) (“The essential elements which constitute a valid gift are the intention of the donor to make a gift, actual or constructive delivery, and its acceptance by the donee.”).

61. Hohfeld, *supra* note 3, at 20.

62. *Id.* at 21.

63. *Id.*

tangible thing). In the above hypothetical, it would therefore be improper to say that the man gave the woman his property. Rather, one should state that the man gave the woman his pocket watch.

Hohfeld also emphasized a distinction between two types of non-legal conceptions: operative facts and evidential facts.⁶⁴ Operative facts are those that "under the general legal rules that are applicable, suffice to change a legal relation."⁶⁵ For example, with respect to the general legal rule applicable to transferring ownership of a thing by giving it as a gift, the operative facts would be, according to Hohfeld, "the intention of the donor to make a gift, actual or constructive delivery [of the thing], and its acceptance by the donee."⁶⁶ A fact might be an "operative fact" even though it alone is insufficient to change a legal relation, if the fact is necessary, along with other operative facts, to change a legal relation.⁶⁷

"An evidential fact is one which, on being ascertained, affords some logical basis—not conclusive—for inferring some other fact."⁶⁸ For example, if the woman has possession of the pocket watch, this is evidence of the operative fact of the man's delivery of the watch to the woman. It is not an operative fact because the woman might have taken the pocket watch from the man without his permission.

Any fact that is neither an operative fact nor an evidential fact is not a material fact,⁶⁹ and is thus irrelevant to resolving the particular legal dispute. For example, that the man with the pocket watch was wearing a blue shirt when he gave the watch to the woman is neither an operative fact nor an evidential fact and is thus irrelevant to the legal issue involved (whether a change in legal relations between the man and the woman, with respect to the watch, arose).⁷⁰ Under the law of evidence such facts are inadmissible,⁷¹ and even if admitted into evidence, should ordinarily be excluded from the factual portion of a judge's opinion, a lawyer's appellate brief, or a law-student's case brief.

Hohfeld then moved to his discussion of the different types of legal relations that might arise from the existence of operative facts.⁷² He argued that all resulting legal relations—whether legal or equitable and irrespective of the area of law (torts, contracts, etc.)—involve jural interests

64. *Id.* at 25-28.

65. *Id.* at 25.

66. *Kelly v. Huplits*, 157 A. 704, 704 (Pa. Super. Ct. 1931).

67. Corbin's definition of *operative fact* as "[a]ny fact the existence or occurrence of which will cause new legal relations between persons," Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 164 (1919) [hereinafter *Legal Analysis*], would have been more precise had it taken this into account.

68. Hohfeld, *supra* note 3, at 27.

69. *Legal Analysis*, *supra* note 67, at 164.

70. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he forsees [sic] that the public force will act in the same way whatever his client had upon his head.").

71. FED. R. EVID. 402.

72. Hohfeld, *supra* note 3, at 28.

that can be described with eight "fundamental legal conceptions," four of which are legal advantages and four of which are legal disadvantages.⁷³ He referred to these eight as "the lowest common denominators of the law."⁷⁴ Hohfeld acknowledged that these eight legal interests, being *sui generis*, were difficult to define, and he set out to give them meaning by linking each of the four advantages to correlative disadvantages and to their opposites.⁷⁵ By identifying correlative interests, he set up a scheme in which all legal interests are held by persons against other persons.⁷⁶

Hohfeld's work was not entirely novel, and in particular he built on Oliver Wendell Holmes's article *Privilege, Malice, and Intent*,⁷⁷ where "Holmes deconstructed abstract legal concepts like the right to compete, or the privilege to abstain from contracting with others, into the complicated functional relations that they embodied."⁷⁸ Hohfeld, however, "formalized Holmes's basic insight, offering a more systematic and precise vocabulary to describe the range of functional relations created by legal rights."⁷⁹ Hohfeld argued that judges often failed to reduce legal advantages to their lowest common denominator, and instead used the term *right* to indiscriminately refer to what were in fact four different legal interests. These interests included—in addition to rights—what Hohfeld called *privileges*, *powers*, and *immunities*.⁸⁰ He argued that the term *right* should be given "a definite and appropriate meaning"⁸¹ that was limited to a particular type of legal interest, so as to avoid errors in legal reasoning.

The term *right*, he asserted, should refer only to a legal interest whose opposite is *no-right* and whose correlative is *duty*.⁸² According to Hohfeld, a *right* does not exist unless another person has a corresponding *duty*.⁸³ Thus, "[a] right is one's affirmative claim against another"⁸⁴ and a *duty* is the corresponding legal obligation owed by the duty holder to the right holder.⁸⁵ In other words, a *right* exists when the government will sanction the person having the corresponding *duty* for such person's failure to perform the duty.⁸⁶ Without someone having a *duty*, there can be no *right*.

73. *Id.* at 30.

74. *Id.* at 58.

75. *Id.* at 30.

76. See CANON, *supra* note 9 at 48 ("Hohfeld proposes to use these legal terms only in *relationship to one another*. For example, he proposes to use the term *right* to describe a person's legal interest only where another person has a *duty*, and vice versa.").

77. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

78. FRIED, *supra* note 22, at 51.

79. *Id.*

80. Hohfeld, *supra* note 3, at 30.

81. *Id.* at 31.

82. *Id.* at 30-32.

83. *Id.*

84. *Id.* at 55.

85. *Id.* at 31.

86. See RESTATEMENT (FIRST) OF PROPERTY § 1 (1936) ("A right, as the word is used in this Restatement, is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act."); Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 502 (1924) [hereinafter *Rights*] ("A 'right' exists when its possessor has the aid of some organized governmental society in controlling the conduct of another person [I]ts 'command' and its punitive

Under Hohfeld's definition of *right*, rights are held against other identifiable persons (including private and public entities).⁸⁷ For example, when a contract is formed, a promisee has a *right* to the promisor's promised performance, because the promisor owes a *duty* to the promisee to perform as promised. We know that the legal relationship between the promisor and the promisee is a "right-duty" relationship because the government provides a remedy to the promisee for the promisor's failure to perform as promised.⁸⁸ Under Hohfeld's description of *right*, it is apparent that the term is limited to when there is a corresponding duty to perform or not perform a *physical act*. For example, to illustrate a "right-duty" relationship, Hohfeld used a landowner's right to have third parties stay off the owner's land (a physical act).⁸⁹

Hohfeld argued that perhaps the best synonym for *right*, as he defined it, is "claim."⁹⁰ Unlike Holmes, who linked a *right* to the prediction that a court would in fact find a corresponding *duty*,⁹¹ "[f]or Hohfeld . . . rights are analytically, not sociologically, correlative with duties; whether the duties are ultimately enforced is altogether a different question."⁹²

A *right* can exist even if the corresponding *duty* is one that will not mature until some point in the future, such as a legally enforceable promise to repay a loan at a future date.⁹³ Such a *right* can be referred to as a *future right* as opposed to a *present right*, and the corresponding *duty* as a *future duty* as opposed to a *present duty*.⁹⁴ But if all of the operative facts for the creation of a *right* have occurred and all that is left for the *duty* to mature is the passage of time, it is still considered an *unconditional right* with a corresponding *unconditional duty*.⁹⁵ If the corresponding *duty* is subject to some

sanctions create jural rights and duties In the present instance, we mean merely that because of particular facts we can predict certain detrimental consequences to B if he does not conduct himself in a specified way, these consequences being action (or more rarely, inaction) by a few individuals as agents of society."); *Id.* at 518 ("[T]he existence of jural right and duty means . . . that organized society affords a systematic remedy or remedies through its judicial and its executive or administrative offices . . ."). A *legal duty* should therefore be distinguished from a *moral duty* whose breach results in informal sanctions such being ostracized. *Id.* at 522.

87. See generally Hohfeld, *supra* note 3, at 30-32 (discussing rights and duties).

88. See RESTATEMENT (SECOND) OF CONTRACTS § 346(1) (1981) ("The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged."). Even if the failure to perform as promised caused no loss to the promisee, the promisee is entitled to an award as nominal damages in recognition that the promisor has breached a duty owed to the promisee. *Id.* § 346(2).

89. Hohfeld, *supra* note 3, at 32.

90. *Id.*

91. See Holmes, *supra* note 70, at 460-461 ("What constitutes law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.")

92. CANON, *supra* note 9, at 51. It was left to Corbin to combine Hohfeld and Holmes: "A statement that a legal relation exists between A and B is a *prediction* as to what society, acting through its courts or executive agents, will do or not do for one and against the other." *Legal Analysis*, *supra* note 67, at 164.

93. *Rights*, *supra* note 86, at 511.

94. *Id.*

95. *Id.* at 512.

event that is uncertain to occur, the *right* is considered a *conditional right* and the corresponding *duty* a *conditional duty*.⁹⁶

A *privilege*, according to Hohfeld, was the opposite of a *duty* and the correlative of a *no-right*.⁹⁷ “[A] privilege is one’s freedom from the right or claim of another.”⁹⁸ Hohfeld believed that the closest synonyms for *privilege* are “liberty”⁹⁹ or legal “freedom.”¹⁰⁰ If a person has a *privilege* against another person then the privilege holder may perform (or not perform) the act in question without the possibility of government sanction. Thus, the other person does not have a *right* to have the person not perform the act (the other person has what Hohfeld called a *no-right*). If a person holds a *privilege* against another person and the person performs the privileged act, he has violated no *right* of the other person. For example, if a person owns a parcel of land, the person has the *privilege* to go onto the land, and the other person does not have a *right* to have the owner stay off the land.

It appears Hohfeld intended a *privilege* to refer to the legal freedom to perform a *physical act*. For example, when illustrating the concept of a *privilege*, he referred to the privilege of entering or not entering onto land that one owns¹⁰¹ or eating a salad when the owner offers it to you,¹⁰² both physical acts. (It would be unusual to say that someone has the privilege to engage in a mental act—though it is true—for the simple reason that it would be a strange rule of law to provide that a person has a duty to not engage in a particular mental act.¹⁰³) But *privilege* should not be confused with the mere physical ability to perform an act. One might have the physical ability to perform an act, but if performing such an act breaches a *duty* owed to another person, one does not have the *privilege*, with respect to that other person, to perform the act. Thus, a *privilege* is the ability to engage in a physical act *without violating a duty owed to another person*.

The existence of a *privilege* does not, however, necessarily mean that a third party with the corresponding *no-right* is under a *duty* to not interfere with the privilege holder engaging in the privileged act. Whether the third party has such a legal disadvantage (in addition to having a *no-right*) is based on a separate analysis of whether the third party has a *duty* to refrain from interference and the privilege holder a corresponding *right* from such interference. And, according to Hohfeld, “[w]hether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits.”¹⁰⁴ Failure to recognize that a *privilege* does not necessarily imply a corresponding *duty* of non-

96. *Id.* at 512-13.

97. Hohfeld, *supra* note 3, at 30.

98. *Id.* at 55.

99. *Id.* at 41.

100. *Id.* at 55.

101. *Id.* at 32.

102. *Id.* at 35.

103. Some might, however, argue that a mental act can be a sin. See, e.g., *Matthew* 5:28 (“But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart.”). However, the government does not sanction one for thinking bad thoughts.

104. Hohfeld, *supra* note 3, at 55.

interference by the party holding the corresponding *no-right* can lead to the erroneous assumption that merely because a party holds a *privilege* against another party, the other party necessarily has a *duty* to refrain from interfering with the privilege holder exercising the privilege. (Of course, such interference cannot breach a duty owed under criminal laws.)

Hohfeld's recognition of a *privilege* (with its correlative *no-right*) as a legal interest distinct from a *right* (with its correlative *duty*) was his most important insight: "In his view, it is one thing for the law to grant a privilege, and something altogether different to corroborate that privilege with a right. Doing so requires the creation of a new duty. Using Hohfeld's terminology, it is simply wrong to deduce duties of non-interference from Hohfeldian privileges."¹⁰⁵ Thus, a person might have a *privilege* to engage in an act, but a third party might similarly have a *privilege* to interfere with the person's attempt to complete the act. "With this idea, Hohfeld formalized an emerging focus on the range of situations in which injury is legally permitted without compensation."¹⁰⁶ As Hohfeld wrote, "A rule of law that *permits* is just as real as a rule of law that *forbids*,"¹⁰⁷ thereby "opening the door to conceptualizing inaction [in the sense of failing to impose a *duty* of non-interference] as a legislative and policy choice."¹⁰⁸

According to Hohfeld, "a legal *power* is the opposite of a legal *disability* and the correlative of legal *liability*."¹⁰⁹ A person holds a *power* when the person has the ability, by performing some act under the person's volitional control, "to effect [a] particular change of legal relations" with another person.¹¹⁰ A *power* is thus "one's affirmative 'control' over a given legal relation as against another."¹¹¹ Hohfeld believed the closest synonym to legal *power* is legal "ability."¹¹² Thus, the opposite is *disability*, because disability indicates a lack of ability.¹¹³ An example of a legal *power* is an agent's ability to affect the principal's legal relations regarding matters within the agent's authority (the scope of the authority being determined by operative facts).¹¹⁴ The principal is under a corresponding *liability* in that the agent's actions are binding on the principal.¹¹⁵ Another example is a donor's ability, under the doctrine *gift causa mortis*, to regain the legal advantages of ownership of the tangible item given to the donee.¹¹⁶ As will be illustrated later in the application of Hohfeldian terminology to contract

105. CANON, *supra* note 9, at 49.

106. *Id.*

107. Hohfeld, *supra* note 3, at 42 n.59.

108. CANON, *supra* note 9, at 49.

109. Hohfeld, *supra* note 3, at 44.

110. *Id.* at 44-45.

111. *Id.* at 55.

112. *Id.* at 45.

113. *Id.*

114. *Id.* at 46.

115. *Id.*

116. *Id.* at 47.

law, merely because one has a *power* does not necessarily mean one has a *privilege* to engage in the acts necessary to exercise that power.¹¹⁷

According to Hohfeld, an *immunity* is the opposite of a *liability* and the correlative of legal *disability*.¹¹⁸ “[A]n *immunity* is one’s freedom from the legal power or ‘control’ of another as regards some legal relation.”¹¹⁹ Thus, a landowner has an *immunity* with respect to a third party transferring the landowner’s ownership of the land, and the third party is under a legal *disability* in that the third party does not have the *power* to compel the landowner to divest her ownership of the land.¹²⁰ Hohfeld believed that the closest synonym to *immunity* is “exemption.”¹²¹

Hohfeld concluded his article by arguing that by recognizing that all legal relations can be reduced to these eight fundamental legal conceptions, his so-called lowest common denominators of the law:

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 In short, the deeper the analysis, the greater becomes one’s perception of fundamental unity and harmony in the law.¹²²

Thus, beyond Hohfeld’s immediate goal of assisting law students with legal reasoning, he hoped to promote unity and harmony in the law by eliminating logical errors and by discerning common principles of justice and policy involved in apparently dissimilar issues.

Hohfeld’s article did not, however, provide a theory for resolving such issues of justice and policy. As stated by one commentator, “Hohfeldian analysis of rights is intended to supply us with a precise vocabulary for reporting the effect, in specific circumstances, of legal rules and transactions, it is not intended to assist us in reaching conclusions about what, in cases of uncertainty, the legal rules are or should be.”¹²³

117. See *infra* Part IV.

118. Hohfeld, *supra* note 3, at 55.

119. *Id.* (emphasis added).

120. *Id.*

121. *Id.* at 57.

122. *Id.* at 59.

123. NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 298 (3d ed. 2008).

Hohfeld's piece was a continuation of the work started by the eighteenth and nineteenth-century analytical jurists Jeremy Bentham, John Stuart Mill, and John Austin, who sought to define legal rights and liberties.¹²⁴ Hohfeld's work also had a superficial similarity to legal formalism and conceptualism by arguing that all legal relations could be reduced to a limited number of legal concepts, by referring to "discern[ing] common principles of justice and policy,"¹²⁵ and by stating that his method of analysis could lead to the "correct" and "true" solution to legal problems.¹²⁶ As Corbin later wrote:

[I]t was Hoh's belief that there is a "positive law," to be determined by logical analysis. He certainly handled his materials with positiveness and vigor and reached definite results. At the age of 36, he might not have approved of my notion that *all* legal rules are merely tentative working rules, drawn out of and changing with the customs and mores of men.¹²⁷

Some considered Hohfeld's work "a perpetuation of the old conceptualist nonsense."¹²⁸

But "Hohfeld was not a formalist of another color."¹²⁹ Whereas legal formalists believed, like Hohfeld, that there were a limited number of fundamental legal principles, the formalists' fundamental principles were substantive value choices, "most significantly, the principle of individual autonomy (and its substantive corollary, a will theory of legal obligation) and the 'police power' of the state (the authority of the government to regulate interactions among private parties to preserve 'the public health, safety, morals, or general welfare')." ¹³⁰ Unlike the formalists, Hohfeld sought to "unify the law *analytically* rather than substantively."¹³¹ Even the analytical jurists, whose work he built on, had sought to unify the law substantively and declared that "[p]eople were free to do anything that did not hurt others."¹³² Thus, although Hohfeld shared with the formalists and the analytical jurists a desire to bring a "fundamental unity and harmony in the law," he did not share their belief that such unity and harmony was based on a broad definition of the concept of liberty, a definition that led to

124. See generally Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

125. Hohfeld, *supra* note 3, at 59.

126. *Id.* at 19, 28.

127. Hull, *supra* note 2, at 259 (quoting Letter from Arthur L. Corbin to E. V. Rostow (Aug. 10, 1957) (on file with the Yale University Library)); see also SIMMONDS, *supra* note 123, at 290 ("Hohfeld's account of rights treats them as conclusively settling those issues to which they are indeed relevant: their significance is limited and highly specific, but utterly reliable.").

128. Singer, *supra* note 124, at 978.

129. Hull, *supra* note 2, at 257; see also TWINING, *supra* note 2, at 36 ("Hohfeld . . . was by no means a blinkered formalist.").

130. CANON, *supra* note 9, at 47-48.

131. *Id.*

132. Singer, *supra* note 124, at 984.

judicial results promoting a laissez-faire system. In fact, Hohfeld's article failed to promote any particular substantive value choices.

Hohfeld's break from classical legal thought is reflected in the very first paragraph of his article, in which he attacked the faulty reasoning of the most significant legal thinkers of his time,¹³³ leading Corbin to write years later that Hohfeld "constructed his analysis out of judicial reasoning in the cases and he *used it intensively* in criticising [sic] judicial opinions and legal articles (*including those of his Harvard instructors*). I feel sure that those Harvard men, like Queen Vic., were 'not amused.'"¹³⁴

Rather than following in formalism's footsteps, his article was "a pragmatic exercise in an era when pragmatism was still highly regarded."¹³⁵ Professor Hull explains:

Hohfeld's analytical schema of jural relations was pragmatic. He wanted to connect legal symbols to the human relationships they described. He did not believe in abstractions called 'rights' and 'duties.' He insisted that they be defined in relation to human beings. By arraying these terms with their 'jural opposites' and 'jural correlatives,' he made clear that no person held a right without that right having a legal impact upon someone else, and that there were two different types of legal impact that flowed from such rights. He also argued that legal relations were far too varied and complex to be explained by using only the two terms, *right* and *duty* He looked at the practical effect of legal relationships to distinguish many types of relationships and tried to apply more descriptive terms to label them.¹³⁶

Thus, "[t]o the extent that Hohfeld stressed underlying relationships and practical context for his analysis of jural relations, his article is realistic as well as pragmatic"¹³⁷

Hohfeld's article undermined formalism in a variety of ways. First, by pointing out that all legal interests consist of relations between persons, it helped to discredit classic legal thought's distinction between public and private spheres.¹³⁸ "Hohfeld's analysis underscored a point . . . anticipated by both the socialists and the Benthamites, that it was the state itself, through its complex scheme of property and contract rules, that created the horizontal relationships among individuals in those rules."¹³⁹ Private

133. CANON, *supra* note 9, at 47.

134. Hull, *supra* note 2, at 258 (quoting Letter from Arthur L. Corbin to E. V. Rostow (Aug. 10, 1957) (on file with the Yale University Library)).

135. Hull, *supra* note 2, at 257.

136. *Id.* at 257-58.

137. *Id.* at 258.

138. WILLIAM W. FISHER III, et al., *AMERICAN LEGAL REALISM* 8 (1993).

139. FRIED, *supra* note 22, at 53.

“rights ultimately derived from public power, in the form of a promise by the state to refrain from interfering with the [right holder as] she exercises [the] right . . . and to force the correlative Hohfeldian duty-holders . . . to desist from any interference with those rights”¹⁴⁰

Second, “[i]t markedly enhanced the power and precision of [the] critique of the classical style of legal reasoning.”¹⁴¹ To the extent classical legal theory maintained that its legal conclusions were based simply on deductive reasoning, Hohfeld’s analysis showed that such reasoning was often faulty. Because there were different kinds of “rights,” legal conclusions could not be developed through deductions from a major premise such as “the right to property.”¹⁴² The American legal realists would, therefore, be able to extend “Hohfeld’s analysis to criticize judicial expansion of a general ‘right to property’ and ‘right to freedom of contract’ in ways which overruled protective social legislation or restricted labor organizing.”¹⁴³ For example, the legal realists pointed out that it was a logical error to conclude what constraints third parties are under from the use of the term *right*, when such term was used indiscriminately.¹⁴⁴ Hohfeld’s article has, therefore, been viewed as shifting the debate about rights into a new stage, moving it away from the Kantian notion that rights, defined broadly, necessarily have internal complexity (including corresponding duties) as well as preemptive force.¹⁴⁵

Third, by emphasizing that all legal advantages have corresponding disadvantages for others (through their correlatives), it helped legal realists “explain why, in resolving most of the disputes that come before them (not merely a few anomalous ‘hard cases’), judges should weigh carefully the practical implications of the decisions.”¹⁴⁶ For example, when making decisions about what a “right to property” means, a judge must decide which legal disadvantages to impose on third parties.¹⁴⁷ The law’s existing scheme of advantages necessarily means there are corresponding disadvantages placed on others, and any rearrangement of advantages “merely substitute[s] one form of constraint for another.”¹⁴⁸ Thus, “any advantage given to one side [is] at the expense of the other”¹⁴⁹ This means any decision regarding a legal advantage is itself a distributive question—“extending privileges, rights, or any of his other [two] legal [advantages] will create losers as well as winners.”¹⁵⁰ And “[t]he choice cannot be made by

140. *Id.* at 79.

141. FISHER, *supra* note 138, at 8.

142. CANON, *supra* note 9, at 49.

143. *Id.* at 50.

144. *Id.*

145. SIMMONDS, *supra* note 123, at 289-90.

146. FISHER, *supra* note 138, at 8.

147. CANON, *supra* note 9, at 49.

148. FRIED, *supra* note 22, at 53.

149. *Id.* at 109.

150. CANON, *supra* note 9, at 50.

reference to the logic of [rights] itself, it will need to be made on other grounds. Those other grounds might well be matters of social principle, ethics, or policy Hohfeld's analysis focused on the necessity of choice."¹⁵¹

Hohfeld's regime of legal advantages could, thus, not be reconciled with liberties, because such entitlements necessarily imposed correlative restraints.¹⁵² Although this was not a novel concept, Hohfeld gave the legal realists "a vocabulary to show that it was necessarily true as a formal matter"¹⁵³ Hohfeld's logical positivist method "implicitly reoriented legal thought away from abstract, free-floating notions of entitlement and toward the sort of pragmatic, consequentialist view of law that was naturally more congenial to the Realists' philosophical and political ends."¹⁵⁴ Similarly, by deconstructing large concepts like "property" into their "component functional relations, his method implicitly underscored how intricate and changeable those relations were, thus undermining the 'givenness' of whatever set of relations happened to exist at the time."¹⁵⁵

By reducing all legal relations to eight fundamental legal concepts, while at the same time exposing the inevitable policy choices that must be made by a court, Hohfeld completed the analytical jurists' project by "closing the door on efforts to render the legal system coherent and self-contained through more precise analysis," and at the same time moved American legal thought beyond that project.¹⁵⁶

As previously noted, it was Arthur Corbin who would ensure that Hohfeld's approach to legal terminology would have a lasting impact, particularly in the area of contract law, by incorporating his terminology in a series of law journal articles and then in the *Restatement of Contracts*.¹⁵⁷ Corbin was likely attracted to Hohfeld's article because it did, in fact, complete the project of eighteenth and nineteenth-century analytical jurists while at the same time having elements that would enable legal thought to progress. Hohfeld's effort to clarify the meaning of eight legal concepts appealed to Corbin because Corbin recognized that "[t]here is peril . . . in th[e] common multiple usage of important words; it very frequently, especially when it occurs in a contract, a court opinion, or a statute, causes misunderstanding, litigation, conflict, and inconsistent decisions."¹⁵⁸ Even though Corbin did not believe that words had intrinsic meanings and believed they could only be given meaning in the context in which they were

151. *Id.* at 49-50.

152. FRIED, *supra* note 22, at 54.

153. *Id.* at 53.

154. *Id.*

155. *Id.*

156. CANON, *supra* note 9, at 50; FRIED, *supra* note 22, at 211 (supporting the American legal realists' "immediate agenda of putting such contestable political choices into the hands of the legislature").

157. TWINING, *supra* note 2, at 35.

158. *Foreword*, *supra* note 1, at 8.

used,¹⁵⁹ he recognized the importance of using them carefully to avoid misunderstandings, a problem with which he was surely well acquainted as a Contracts professor. Also, Corbin, though suspicious of conceptualism,¹⁶⁰ was dedicated to explaining how contract law operated, and a system that would help clarify its workings surely appealed to him. As noted by William Twining, “[i]n respect of analysis and refinement of legal concepts, far from reacting against the Austinian tradition, Corbin, following Hohfeld, worked vigorously within it.”¹⁶¹

Corbin was also a pragmatist¹⁶² who rejected the prevailing method of legal reasoning. Starting in 1912, he wrote a series of law journal articles implicitly attacking formalism.¹⁶³ Corbin believed court decisions were ultimately based on policy choices, and that common-law rules were developed inductively by examining the facts and holdings of all relevant cases, with changes to the rules made when prior facts did not fit the current case.¹⁶⁴ Hohfeld, pointing out that judicial reasoning often included logical errors, supported Corbin’s belief that judicial reasoning was not simply an exercise in deductive reasoning. At the same time, however, Corbin believed in the critical importance of rules, one scholar describing his view as follows: “[r]ules are indeed only working rules, but working rules are not *irrelevant*: if gone tomorrow, they are nonetheless here today, and they have serious work to do.”¹⁶⁵ Although he was skeptical of textbook formulations of rules and believed all legal doctrines are “tentative working rules,” Corbin was not skeptical about the existence of legal rules.¹⁶⁶

Corbin was also immensely dedicated to improving how law schools taught their students. He believed that the legal education he received at Yale at the close of the late nineteenth century had not adequately prepared him for practice.¹⁶⁷ His professors had employed the so-called Yale system or Yale method, which consisted of lectures about canned doctrine, the intensive study of textbooks, and examination by recitation in which

159. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965).

160. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 49 (1992).

161. TWINING, *supra* note 2, at 29.

162. See HORWITZ, *supra* note 160, at 49 (“Corbin . . . like many transplanted Westerners of this period, brought an earthy, pragmatic skepticism to his intellectual work Corbin’s writing in contract is perhaps the ultimate legal expression of the pragmatic temperament at work, though if he had even heard of William James or John Dewey, I doubt that Corbin would have cared much for their high-toned philosophizing.”); TWINING, *supra* note 2, at 27 (writing that Corbin was “brought up on the prairies of Kansas” and that “[r]eligious skepticism, the pioneer spirit and a grandfather who ‘laughed at orthodoxies’ set the tone for his early upbringing”).

163. HORWITZ, *supra* note 160, at 49.

164. TWINING, *supra* note 2, at 31.

165. Kenneth D. Crews, *Corbin, Edward Samuel*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 129 (Roger K. Newman ed., 2009).

166. TWINING, *supra* note 2, at 31.

167. *Id.* at 28.

there were right and wrong answers to the professor's questions.¹⁶⁸ Corbin believed the Yale system was deficient because it did not include any training in the analysis of complex fact patterns.¹⁶⁹ Thus, when Corbin started teaching at Yale Law School, "his central concern was to work out a method of teaching and exposition of legal doctrine which overcame the inadequacies of the Yale system."¹⁷⁰ Even before he knew the details of Langdell's case method at Harvard, he developed his own case-method system of teaching, and he was instrumental in establishing the case method at Yale.¹⁷¹

So when Hohfeld's manuscript landed on Corbin's desk in 1913, Hohfeld's approach to legal reasoning and his pedagogical emphasis resonated with Corbin. The article at once undermined formalism's emphasis on guiding substantive legal principles from which subsidiary legal rules could be deduced (and from there "correct" answers to disputes), while at the same time clarifying the use of language to avoid logical errors in deductive reasoning and helping to bring order to *today's* legal rules. Also, Corbin needed someone with Hohfeld's brilliance to accomplish his goals. As stated by Morton Horwitz, "Corbin was not an original thinker. He took the ideas and insights of others and worked them into concrete legal rules with care and precision."¹⁷²

D. *The Wunderkind*

Corbin was so taken with Hohfeld's article that he not only recommended that the *Yale Law Journal* editors publish it, he pushed for Hohfeld's hiring,¹⁷³ and Hohfeld accepted a position at the school in 1914.¹⁷⁴ Hohfeld would now have an opportunity at an eastern law school to implement his article's intended purpose—the training of law students to properly analyze legal problems and to recognize and avoid errors in deductive reasoning.

But initially, Hohfeld likely overused his approach to legal reasoning. In his first year at Yale he employed his terminology in the classroom in such an exacting fashion that the students resented him.¹⁷⁵ As stated by Corbin, "[he] was a severe taskmaster, requiring his students to master his

168. *Id.*; John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of Yale Law School*, in *THE HISTORY OF YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES* 17, 30 (Anthony T. Kronman ed., 2004); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 120 (1986).

169. TWINING, *supra* note 2, at 28.

170. *Id.*

171. *Id.* at 33.

172. HORWITZ, *supra* note 160, at 50.

173. TWINING, *supra* note 2, at 34.

174. Wellman, *supra* note 22, at 270. See also Hull, *supra* note 2, at 260 (quoting Letter from Arthur L. Corbin to E. V. Rostow (Aug. 10, 1957) (on file with the Yale University Library) ("[A]t the time that he endorsed 'Some Fundamental Legal Conceptions' for publication he was so taken with the article that he decided to see if he could bring the young man to Yale. 'Largely because of Hoh's article, but also because of the results of the inquiry, Yale offered a professorship to him, on a permanent basis.'")).

175. Hull, *supra* note 2, at 263-64.

classification of 'fundamental conceptions' and to use accurately the set of terms which they expressed. They found this, in the light of the usage of the other professors, almost impossible."¹⁷⁶ The students were so vexed they submitted a petition to the university's president requesting that Hohfeld not be retained,¹⁷⁷ but his contract with Yale did not permit his termination and the effort failed.¹⁷⁸ Hohfeld was deeply hurt by the episode, but rather than returning to Stanford (as both his contracts with Stanford and Yale permitted), he immediately resigned from Stanford and chose to stay at Yale.¹⁷⁹ Corbin later saw the law school's dean pat Hohfeld on the back and say to him, "Be *kinder* to them, Hohfeld."¹⁸⁰

Ultimately, Hohfeld triumphed. The entire Yale faculty, save one,¹⁸¹ eventually adopted Hohfeldian terminology for classroom use, and he became the wunderkind of the faculty.¹⁸² Hohfeld had achieved exactly what he set out to do. But in October 1918, just four years after starting at Yale, he tragically died at the age of thirty-nine¹⁸³ from endocarditis¹⁸⁴ during one of the worst influenza pandemics in modern history.¹⁸⁵

E. Fading from Memory

Corbin, before and after Hohfeld's death, sought to keep Hohfeld's work alive, applying Hohfeldian terminology to various areas of contract law in a series of law journal articles.¹⁸⁶ Also, as the Special Adviser to the *Restatement of Contracts*¹⁸⁷ drafted between 1923 and 1932,¹⁸⁸ Corbin persuaded Samuel Williston, the project's Reporter, to adopt Hohfeldian terminology in the *Restatement*.¹⁸⁹ And because of its implicit subversion of formalism, the American legal realists seized upon Hohfeld's work and

176. Foreword, *supra* note 1, at x; see also Nyquist, *supra* note 20, at 245 ("In the classroom Hohfeld apparently deployed his analysis of legal relations and vocabulary without letup. This, of course, drove his student's to the dean's office.").

177. Hull, *supra* note 2, at 264-65.

178. *Id.* at 265.

179. *Id.* at 266.

180. *Id.* at 265 (quoting Letter from Arthur L. Corbin to E. V. Rostow (Aug. 10, 1957) (on file with the Yale University Library)).

181. *Id.* at 268-69. Professor William Howard Taft was the lone exception. *Id.* at 268.

182. FISHER, *supra* note 138, at 8. In 1917 Hohfeld published a follow-up to his seminal article, in which he applied his terminology to a variety of situations. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

183. Goble, *supra* note 15, at 125. There are references to Hohfeld being thirty-eight at the time of his death. see, e.g., TWINING, *supra* note 2, at 34; Nyquist, *supra* note 20, at 238, but he was born on August 8, 1879, and died on October 21, 1918, Goble, *supra* note 15, at 124, which would have made him thirty-nine.

184. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 411 (11th ed. 2003) (defining *endocarditis* as an "inflammation of the lining of the heart and its valves").

185. Hull, *supra* note 2, at 274.

186. TWINING, *supra* note 2, at 35.

187. See RESTATEMENT OF CONTRACTS vi (1932) (identifying Corbin as the Special Adviser).

188. See Wm. Draper Lewis, *Introduction to RESTATEMENT OF CONTRACTS* vii, ix (1932) (noting that work was begun on the *Restatement of Contracts* in June 1923); *id.* at xi (noting that the *Restatement of Contracts* was approved by the American Law Institute at its annual meeting in May 1932).

189. TWINING, *supra* note 2, at 35; see also Lewis, *supra* note 188, at xii-xiv (explaining the principles of terminology employed).

used it to their advantage in overturning the prevailing method of legal reasoning.¹⁹⁰

But by the Second World War, Hohfeld's work had largely faded from memory.¹⁹¹ Grant Gilmore, a student of Corbin's at Yale Law School in the early 1940s, commented that even Corbin, while giving a preliminary lecture on Hohfeldian analysis in his first-year Contracts course, did not mention Hohfeld further.¹⁹² In 1963, Corbin lamented as follows: "Hohfeld may have hoped that his analysis of legal relations and his choice of terms would be generally accepted and followed in the course of time. Forty years of subsequent experience have shown that such a hope was in large part . . . vain."¹⁹³

There are likely several reasons Hohfeld has largely faded from memory. First, the topic of legal terminology is unlikely to elicit widespread enthusiasm. Even Corbin referred to the topic as a "dry region of legal terminology—legal lingo" when discussing Hohfeld's work.¹⁹⁴ For most, discussing legal terminology is far less interesting than discussing the substantive policies that should be used to formulate legal rules and decide cases. And although some readers initially "got the erroneous impression that his analysis of concepts and terms was offered as a method of determining social and legal policy,"¹⁹⁵ his analysis did nothing of the kind. Hohfeld's goal was to promote proper and clear legal reasoning, not to provide solutions to legal issues.¹⁹⁶ Second, "most people resent being shown that their thoughts are confused and their language is unclear and inconsistent."¹⁹⁷ Third, most find Hohfeld's writing style to be as dull and obscure as the article's topic. Commentators have described his writing as

190. See FRIED, *supra* note 22, at 53 ("[M]any of the Realists were quick to see its seditious implications."); FISHER, *supra* note 138, at 8 ("Neither essay makes any mention of sociology, economics, or the law in action. Instead they seek to derive insight from precise categorization of legal concepts. Yet, in several ways . . . Hohfeld's taxonomy of entitlements was of practical use to the Realists."); CANON, *supra* note 9, at 53 ("It would be difficult to overstate the significance of Hohfeld's central analytic insights for the legal realists in general, all of whom borrowed from his framework."). American legal realism is "[t]he label for a category of legal commentators, primarily from the 1930s and 1940s, but with some significant contributions earlier and later. These commentators were 'realists' in the sense that they wanted citizens, lawyers, and judges to understand what was *really* going on behind the jargon and mystification of the law." BIX, *supra* note 8, at 3.

191. CANON, *supra* note 9, at 53.

192. KALMAN, *supra* note 168, at 120.

193. *Foreword*, *supra* note 1, at ix. Hohfeld's analysis regained some of its popularity after 1970, when Critical Legal Studies scholars sought to revive the realist tradition. CANON, *supra* note 9, at 53.

194. Arthur L. Corbin, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 607, 607 (1921).

195. *Foreword*, *supra* note 1, at xi.

196. See CANON, *supra* note 9, at 51 ("Hohfeld's analytic scheme offers no assistance here—this is a question for policy. All sorts of moral, political, economic, or institutional considerations might well push a decision maker to decide it one way or the other. But Hohfeld left it to others to speak about how such questions of 'justice or policy' should be analyzed and decided.").

197. *Foreword*, *supra* note 1, at ix.

"difficult to read,"¹⁹⁸ having "the air of musty scholasticism,"¹⁹⁹ and "turgid and abstract."²⁰⁰ Fourth, using Hohfeld's legal terminology can be taxing; Corbin noted that "mastery of [Hohfeld's] work is a severe disciplinary process."²⁰¹ As stated in 1921 by Edwin Patterson, a Contracts scholar, after trying to apply Hohfeld's terminology in his teaching, "it takes so much thought to decide which Hohfeldian label to stick on that I tend to lose sight of the real issues involved."²⁰²

III. THE VALUE OF REDISCOVERING HOHFELDIAN TERMINOLOGY

The usefulness of Hohfeldian terminology is a matter of contention. William Twining has asserted that

it is now widely accepted that his analysis . . . has a less widespread utility than was once thought, and that he failed to substantiate his claims that reducing all legal relations to their lowest common denominator would make it possible to discuss common principles of justice and policy underlying the various jural problems involved and that it would increase 'one's perception of fundamental unity and harmony in the law.'²⁰³

Samuel Williston, despite incorporating Hohfeldian terminology into the *Restatement*, later wrote that it was unlikely lawyers and judges would ever employ unusual words designed to create perfect distinctions, particularly because legal vocabulary was already replete with words in common use having more than one meaning.²⁰⁴ He also noted that "[o]nly after it was determined that the plaintiff could or could not recover under a variety of situations, could appropriate names for the legal relations become available" and Hohfeld's system was therefore of diminishing importance in legal education.²⁰⁵ And, as previously discussed, consistent application of Hohfeldian terminology can be taxing, perhaps causing one to lose sight of more important issues.²⁰⁶

These are fair criticisms, but to permit them to marginalize Hohfeldian terminology is to ignore Hohfeld's stated purpose—to assist law students in developing the ability to engage in legal reasoning. As noted by Professor

198. Linzer, *supra* note 7, at 271.

199. FRIED, *supra* note 22, at 53.

200. FISHER, *supra* note 138, at 8.

201. *Foreword*, *supra* note 1, at xi.

202. Hull, *supra* note 2, at 276 (quoting Letter from Edwin W. Patterson to Roscoe Pound (May 14, 1921) (on file with the Harvard Law School Library)).

203. TWINING, *supra* note 2, at 34-35 (internal citations omitted).

204. SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 207 (1941).

205. *Id.* at 208.

206. See *Foreword*, *supra* note 1, at xi; Hull, *supra* note 2, at 276 (quoting Letter from Edwin W. Patterson to Roscoe Pound (May 14, 1921) (on file with the Harvard Law School Library)).

Nyquist, Hohfeldian analysis trains students in at least five important lawyering skills.²⁰⁷ First, by having students focus on whether the court is using imprecise language to explain the legal relations at issue, Hohfeldian analysis trains students to read critically.²⁰⁸ Second, it trains students to state the issues in dispute precisely and to avoid ambiguous language.²⁰⁹ Third, by requiring students to state the issues precisely, Hohfeldian analysis enables students to better analogize and distinguish cases by recognizing when the issues involved in superficially dissimilar cases are in fact the same, and vice versa.²¹⁰ Fourth, by requiring the legal relations between persons to be broken down into their component parts, it trains students to sort out complex legal relations.²¹¹ Fifth, Hohfeldian analysis trains students to avoid logical errors, particularly the errors of deducing duties from privileges, deducing privileges from rights, and assuming that legal relations among more than two persons must be identical.²¹²

This last skill is perhaps Hohfeldian terminology's most valuable use. Not only will the careful use of Hohfeldian terminology train students to avoid logical errors, its use will train them to recognize the logical errors of their adversaries and the court, thereby providing them with a powerful tool of advocacy. As stated by Williston, "whatever limitations there may be to the value of analytical logic as a solvent of legal problems, it is one of the weapons of an accomplished lawyer, and one which an intelligent beginner can soon learn to use."²¹³

Accordingly, despite the limitations of Hohfeldian terminology, the terminology's use remains "a powerful tool for teaching."²¹⁴ Yes, legal terminology is not particularly interesting. No, Hohfeldian terminology does not provide any help with which legal rules a court should adopt. And yes, the terminology's use can be taxing. But, as anyone trained in Hohfeldian terminology and analysis comes to realize, its use promotes a clarity of thought about legal issues that is indispensable to truly thinking like a lawyer.

IV. HOHFELD'S SYSTEM APPLIED TO CONTRACT LAW

In this Part, Hohfeld's system will be applied to contract law. This is not, of course, the first time this has been done. Hohfeld's article included contract-law examples;²¹⁵ Corbin famously applied Hohfeld's system to a

207. Nyquist, *supra* note 20, at 246-53.

208. *Id.* at 246-47.

209. *Id.* at 247-48.

210. *Id.* at 248-49.

211. *Id.* at 249-51.

212. *Id.* at 251-53.

213. WILLISTON, *supra* note 204, at 209.

214. Nyquist, *supra* note 20, at 238. And to avoid having one's students petition the dean for your removal, unlike Hohfeld, one need only use it in moderation. See *id.* at 245 ("I have found that once students are familiar with Hohfeld's system, it is sufficient to signal when his vocabulary is in use, and there is no need to apply it at all times.").

215. Hohfeld, *supra* note 3, at 49-51.

variety of contract doctrines in several law journal articles;²¹⁶ Hohfeldian terminology was used in the *Restatement of Contracts*;²¹⁷ and Professor Nyquist, a contracts professor, provided examples of how Hohfeldian terminology can be applied to contract law.²¹⁸ In this Part, however, Hohfeldian analysis is applied to the entire spectrum of key contract doctrines, ranging from contract formation to remedies, and thereby providing, for the first time, a single source devoted solely to Hohfeldian analysis and contract law. To organize the analysis, this Article groups contract doctrines into four categories: (A) contract formation; (B) breach; (C) defenses; and (D) remedies.

A. Contract Formation

Whether a contract is formed between two or more persons is important because, upon formation, the legal relations between the parties immediately changes. Under Hohfeldian analysis, the formation of a contract does not create legal relations where none existed before (this would be an error easily made by one not familiar with Hohfeld's system), but rather changes the legal relations between the parties who have formed the contract.

1. Legal Conceptions Contrasted with Non-Legal Conceptions in the Formation of a Contract

Before analyzing contract formation doctrines using Hohfeld's eight fundamental legal concepts, it is worthwhile to address the distinction between legal conceptions and non-legal conceptions in this area. Hohfeld noted that confusing legal conceptions and non-legal conceptions was prevalent in the field of contract law,²¹⁹ and believed this was evident in the use of the word *contract*.²²⁰ The word *contract* is sometimes used as a synonym for *bargain*; *contract* is sometimes used to refer to a document that evidences a bargain; and *contract* is sometimes used to refer to the legal relations resulting from a bargain.²²¹

Under Hohfeldian terminology, only the third is correct. A *contract* is a legal conception, and therefore the word should not be used to refer to the physical facts necessary to bring a contract into existence. The word *contract* refers to the legal relations that arise between two or more persons upon the occurrence of operative facts.²²² A written document signed by each party that includes promises is a *fact* that *might* lead to a change in

216. TWINING, *supra* note 2, at 35.

217. *Id.*

218. Nyquist, *supra* note 20, at 242-43.

219. Hohfeld, *supra* note 3, at 24.

220. *Id.* at 24-25.

221. RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. a (1981).

222. See *Legal Analysis*, *supra* note 67, at 165 ("The term 'legal relation' should always be used with reference to two person, neither more nor less. One does not have a legal relation to himself."); see also RESTATEMENT OF CONTRACTS § 15 (1932).

legal relations between the parties, but the written document itself is not a *contract* any more than a pocket watch is itself *property*.

Thus, when the parties to a bargain reduce the terms of their bargain to a written document, it is best to avoid calling the document “the contract.” Doing so confuses a physical fact (the existence of a written document with the terms of the bargain written on it) with the resulting legal relation that might arise upon signing the document (a contract). It is therefore better to refer to the document as the *instrument* and the resulting legal consequences as the *contract*.

Of course, it is unnecessary to do this religiously, and it becomes cumbersome to continually refer to the document as “the instrument.” But avoiding the use of the word *contract* to refer to the instrument is important in cases where an issue is whether terms external to the instrument are part of the contract. For example, the parol evidence rule does not preclude terms extrinsic to the instrument from being part of the contract if they are not contradicted by the instrument and it was natural to exclude them.²²³ This distinction between *contract* (a legal conception) and *instrument* (a non-legal conception) is also important in recognizing whether an issue is one of law or fact. Whether a *contract* exists is, unless operative facts are in dispute, an issue of law.²²⁴ Whether an *instrument* existed is an issue of fact to be decided by the fact finder.

Hohfeld argued that the operative facts in the formation of a contract are an offer, acceptance, etc.,²²⁵ and Corbin concurred, stating that an offer and an acceptance were operative facts for the formation of a contract.²²⁶ But here, Hohfeld and Corbin made a misstep by exposing the mistaken belief that only physical and mental facts give rise to legal relations. Some of what Hohfeld and Corbin considered to be operative facts, and thus non-legal conceptions, are legal conceptions. A careful review of the requirements of contract formation—manifestation of mutual assent, capacity, consideration, reasonably certain terms, and lawful purpose—shows that each, except capacity, is a legal conception.

223. RESTATEMENT (SECOND) OF CONTRACTS § 216(2) (1981).

224. See *Ronan Assocs., Inc. v. Local 94-94A-94B*, Int’l Union of Operating Eng’rs, 24 F.3d 447, 449 (2d Cir. 1994) (“Under traditional principles of contract law, questions as to what the parties said, what they intended, and how a statement by one party was understood by the other are questions of fact; however, the matter of whether or not there was a contract, in light of the factual findings on these questions, is an issue of law.”).

225. Hohfeld, *supra* note 3, at 26.

226. Arthur L. Corbin, *Offer and Acceptance, and Some Resulting Legal Relations*, 26 YALE L.J. 169, 170-71 (1917) [hereinafter *Offer and Acceptance*]; Arthur L. Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739, 739 (1919) [hereinafter *Conditions*] (“A says to B, ‘If you will agree to pay me \$100 for this horse you may have him and you may indicate your agreement by taking him.’ This is a physical fact, called an offer, consisting of certain muscular acts of A (his spoken words) producing certain physical effects in B.”).

Take, for example, a requirement that a contract include a manifestation of mutual assent, which usually takes the form of an offer and an acceptance.²²⁷ By using the term *manifestation*, only physical facts, and not mental facts, are sufficient to establish this element. This is one of the distinctive features of the so-called objective theory of contract.²²⁸ If this were the only distinctive feature of the objective theory of contract, it would simply mean that the requirements of offer and acceptance are limited to certain types of operative facts—physical facts—and would in no way undermine Hohfeld's and Corbin's belief that the requirements of offer and acceptance are operative facts.

But contract law only considers a person to have *manifested* an intention if the person had *reason to believe* the recipient will infer such an intention from the physical acts.²²⁹ And the "reason to believe" standard is a negligence standard.²³⁰ Whether a person was negligent, however, is a matter of opinion, drawn from facts. An apparent operative fact (such as offer or acceptance) includes, as a requirement to determine if the apparent operative fact exists, a conclusion that is debatable (e.g., did the speaker have reason to believe the recipient would construe his words as a manifestation to enter into an agreement?). It becomes clear that the apparent operative facts—such as offer and acceptance—are not facts at all.

Consider the well-known case of *Embry v. Hargadine, McKittrick Dry Goods Co.*,²³¹ in which the defendant's president, in response to the plaintiff's offer for a year of reemployment, allegedly said, "Go ahead, you're all right. Get your men out, and don't let that worry you."²³² The defendant's president denied making this statement,²³³ and whether he made it was therefore an issue of fact. But the appellate court assumed he said it, and addressed whether such statement, if made, would have been an acceptance of the plaintiff's offer for reemployment.²³⁴ This was not an issue of

227. RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (1981) ("The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.").

228. See *City of Everett v. Sumstad's Estate*, 631 P.2d 366, 367 (Wash. 1981) ("The objective manifestation theory of contracts, which is followed in this state, lays stress on the outward manifestation of assent made by each party to the other. The subjective intention of the parties is irrelevant.") (citation omitted); see also Holmes, *supra* note 70, at 463-64 ("We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing.").

229. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

230. Daniel P. O'Gorman, *Contract Law and the Hand Formula*, 75 LA. L. REV. 127, 127-28 (2014).

231. 105 S.W. 777 (Mo. Ct. App. 1907).

232. *Id.* at 777.

233. *Id.*

234. *Id.* at 778-80.

deciding whether an operative fact existed. Rather, it involved determining whether the defendant's president had reason to believe that the plaintiff would construe his alleged response as assent to the plaintiff's offer.

Similarly, determining whether an agreement has consideration requires that the decision maker decide whether a reasonable person would conclude that each party was at least partly motivated to enter into the agreement to obtain what the other party was giving, based on what the parties manifested.²³⁵ Thus, the facts can be undisputed but reasonable persons might disagree as to whether a reasonable person would believe the parties had manifested the requisite motivation. Because the objective theory of contract applies to determining whether there is consideration, the requirement of consideration cannot be proven true or false; rather, it is a matter of opinion drawn from facts.

The requirement that the bargain have reasonably certain terms is also not something capable of being proven true or false. Reasonable persons might disagree on whether a missing term is material or whether a term that is included is so vague that the parties' obligations are not sufficiently definite.²³⁶ Also, whether a contract has a lawful purpose is an issue that often requires a balancing of the interest in enforcing the promise against the public policy against enforcement.²³⁷ Only capacity is an operative fact. For example, a person has no capacity to contract "if his property is under guardianship by reason of an adjudication of mental illness or defect."²³⁸ Determining capacity therefore does not require making an evaluation from facts.

Thus, it is incorrect to state that the *operative facts* of the legal relation called *contract* include an offer, acceptance, capacity, consideration, reasonably certain terms, and lawful purpose. Each—save capacity—is a legal conception that requires a fact finder to make an intermediary legal conclusion drawn from facts. Thus, before concluding that a contract has been formed, an intermediate step, between the fact finder determining whether the operative facts exist and whether a contract was formed, is necessary.

Corbin seemed to recognize this necessary step between determining the facts and deciding if they changed legal relations. As he stated with respect to the process of contract interpretation:

235. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981) ("Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state . . .").

236. See generally Daniel P. O'Gorman, *The Restatement (Second) of Contracts' Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency*, 36 U. HAW. L. REV. 169, 202-13 (2014) (discussing the reasonably certain terms requirement).

237. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) (setting forth a balancing test when a statute does not expressly provide that a bargain is void or unenforceable); *id.* cmt. b ("In doubtful cases . . . a decision as to enforceability is reached only after a careful balancing, in light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms.").

238. *Id.* § 13.

The first step in this judicial process is the merely historical one of determining what the operative facts were. What did the parties say and do? What words did they use? Did they execute a document? This historical determination is made possible by evidence.

The next step is one of interpretation. In taking this step the court may put itself to two questions: first, what was the actual state of mind of the contracting parties, their meaning and intention at the time they said the words or performed the other acts to be interpreted; *second, what meaning do the words and acts of the parties now express to a reasonable and disinterested third party?* If the actual intention of the parties is not the same as the meaning that is now conveyed to a reasonable man, it is the latter that will more often prevail²³⁹

Also, when describing the operative fact that is necessary to create an offer, he noted that “[i]t must be an act that leads the offeree *reasonably* to believe that a power to create a contract is conferred upon him.”²⁴⁰ What a “reasonable and disinterested third party” would believe is an intermediary legal conclusion, not an operative fact.

Thus, by referring to the elements of a contract as its operative facts, Hohfeld and Corbin failed to appreciate that between operative facts and the creation of a legal relationship there often exist intermediary legal conclusions that are legal conceptions. The operative facts for contract formation—as opposed to legal conclusions derived from those facts and the myriad of evidential facts—are actually quite limited: two or more persons (a fact) whose property is not under guardianship by reason of an adjudication of mental illness or defect (a fact) each of whom made a manifestation (a fact). After that, intermediary legal conclusions derived from those facts must be made to determine if the legal relation called *contract* arose.

2. Fundamental Legal Conceptions in the Formation of a Contract

Hohfeldian terminology will now be applied to the formation of a contract. Prior to formation, a party is usually *privileged* to act or not act with respect to what has been (or will) be promised, and the other party has a corresponding *no-right* with respect to the first party acting (or not acting) in such a way. As stated by Hohfeld, “if A has not contracted with B to perform certain work for the latter A’s privilege of *not* doing so is the very negation of a duty of *doing* so.” Upon contract formation, these legal relations will change.

239. *Conditions*, *supra* note 226, at 740-41 (emphasis added).

240. *Offer and Acceptance*, *supra* note 226, at 182 (emphasis added).

The first requirement for the formation of a contract is the manifestation of mutual assent.²⁴¹ A manifestation of mutual assent ordinarily takes the form of an offer and an acceptance.²⁴²

a. Offer

An offer is (1) a manifestation of willingness to enter into an agreement²⁴³ (2) that is communicated or delivered to the offeree²⁴⁴ (3) with the offeree justifiably understanding that her assent is invited and will conclude the agreement without a further manifestation from the offeror.²⁴⁵ Only the second requirement seems purely factual,²⁴⁶ though the concept of constructive delivery would be a legal conception.²⁴⁷

To analyze the concept of *offer* in Hohfeldian terms, let us assume that *X*, the owner of a pocket watch, is considering making an offer to *Y* to sell the watch to *Y*. Even though *X* has a “right” in the broad sense of the term to engage in the acts that would constitute an offer to *Y*, does *X* have a *Hohfeldian right* against *Y* to engage in all of those acts? In other words, does *X*’s “right,” in the broad sense of the word, to engage in such acts correlate to a corresponding *duty* by *Y* to permit *X* to engage in those acts?

Analysis reveals that *X* does not have a Hohfeldian *right* against *Y* to engage in all of those acts. This is because *Y* is not under a *duty* to *X* to permit him to communicate or deliver an offer to her. The reason is clear: *Y* has no duty to form an agreement with *X* because of the principle of

241. See RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) (stating that the formation of a contract requires a manifestation of mutual assent).

242. See *id.* § 22 (“The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.”).

243. See *id.* § 24 (“An offer is the manifestation of willingness to enter into a bargain . . .”). It is better to ask whether there has been a manifestation of willingness to enter into an *agreement*, as opposed to a willingness to enter into a *bargain*, because the former divorces the requirement of consideration from the requirement of an offer, and therefore aids in analysis. See Daniel P. O’Gorman, *Redefining Offer in Contract Law*, 82 Miss. L.J. 1049, 1075-79 (2013) (explaining the confusion caused by the *Restatement*’s use of the term *bargain* in its definition of offer).

244. E. ALLAN FARNSWORTH, *CONTRACTS* 131 (4th ed. 2004). An offer must be communicated or delivered to the offeree because an offeree is not responsible for an unintended manifestation of assent unless the manifestation was the result of the offeree’s negligence. See RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. c (1981) (“[T]here must be either intentional or negligent creation of an appearance of assent.”).

245. See RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (providing the manifestation must be “so made as to justify another person in understanding that his assent . . . is invited and will conclude [the agreement]”).

246. The *Restatement (Second) of Contracts* does not have a rule specifying when an offer is considered received by an offeree, but it does have a rule regarding when a written revocation, rejection, or acceptance is considered received. See *id.* § 68 (“A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited . . .”). Intermediary legal conclusions could be necessary, for example, if there is a dispute as to whether the undisputed facts indicate whether there was sufficient authorization.

247. Consider, for example, the concept of constructive delivery in property law. See *Waite v. Grubbe*, 73 P. 206, 208 (Or. 1903) (holding there was constructive delivery when donor showed donee where money was buried).

freedom from contract.²⁴⁸ And if *Y* has no duty to form an agreement with *X*, it would make no sense to say that *Y* has a duty to permit *X* to engage in the acts necessary to make an offer to her. For example, if *Y* sees *X* coming to her front door and knows he intends to make an offer to her to sell her his pocket watch, *Y* has the *privilege* (the opposite of a *duty*) to not open the door and thus frustrate *X*'s effort to make an offer to her. Similarly *Y* has the privilege to not answer her telephone when she sees it is *X* calling, when she knows *X* wants to make her an offer. Thus, although *Y* probably does not have the privilege to prevent *X* from manifesting a willingness to enter into an agreement with her (this would likely breach a duty under criminal law or tort law), she does have the privilege to prevent such manifestation from being communicated or delivered to her.²⁴⁹

A third party, however, has a duty in tort to not intentionally and improperly interfere with the formation of a contract between other parties.²⁵⁰ Thus, a third party would be under a *duty* not to interfere improperly with *X* making an offer to *Y* to sell his pocket watch to her. For example, a third party has a *duty* not to wrongfully intercept the offer, and thus *X* holds a corresponding *right* against the third party to not have the third party wrongfully interfere with *X* making an offer to *Y*. The making of an offer could itself even constitute tortious interference.²⁵¹

The law of tortious interference is a particularly good example of the importance of Hohfeldian analysis, and of identifying the legal interest between two specific persons. For example, even though *X* does not hold a *right* against *Y* to communicate or deliver an offer to *Y*, *X* holds a *right* against the third party to not have the third party improperly interfere with the communication or delivery of the offer to *Y*. What constitutes *improper* interference (i.e., the scope of the third party's *duty*) and what conduct the third party is *privileged* to engage is a question Hohfeldian analysis does not answer; it is a policy question to be decided by the

248. See *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 402 (8th Cir. 1988) ("In the situation of a typical, garden-variety offer to contract, the offeree is free to reject the offer without running the risk of incurring liability as a result.").

249. There is, however, a notable exception, but it is statutory. Under federal labor law an employer and a union each have a duty to bargain with the other, 29 U.S.C. § 158(a)(5), (b)(3), and thus each has the right against the other to make an offer. See *N.L.R.B. v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) ("As we view the statute, it is the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground."). Accordingly, an employer would breach a duty owed to the union if the employer refused to permit delivery of an offer to it. But, again, that is a statutory right, and it is noteworthy for the very reason that it is contrary to the common-law rule.

250. See RESTATEMENT (SECOND) OF TORTS § 766B (1979) ("One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.").

251. See *Datam Mfg., L.L.C. v. Magna Powertrain USA, Inc.*, No. 306202, 2014 WL 587052, at *13 (Mich. Ct. App. Feb. 13, 2014) ("[F]or tortious interference with a contract, the act of making a competing offer is not per se a wrongful act, but a wrongful act can be established if the evidence shows the competing offer was made with malice, ill motivation, or unlawful purpose.").

courts.²⁵² But Hohfeldian analysis does show that simply because *X* has a “right,” in a broad sense, to make an offer to *Y* does not mean that *Y* is under a *duty* to permit such an offer to be made to her, or even mean that a third party must refrain from all conduct that would thwart *X*’s effort to make an offer to *Y* (only *improper* interference is prohibited).

If *X* does not have a *right* to engage in all of the acts necessary to make an offer to *Y*, does *X* have a *privilege* to engage in the necessary acts? *X* would not have a *privilege* if *X* had a *duty* to engage in those acts since a *privilege* and a *duty* are jural opposites. It is clear that *X* does not, however, ordinarily have a *duty* to *Y* to engage in those acts.²⁵³ As indicated, the principle of freedom of contract includes freedom *from* contract, the freedom to not enter into a contract.

There might, however, arise an unusual situation in which, through the existence of certain operative facts, a *duty* arises to make an offer. The celebrated case of *Hoffman v. Red Owl Stores, Inc.* is perhaps such an example.²⁵⁴ In *Hoffman*, the court held that the defendant breached an enforceable promise to enter into a franchise agreement with the plaintiff as long as the plaintiff met certain conditions.²⁵⁵ Essentially, the court found that the defendant had promised to engage in the acts necessary to make an offer to the plaintiff, and then breached that promise by not engaging in those acts, even though the plaintiff met the stated conditions.²⁵⁶ Thus, the defendant breached its *duty* to make an offer.

A similar situation might arise in the construction industry when a subcontractor submits a bid to a general contractor. The bid might not constitute an offer because a reasonable person might believe the subcontractor did not intend to conclude a deal until any agreement was reduced to a more detailed written document.²⁵⁷ But, similar to *Hoffman*, the bid might constitute a promise to make an offer, thereby inducing reasonable reliance by the general contractor on the bid by incorporating the bid amount in its

252. For example, no court would hold that a third party, upon becoming aware that *X* intends to offer the pocket watch to *Y* for \$50, is under a duty to refrain from making a better offer to *X* when the third party desires the watch. But all courts would hold that the third party has a duty to not take an envelope from *Y*’s doorstep that includes an offer from *X* because the third party dislikes *Y* and does not want *Y* to obtain the enjoyment of the pocket watch.

253. See Rights, *supra* note 86, at 521 (“*B* is under no duty to advertise his wares or to make offers . . .”); *Gumaer v. Interior Credit Bureau*, 627 P.2d 647, 648 (Alaska 1981) (“The offeror is under no duty to make an offer.”).

254. 133 N.W.2d 267 (Wis. 1965).

255. See *id.* at 274 (“The record here discloses a number of promises and assurances given to Hoffman [by] Red Owl upon which plaintiffs relied and acted upon to their detriment. Foremost were the promises that for the sum of \$18,000 Red Owl would establish Hoffman in a store.”). The court held that the promise was enforceable under the doctrine of promissory estoppel. *Id.* at 274-75.

256. The promise was not itself an offer because the terms of the proposed franchise agreement lacked so much detail that the parties’ relationship was at the preliminary negotiations stage. See *id.* at 274-75 (stating that a contract had not arisen because the proposed franchise agreement lacked detail).

257. See RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981) (“Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.”) (emphasis added).

own bid to the project owner.²⁵⁸ If the subcontractor revokes its bid after the general contractor enters into the prime contract with the project owner and before the general contractor and the subcontractor adopt a written memorial of any agreement, the subcontractor might have breached a *duty* to make an offer to the general contractor. Thus, in certain limited circumstances a *duty* by *X* to *Y* to make an offer to *Y* can arise by *X* making an enforceable promise to *Y* make an offer.

But ordinarily *X* has no *duty* to *Y* to make an offer to her because *Y* does not have a *right* against *X* to have him make an offer to her. He makes the offer or not; the choice is his. Accordingly, *X* has the *privilege* to engage in the acts necessary to make an offer to *Y*, and *Y*, although having the *privilege* to interfere with *X*'s attempt to make an offer to *Y* by preventing communication or delivery of the offer to her, has a *no-right* (the opposite of a *right*) with respect to *X* making an offer to *Y*.

Does *X* also have a *power* against *Y* with respect to making an offer to her? It is tempting to say 'yes' (and this is the standard answer),²⁵⁹ but the answer is 'no.' It might be suggested that the answer is 'yes' because an offer presumably gives the offeree a *power* to form a contract, and the formation of a contract changes the legal relations between *X* and *Y*. But, an offer might propose an agreement that lacks consideration;²⁶⁰ the offer might be made by a person without legal capacity;²⁶¹ an offer might be made that does not include reasonably certain terms;²⁶² or an offer might be made that proposes an exchange with an unlawful purpose.²⁶³ In each of these situations, the offer would not give *Y* the *power* to form a contract.

258. This is presumably why courts rely on the doctrine of promissory estoppel to enforce the bid, and not a contract theory, when the subcontractor attempts to revoke the bid before the general contractor manifests assent. See, e.g., *Dynalectric Co. of Nev., Inc. v. Clark & Sullivan Constructors, Inc.*, 255 P.3d 286 (Nev. 2011). Such a bid, if considered an offer, creates an option contract, permitting the offeree to accept the offer despite the subcontractor's attempted revocation. *Drennan v. Star Paving Co.*, 333 P.2d 757, 759-60 (Cal. 1958); RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981). If the general contractor accepts the offer, a contract is formed, and there would be no reason to rely on promissory estoppel. See *Banbury v. Omnitrition Intern., Inc.*, 533 N.W.2d 876, 881 (Minn. Ct. App. 1995) ("[T]he doctrine of promissory estoppel only applies where no contract exists."). The distinction could be important with respect to the remedy awarded, though the *Restatement* indicates that the remedies might not be different. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("The remedy granted for breach [when the promise is enforceable under promissory estoppel] may be limited as justice requires."); *id.* § 87(2) cmt. e ("Full-scale enforcement of the offered contract is not necessarily appropriate in . . . cases [where foreseeable reliance on an offer creates an option contract].").

259. See Nyquist, *supra* note 20, at 243 n.19 ("[I]ssuance of an offer is . . . a power since it changes a legal relationship of another (the offeree).").

260. For example, the offeror's promise might be limited to a promise to perform a pre-existing legal duty. See RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981) ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .").

261. See *id.* § 13 ("A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.").

262. See *id.* § 33(1) ("Even though a manifestation of intention is understood to be intended as an offer, it cannot be accepted so as to form a contract unless the terms of the contracts are reasonably certain.").

263. See *id.* § 7 cmt. a (discussing "void" agreements).

It might be suggested that the offer gives *Y* the *power* or the *privilege* to form an *agreement* (if not necessarily a contract),²⁶⁴ but this would also be incorrect. Although an acceptance does create an agreement, an agreement, without more, does not change legal relations (for example, the agreement might lack consideration, one of the parties might lack legal capacity, etc.), and thus would not always give the offeree a *power*. It is also incorrect to say that the offeree has a *privilege* to form an agreement because privileges refer to the legal ability to engage in a physical act, and an agreement is a legal conception, not a physical act. An agreement is defined as “a manifestation of mutual assent on the part of two or more persons,”²⁶⁵ and the use of the term *manifestation* requires a conclusion derived from facts. What an offer does is provide the offeree with the *physical power* to make a manifestation that has *reference to something that would not exist had the offeror not made an offer*.

Thus, although an offer will often give the offeree the *power* to form a contract, it will not always do so. Accordingly, to state that an offeror has the *power* to make an offer is incorrect because this assumes all offers create a *power* or a *privilege* in the offeree. It would, however, be correct to state that an offeror, who has legal capacity, has the *power* to give an offeree, who has legal capacity, the *power* to form a contract.

Lastly with respect to offers, *X* ordinarily has an *immunity* from the power of *Y* to compel *X* to make an offer that would give *Y* the power to form a contract. Ordinarily *Y* cannot compel *X* to give anyone, including *Y*, the power to form a contract.

In conclusion, with respect to the making of an offer, *X* does not have a *right* against *Y* to make an offer to *Y* because *Y* may interfere with *X*'s effort to communicate or deliver the offer to *Y*, but *X* has a *right* against third parties to not have them intentionally and improperly interfere with him making an offer to *Y*. *X* has a *privilege* against *Y* to engage in the acts necessary to make an offer to *Y*, but as already noted, the fact that it is a mere privilege and not a *right* means that *Y* can interfere with *X*'s attempt to communicate or deliver the offer to *Y*. Although *X* has the *privilege* to engage in the acts necessary to make an offer to *Y*, it is incorrect to state that *X* has the *power* to make an offer since an offer does not necessarily change the legal relations between *X* and *Y*. *X* does, however, if *X* has legal capacity, have the *power* to give *Y* the power to form a contract. *X* also has an *immunity* from *Y* compelling *X* to make an offer to *Y* that would give *Y* the power to form a contract.

264. The author of this Article has, in fact, previously made this very suggestion. See O'Gorman, *supra* note 236, at 1086 n.211 (“If an offer does not necessarily provide the offeree with a power to form a contract, the most that can be said is that the offeree has a privilege to complete the manifestation of mutual assent.”).

265. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

b. Acceptance

Acceptance of an offer requires (1) a manifestation of assent (2) by an offeree (3) to the terms of the offer (4) made in a manner invited or required by the offeror (5) while the law still permits an acceptance to be made.²⁶⁶ At the outset, it is important to recall that an acceptance is a legal conception because its elements consist of legal conclusions, not simply facts (e.g., did the recipient have reason to know her words would be construed by the offeror as indicating assent? Did the offeror have reason to know that the recipient would believe she was an offeree? Did the recipient's response mirror the offer? Did the offeror manifest an intention that acceptance be manifested in a particular way?). Accordingly, it is improper to ask whether a recipient of an offer²⁶⁷ has a right or privilege to "accept" an offer because *right* and *privilege* refer to physical acts. It is better to ask whether the recipient of an offer has the right or privilege *to engage in the acts necessary to accept the offer*.

Also, it is important to recognize that the effect of an acceptance depends on the circumstances, including the offer's terms and the legal capacities of the parties. Although an acceptance forms an agreement irrespective of the offer's terms and the legal capacity of the parties,²⁶⁸ an agreement does not itself change the legal relations between the parties. If the offer proposed an exchange, the acceptance forms a particular type of agreement—a bargain²⁶⁹—but a bargain, like an agreement, does not itself change the legal relations between the parties.²⁷⁰

If, however, the offer proposed an exchange, the exchange included consideration, the bargain has a lawful purpose, and both the offeror and the offeree have the capacity to enter into a contract, the acceptance forms a contract, which does change legal relations, and thus the offeree would hold a *power* upon receipt of the offer. It is a *power* even though the offeror usually retains the *power* to revoke the offer since the offeror, to exercise his power of revocation, must communicate the revocation to the offeree before acceptance, and thus the offeree has the ability to form a contract even if the offeror desires to revoke.²⁷¹ The offeree's *power* to form a contract will, however, be lost (i.e., terminated) upon the occurrence of any of the following six events: (1) the offeror's or offeree's death

266. *Id.* §§ 35, 50.

267. The term *recipient* is used instead of *offeree* because whether the recipient is an offeree is one of the requirements of an acceptance. See *id.* § 50 (defining *acceptance* as a manifestation of assent by an *offeree*).

268. See *id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

269. See *id.* ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.").

270. See *id.* § 35 cmt. c ("Exercise of the power of acceptance concludes an agreement and a bargain, and thus satisfies one of the requirements for formation of an informal contract enforceable as a bargain. But a contract is not created unless the other requirements are met. Thus there may be no consideration; or impossibility or illegality may prevent any duty of performance from arising.") (citations omitted).

271. *Offer and Acceptance*, *supra* note 226, at 187.

or legal incapacity; (2) receipt by the offeree of the offeror's revocation; (3) lapse of time; (4) the offeror's receipt of the offeree's rejection (unless the offeror manifested a contrary intention); (5) the offeror's receipt of the offeree's counteroffer (unless the offeror or offeree manifested a contrary intention); or (6) the non-occurrence of any condition of acceptance under the offer's terms.²⁷²

Because Hohfeldian analysis focuses on events that change legal relations, the following discussion will primarily focus on the situation in which an acceptance will form a contract (not simply an agreement or a bargain), and the offeree therefore has a *power* to form a contract.

With respect to an acceptance, does *Y* owe a *duty* to *X* to perform the acts necessary to accept *X*'s offer? The answer, of course, is 'no.' Under the concept of freedom *from* contract she is under no duty to accept an offer.²⁷³

Does *Y* have a Hohfeldian *right* against *X* to perform the acts necessary to accept the offer? The answer is ordinarily 'no' because under the law *X* usually has no *duty* to permit *Y* to engage in such acts. Under the rule of *Dickinson v. Dodds*,²⁷⁴ *X*, after making an offer to *Y*, usually has the *privilege* to engage in the acts necessary to withdraw the offer prior to an acceptance by *Y*, and also has the *power* to eliminate *Y*'s power to form a contract. *Y* therefore has a corresponding *no-right* with respect to *X*'s *privilege* to engage in the acts necessary to terminate *Y*'s power to form a contract, and also has a corresponding *liability* with respect to *X*'s *power*. In fact, *X* has a *privilege* to withdraw the offer even when *X* has promised *Y* that he will not withdraw it, except under certain circumstances.²⁷⁵

It is not *X*'s *right* against *Y* to withdraw his offer in that *Y* does not have a *duty* to permit *X* to withdraw it. For example, suppose that *X* has made an offer to *Y*, and *Y* sees *X* walking toward her. *Y*, suspecting that *X* might withdraw his offer, may manifest assent to *X*'s offer and conclude an agreement. Admittedly, *Y*'s power to form a contract in such a situation is limited by the doctrine of indirect revocation, under which the offeree's power to form a contract is terminated "when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to the effect."²⁷⁶ But there is no rule that an offeree, who has not acquired reliable information to that effect, must confirm with the offeror his continuing intention to enter into a

272. RESTATEMENT (SECOND) OF CONTRACTS §§ 36, 38, 39 (1981).

273. See *Rights*, *supra* note 86, at 521 ("[An offeree] is under no duty to accept offers made to him."); Arthur L. Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571, 572 (1925) [hereinafter *Options*] ("[W]here A has made an offer to B, the latter has a choice to make between accepting and not accepting.").

274. 2 Ch. Div. 463 (Ct. App. Chancery Div. 1876).

275. See RESTATEMENT (SECOND) OF CONTRACTS § 42 cmt. a (1981) ("Most offers are revocable . . . [T]he ordinary offer is revocable even though it expressly states the contrary, because of the doctrine that an informal agreement is binding as a bargain only if supported by consideration.").

276. *Id.* § 43.

bargain before accepting the offer, even if the offeree suspects the offeror is having second thoughts.

Of course, the law could have provided that *X* does not, unless the offer indicates otherwise, have the power to revoke his offer (at least for a reasonable amount of time) and is under a *disability* to *Y*, with *Y* retaining a *power* to form a contract (for a reasonable amount of time).²⁷⁷ In fact, providing *X* with the *power* to terminate *Y*'s *power* to form a contract has caused enough concern that exceptions have arisen to the general rule, primarily designed to protect and encourage reliance on offers.

Even under traditional rules, *X* does not have the power to terminate *Y*'s power to form a contract when *X* promises, in exchange for consideration, to not withdraw the offer.²⁷⁸ But new exceptions have arisen and provide that *X* does not have such a power when (1) *X* makes the promise with the requisite formality;²⁷⁹ (2) *X* makes a promise to keep the offer open and it is reasonably foreseeable that *Y* will rely on the promise, and there is reliance and injustice would result from permitting revocation;²⁸⁰ (3) *Y* starts performing in response to *X*'s offer of a unilateral contract;²⁸¹ or (4) *X* makes an offer (without a promise to keep it open) and it is reasonably foreseeable that *Y* will substantially rely on it before accepting, and does substantially rely, and injustice would result from permitting revocation.²⁸² Thus, it is more accurate to state that *X* *ordinarily* has the power to terminate *Y*'s power to form a contract.

When *X* does not have the power to terminate *Y*'s power of acceptance, the law states that an "option contract" exists.²⁸³ An option contract is defined as "a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke the offer."²⁸⁴ The promise can be express, implied-in-fact, or implied-in-law.²⁸⁵ For example,

277. See *id.* § 25 cmt. b ("To provide the offeree with a dependable basis for decision whether or not to accept, the rule in many legal systems is that an offer is irrevocable unless it provides otherwise.").

278. *Id.* § 25 cmt. c; *Jorstad v. Yates*, 447 N.W.2d 283, 285 (N.D. 1989).

279. U.C.C. § 2-205 (2013).

280. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); *Ragosta v. Wilder*, 592 A.2d 367, 370-71 (Vt. 1991).

281. *Id.* § 45; *Eaton v. Eaton*, No. 286-S, 2005 WL 3529110, at *6 (Del. Ct. Ch. Dec. 19. 2005); see also K. N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance*, II. 48 YALE L.J. 779, 787 n.9 (1939) ("There is a fine flagpole outside my classroom window, with a golden crown on top, and something very lovely went out of my life two years ago when the cases finally compelled me to stop revoking [my offer for the student to climb the flagpole] with the student almost up to the crown.").

282. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981); *Drennan v. Star Paving Co.*, 333 P.2d 757, 759-60 (Cal. 1958).

283. RESTATEMENT (SECOND) OF CONTRACTS § 25 (1981).

284. *Id.* The phrase, with its use of "contract," is an unfortunate one because it suggests that a promise to keep an offer open is only enforceable if given for consideration. But the *Restatement (Second) of Contracts* defines *contract* as any promise that is enforceable, even one that is enforceable without consideration. *Id.* § 1. Thus, under the *Restatement*, a promise that is enforceable under the doctrine of promissory estoppel is a *contract*. Unlike Hohfeld's proposed terminology, which by narrowing the definition of terms avoids confusion and logical errors, the *Restatement's* decision to adopt a single word—*contract*—for all legally-enforceable promises surely has the opposite effect.

285. That the promise may be express or implied-in-fact is based on the fact "[a] promise . . . may be inferred wholly or partly from conduct." *Id.* § 4.

as previously discussed, the law implies, as a matter of law, a promise to not revoke an offer of a unilateral contract after the offeree begins performing in response to the offer²⁸⁶ or when substantial reliance on an offer is reasonably foreseeable.²⁸⁷

Because an option contract “limits the promisor’s *power* to revoke an offer,”²⁸⁸ the offeree’s attempted revocation²⁸⁹ does not affect the offeree’s *power* to form a contract.²⁹⁰ Thus, if *X* promises *Y* \$100 if *Y* walks across the Brooklyn Bridge,²⁹¹ once *Y* starts walking across the bridge, *X* is under a *disability*. If *Y* completes the walk, *Y* has exercised her *power* to form a contract and a contract is formed.²⁹² *Y* has a *privilege* to engage in the acts necessary to form a contract, but does not have a *duty* to engage in those acts.²⁹³ Thus, *X* does not have a *right* to have *Y* walk across the bridge.

A related and difficult issue is whether the offeror in an option contract retains the *privilege* to engage in the physical act of attempting to revoke the offer or whether the offeror has a *duty* to not do so. For example, even though, as discussed, the offeror does not have the *power* to extinguish the offeree’s *power* to form a contract once an option contract arises,²⁹⁴ does an option contract also impose on the offeror a *duty* to not tell the offeree that he is revoking the offer? If we use Hohfeld’s synonym

286. *Id.* § 45(1); see also ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 59 (2d ed. 2009) (recognizing that such an option contract is a legal fiction created for a policy reason—to protect the offeree’s reliance—but that it could be argued there is an implied-in-fact promise to keep the offer open after the start of performance). Although Section 45’s comment refers to a promise, see RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1981) (“The rule of this Section is designed to protect the offeree in justifiable reliance on the offeror’s *promise* . . .”) (emphasis added), the promise is presumably the promise to perform if there is an acceptance, not an express or implied-in-fact promise to keep the offer open.

287. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981); see also *id.* § 87 cmt. e (noting that in such a situation “justice may require a remedy”).

288. *Id.* § 25 (emphasis added).

289. To avoid confusion, it seems best to limit the term *revocation* to a situation in which the offeree’s power is in fact terminated, as opposed to using the term to simply describe an offeror manifesting an intention to revoke the offer, irrespective of whether it has the effect of terminating the offeree’s power.

290. See *id.* cmt. d (“The principal legal consequence of an option contract is that . . . it limits the promisor’s power to revoke an offer A revocation by the offeror is not of itself effective . . .”).

291. This is the classic unilateral contract hypothetical, suggested by I. Maurice Wormser. See I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 *YALE L.J.* 136, 136 (1916) (“Suppose A says to B, ‘I will give you \$100 if you walk across the Brooklyn Bridge,’ and B walks—is there a contract?”).

292. See RESTATEMENT (SECOND) OF CONTRACTS § 45(2) (1981) (“The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.”).

293. See *id.* § 45 cmt. e (“Where part performance or tender by the offeree creates an option contract, the offeree is not bound to complete performance.”); *Offer and Acceptance*, *supra* note 226, at 192 (“It must be observed that after such a part performance there is as yet no contract, for by hypothesis acceptance was to consist of complete performance.”); JEFF FERRIELL, *UNDERSTANDING CONTRACTS* 7 (2009) (noting that a unilateral contract “is concluded when the requested performance is complete”); *id.* at 208 (“[T]he promisee either accepts by fully performing, or fails to accept by failing to completely perform. Part performance is not an acceptance.”).

294. See RESTATEMENT (SECOND) OF CONTRACTS § 25 cmt. d (1981) (“The principal legal consequence of an option contract is that . . . it limits the promisor’s power to revoke an offer A revocation by the offeror is not of itself effective . . .”).

for *right*, this will be based on whether doing so creates a *claim* by the offeree against the offeror for doing so. A *claim* is defined as “[t]he aggregate of operative facts giving rise to a right enforceable by a court.”²⁹⁵

Let us return to the Brooklyn Bridge hypothetical. Suppose *X*, after *Y* starts walking across the bridge, comes upon *Y* and says to her, “I revoke my offer.” Does *X*’s mere physical act of stating these words to *Y* provide *Y* with a *claim* against *X*? The *Restatement* comments provide that completing performance of a unilateral contract, although a condition to the offeror’s duty to perform, “may be excused, for example, if the offeror prevents performance, waives it, or repudiates.”²⁹⁶ It is clear that *X*, by engaging in the physical act of telling *Y* that he revokes his offer, has not prevented *Y*’s performance since *X* has not prevented *Y* from finishing her walk across the bridge. *X* has also not waived complete performance by *Y* as a condition to his duty to pay her \$100 because under the *Restatement*, a waiver is a promise to perform despite the non-occurrence of the condition.²⁹⁷ *X* is doing the opposite of promising to perform.

If anything, *X* has repudiated. A repudiation is “a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . . or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.”²⁹⁸ Even though a contract is not yet formed (because *Y* has not accepted by completing her walk across the bridge),²⁹⁹ *X* is indicating he will commit a total breach if *Y* accepts. And even though *X*’s duty to perform is conditional on *Y* accepting *X*’s offer, a repudiation can occur when the offeror’s duty to perform is conditional on the offeree performing first,³⁰⁰ the only difference is that here the offeree’s performance occurs at the same time a contract is formed. Thus, there is no reason to reject the use of the term *repudiation* when referring to an offeror’s attempt to revoke an offer under an option contract. And because a repudiation excuses the non-occurrence of the constructive condition of the offeree’s substantial performance,³⁰¹ the offeror’s promise to

295. BLACK’S LAW DICTIONARY 281 (9th ed. 2009).

296. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. e (1981).

297. *Id.* § 84(1); see also *id.* § 84 cmt. a (“[T]he rule of Subsection (1) can be thought of in terms of waiver of a defense not addressed to the merits . . .”) (emphasis added).

298. *Id.* § 250.

299. See *Offer and Acceptance*, *supra* note 226, at 192 (“It must be observed that after such a part performance there is as yet no contract, for by hypothesis acceptance was to consist of complete performance.”); FERRIELL, *supra* note 293, at 7 (noting that a unilateral contract “is concluded when the requested performance is complete”); *id.* at 208 (“[T]he promisee either accepts by fully performing, or fails to accept by failing to completely perform. Part performance is not an acceptance.”).

300. See RESTATEMENT (SECOND) OF CONTRACTS § 253 cmt. c (1981) (noting that repudiation can occur “when performances are to be exchanged under an exchange of promises and one party repudiates a duty with respect to the expected exchange before the other party has fully performed that exchange”).

301. See *id.* § 253(2) (“Where performances are to be exchanged under an exchange of promises, one party’s repudiation of a duty to render performance discharges the other party’s remaining duties to render performance.”); § 225 cmt. b (“The non-occurrence of a condition may be excused on a variety of grounds It may be excused by a repudiation of the conditional duty . . .”).

perform upon the offeree completing performance matures (i.e., becomes an unconditional duty) and a failure to perform is thus a breach of a duty, even if the offeree fails to complete performance.

Such a rule is justified on efficiency grounds. In general, a party is expected to avoid losses that could be avoided through reasonable efforts and without undue risk, burden, or humiliation.³⁰² To show how the rule is justified for the sake of efficiency, consider the well-known case of *Rockingham County v. Luten Bridge Co.*,³⁰³ with a slight variation on the facts. Assume that the county's offer was for a unilateral contract—a promise to pay a specified amount of money if the company completed the bridge, and assume that a reasonable person would construe the offeror as not wanting a return promise as the method of acceptance.³⁰⁴ Until the bridge is completed, there is no acceptance.³⁰⁵ After the company starts building the bridge, the county tells the company that it no longer wants the bridge because it will not be building a road to it.³⁰⁶

The county, of course, does not have the *power* to terminate the company's *power* to form a contract because once the company started building the bridge, an option contract arose.³⁰⁷ But as in the real case—in which a

302. *Id.* § 350.

303. 35 F.2d 301 (4th Cir. 1929).

304. The latter clause is necessary because phrasing an offer as "If x, then y," is itself insufficient to render an offer as one for a unilateral contract. Although the first step in determining whether an offer is for a unilateral contract is to look carefully at the offer's language, and although an offer for a unilateral contract typically uses words such as "if" or "provided," "[t]he offeror is often indifferent to whether acceptance takes the form of words of promise or acts of performance, and his words literally referring to one are often intended and understood to refer to either." RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. a (1981) (emphasis added). The *Restatement* illustrations demonstrate this. In each of the following illustrations, the American Law Institute believed a reasonable person would construe the offer as doubtful as to whether the offeror was seeking a promise or performance as the manner of acceptance, even though the language suggests an offer for a unilateral contract: "A writes to B, 'If you will mow my lawn next week, I will pay you \$10.' B can accept A's offer either by promptly promising to mow the lawn or by mowing it as requested." "A says to B: 'If you finish that table you are making and deliver it to my house today, I will give you \$100 for it.' B replies, 'I'll do it.' There is a contract. B could also accept by delivering the table as requested." *Id.* at illus. 1 & 2. Although the language used by the offeror suggests acceptance only by performance, the context suggests offeror indifference to the manner of acceptance (or a case of doubt), which permits acceptance by either performance or return promise. *Id.* § 32.

305. See *Offer and Acceptance*, *supra* note 226, at 192 ("It must be observed that after such a part performance there is as yet no contract, for by hypothesis acceptance was to consist of complete performance."); see Ferriell, *supra* note 293, at 7 (noting that a unilateral contract "is concluded when the requested performance is complete"); *id.* at 208 ("[T]he promisee either accepts by fully performing, or fails to accept by failing to completely perform. Part performance is not an acceptance.").

306. *Rockingham Cnty.*, 35 F.2d at 303.

307. RESTATEMENT (SECOND) OF CONTRACTS § 45(1) (1981); see also *id.* § 25 cmt. d ("The principal legal consequence of an option contract is that . . . it limits the promisor's power to revoke an offer. . . . A revocation by the offeror is not of itself effective, and the offer is properly referred to as an irrevocable offer."). Corbin, however, maintained that in such a situation the *power* of acceptance should be terminated, because otherwise it might encourage the offeree to finish performance, an inefficient act. *Offer and Acceptance*, *supra* note 226, at 189–90. Later in the same article, though, Corbin stated that "[i]f the offer has become irrevocable, however [through part performance], the offeree still has the power to create a contract by completing the requested acts, in spite of a notice to the contrary from the offeror." *Id.* at 192. Later, he again repeated his proposed limitation on this general rule: "To this rule there should probably be added some such rule as the following: If the continuation of performance will increase the amount of the offeree's claim, the revocation shall be effective; in such case

bilateral contract was formed before the company started building³⁰⁸—it would be best if the company does not finish the bridge because the county does not want it. The company's time and effort are better spent elsewhere. There is no value to finishing a "bridge to nowhere" (except for it to be periodically visited by curious law students and law professors).

Thus, the offeror's statement that it is revoking its offer changes the offeror's conditional duty to perform to an unconditional duty to perform. But is that enough to conclude that the offeror has a *duty* to not make an ineffective statement of revocation to the offeree? Is the court-imposed excuse for the non-occurrence of a condition (full performance and acceptance) the type of sanction that would make it a *duty*?

Corbin described a Hohfeldian *duty* as one where the party who breaches the duty "will be penalized by society for disobedience,"³⁰⁹ and will be penalized by "certain physical consequences in the form of action by the agents of the state"³¹⁰ This is consistent with Hohfeld's assertion that the closest synonym to *right* (the opposite of *duty*) was "claim."³¹¹ When the law excuses the offeree's failure to complete performance and imposes a duty on the offeror to perform despite the condition's non-occurrence, there are no physical consequences imposed by the state. As long as the offeror performs his duty (which has now matured), there will be no government sanction. Rather, the offeror's privilege has simply been removed as a matter of law.

But Corbin also maintained that the government sanction necessary to create a *duty* need not consist of affirmative action by the government:

It is not necessary to the existence of a jural duty that the sanction or penalty should consist of affirmative action by an officer. Suppose the only rule of law against homicide is this: Thou shall not kill; if B shall kill A, B shall be *outlaw*, and anyone (X) is privileged to kill him and to seize his goods. Surely this would be sufficient to create a 'duty' not to kill. The denial of the usual forms of protection, the extinguishment of 'personal' or 'property' rights possessed by B before his wrongful act, is itself a sanction and a penalty.³¹²

Corbin then provided a series of examples where he believed a *duty* existed when "the societal penalty or sanction consist[ed] in the creation of new and detrimental jural relations by rule of law alone without any affirmative

if the offeree can show with reasonable certainty that he would have performed in full, he shall be entitled to the same damage as if the contract had been a bilateral contract in the beginning." *Id.* at 196. It does not appear, however, that Corbin's proposal has been adopted.

308. *Rockingham Cnty.*, 35 F.2d at 302, 304.

309. *Legal Analysis*, *supra* note 67, at 167.

310. Arthur L. Corbin, *Jural Relations and their Classification*, 30 YALE L.J. 226, 230 (1921).

311. *Id.*

312. *Rights*, *supra* note 86, at 519.

judicial or executive action.”³¹³ Corbin, however, argued that although “[t]he societal sanction or penalty need not consist of affirmative action by ‘officers of the law’ . . . it must be such as to affect their action . . . somehow disadvantageously to the wrongdoer.”³¹⁴ According to Corbin, an example of a situation that did not involve a *duty* was “[a] creditor los[ing] a valuable right when he releases his debtor, [because] this loss is not a societal penalty for a wrongful act.”³¹⁵

The question then—if one accepts Corbin’s definition of *duty*—is whether the offeror stating that he is revoking his offer is itself a wrongful act (even though the statement is ineffective as a revocation) with the law excusing the non-occurrence of the condition being a societal penalty for such wrongful behavior.³¹⁶ Corbin was himself equivocal on whether to consider the offeror under an option contract as having a *duty* to not tell the offeree that the offer was revoked:

In some instances the purpose of a promise may be the creation of some other legal relationship than *duty* between the promisor and the promisee. Thus, A may make an offer to B and may promise for consideration or under seal not to withdraw the offer. This *might be* (and often has been) regarded as creating a duty in A not to change his mind or not to notify B of such a change, *but it should far better be regarded as creating a power* in B to be exercised by acceptance and a disability in A to extinguish that power.³¹⁷

This suggests that Corbin believed the offeror has the *privilege* to tell the offeree he was revoking the offer, just not the *power* to terminate the offeree’s power to form a contract.

In the same article, however, Corbin then wrote, “It does not mean that the option giver has merely a duty not to revoke, for breach of which he must pay damages, *although such a duty may exist*; it means that he has no power (that is, has a disability) to destroy the option holder’s power.”³¹⁸ Corbin similarly wrote in another article that “[i]n such case the offeror is never privileged to revoke”³¹⁹ and “[i]n spite of an attempted revocation, the offeree still has the power of acceptance; while the offeror lacks not only the privilege of revoking, but also the power to revoke.”³²⁰ He also wrote that the offeror is “deprived of both privilege and power.”³²¹

Ultimately, this is an issue solely of semantics. Hohfeldian terminology is not necessary here to avoid errors in reasoning because the law has

313. *Id.* at 520-21.

314. *Id.* at 522.

315. *Id.*

316. *See id.*

317. *Conditions, supra* note 226, at 745 n.13 (emphasis added).

318. *Id.* at 764 (emphasis added).

319. *Offer and Acceptance, supra* note 226, at 188.

320. *Id.* at 189.

321. *Id.* at 197.

specified the consequence of the repudiation—the conditional duty to perform becomes unconditional.³²² But referring to the offeror as having a *duty* to not say to the offeree he is revoking the offer (even though it is ineffective as a revocation) seems appropriate. Such a statement by the offeror, when the offeror does not have the power to revoke, is properly considered wrongful, and the law declaring that the offeror's conditional duty becomes an unconditional duty has the characteristics of a negative sanction.

More importantly, however, what neither the *Restatement* nor Hohfeldian analysis answers is whether the *duty* to perform that matures despite the offeree's failure to fully perform is a duty enforceable under a bargain theory or some alternative legal theory. The issue is important because merely identifying a breach of a duty does not disclose the type of remedy available for the breach. Presumably, if full performance is necessary to accept the offer, the duty is not enforceable under a bargain theory, and thus expectation damages (i.e., full enforcement) would not be an entitlement.³²³ An offeree is, of course, discouraged from continuing to perform because a court might hold that any costs incurred after repudiation were losses that were not caused by the repudiation.³²⁴ But by failing to complete performance (and accept the offer), the offeree does not know what the remedy will be for the offeror's breach of duty. With an option contract that can be accepted through a return promise, this issue would presumably not arise, because the offeree need only provide a return promise to form a contract and would thus be entitled to full enforcement of the promise.

c. Consideration, Legal Capacity, Reasonably Certain Terms, and Lawful Purpose

If there is an offer and an acceptance, an agreement forms.³²⁵ This, in itself, is insufficient to change any legal relations between the parties. To determine if there is a change in legal relations, one must continue the analysis and determine whether the remaining elements of a contract exist.

322. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. e (1981).

323. Compare RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (providing that ordinarily a party has a right to damages, measured by his expectation interest) with RESTATEMENT (SECOND) OF CONTRACTS § 87 cmt. e (1981) (stating that when a contract is formed despite an attempted revocation of the offer because an option contract arose through reliance on the offer, "[f]ull-scale enforcement of the offered contract is not necessarily appropriate . . ."); *id.* § 90(1) (providing that when a promise is enforceable under the doctrine of promissory estoppel, "[t]he remedy granted for breach may be limited as justice requires").

324. A situation in which it might be reasonable for the offeree to complete performance is when it would otherwise be difficult for the offeree to prove that she would have completed performance had there not been a repudiation by the offeror. See *id.* § 244 ("A party's duty to pay damages for total breach . . . is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise."); RESTATEMENT OF CONTRACTS § 45 illus. 1 (1932) (offeree must "prove that he would have complied with the terms of the offer" to have a right to damages). This would seem likely with many reward or "prove me wrong" offers.

325. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

The agreement must have consideration,³²⁶ which means it must be of a particular type—a bargain³²⁷—and must not be supported on one side simply by a promise to perform an existing *duty*.³²⁸

The next question is whether each of the parties had legal capacity to enter into a contract. For example, a person has no capacity to contract “if his property is under guardianship by reason of an adjudication of mental illness or defect.”³²⁹ As previously discussed, the term *capacity* denotes an operative fact and not a legal conception. If a person does not have legal capacity, the person has no *power* to enter into a contract. The bargain must also have reasonably certain terms³³⁰ and a lawful purpose.³³¹

A party cannot waive any of these requirements to the formation of a contract.³³² For example, an agreement that lacks consideration does not become a contract when the parties agree to waive the consideration requirement.³³³

B. Breach

Having applied Hohfeldian analysis to contract formation, this Article now turns to the second topic—breach. Although the phrase “bundle of rights, powers, privileges, and immunities” is commonly used to refer to the legal interests associated with the ownership of things,³³⁴ it is fully applicable to the legal interests associated with a contract. Similar to a person’s obtaining ownership of a thing, once a contract arises, a bundle of rights, powers, privileges, and immunities, along with their correlatives (duties, liabilities, no-rights, and disabilities), arises between the parties to the contract (and, to a lesser extent, third parties) that are different from the legal interests between the parties prior to contract formation. In a sense, the moment of contract formation might be called a “Hohfeldian moment,” a point in time in which the legal relations between the parties change, often in dramatic ways.

Most importantly, any promise that was part of the bargain becomes a *duty* to perform as promised (though it might be a *conditional duty*) with a corresponding *right* in the other party to the performance. Before contract formation, the offeror had the *privilege* to not perform any promises in the

326. See *id.* § 17(1) (“[T]he formation of a contract requires . . . consideration.”).

327. See *id.* (“A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances [T]he formation of a contract requires a bargain”); HILLMAN, *supra* note 286, at 39 (“A bargained-for exchange is one kind of agreement (People can make agreements that do not constitute a bargained-for exchange. For example, you and Alice can agree that you will give her your piano as a gift.).”).

328. See RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration”).

329. *Id.* § 13.

330. *Id.* § 33.

331. *Id.* § 178.

332. *Omni Group, Inc. v. Seattle-First Nat’l Bank*, 645 P.2d 727, 729 (Wash. Ct. App. 1982).

333. See *id.* (“[A] party cannot create an enforceable contract by waiving the condition which renders his promise illusory.”).

334. See generally J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996).

offer and the offeree had a corresponding *no-right* with respect to compelling the offeror to perform. But upon contract formation, the offeree's *privilege* to not perform transformed into its jural opposite—a *duty* to perform.

The non-performance of a contract *duty*, at the time performance is due, is a breach,³³⁵ and its status as a breach is not affected by the consequences (or lack therefore) of the failure of performance.³³⁶ Even if the breach of the contract *duty* causes no loss to the holder of the corresponding *right*, the government will penalize the breaching party by entering a judgment of nominal damages against that party,³³⁷ publicly branding the breaching party as a wrongdoer.³³⁸

Considering such *rights* and *duties* to arise at the time of contract formation—and not before—is in some sense arbitrary.³³⁹ Because such *rights* and *duties* can include *conditional rights* and corresponding *conditional duties*, one could sensibly take the position that there are similar conditional rights and conditional duties even prior to that Hohfeldian moment of contract formation. For example, if *X* makes an offer to *Y*, *X*'s promise in the offer is in a sense already a conditional duty, a duty conditional upon *Y*'s accepting *X*'s offer. But to render Hohfeldian terminology useful, a line must be drawn somewhere, and it is customary to draw that line at contract formation; pre-contract formation promises are therefore not considered conditional *duties*.³⁴⁰

The parties have the *power* and *privilege*, by forming a contract, to alter their legal relations in ways additional to the creation of "right-duty" relationships. The parties might, for example, create a "privilege-no-right" relationship by granting one of the parties a *privilege* where prior to contract formation there was a *duty*. An example would be a contract providing a party with the *privilege* to enter the other party's land, where before there was a *duty* to not trespass. The original *duty* is replaced with a *privilege* to perform the act. Or, the parties might create a "power-liability" relationship by granting one of the parties a *power* where before there was a *disability*. For example, the contract might grant one of the parties a

335. RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981).

336. *Rights*, *supra* note 86, at 524.

337. RESTATEMENT (SECOND) OF CONTRACTS § 346(2) (1981).

338. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 1 (1986) ("Lawsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him.").

339. *Rights*, *supra* note 86, at 513.

340. *Id.* at 513; *see also Conditions*, *supra* note 226, at 743 ("An offer is a cause (or condition) of the power in the offeree. An acceptance is a cause (or condition) of contractual rights and duties. Nevertheless in contract law it is not common to speak of these facts as conditions, although such usage is not unknown. The term condition is more properly restricted to facts subsequent to acceptance and prior to discharge."). Thus, because the requirements to the formation of a contract are not considered conditions, their non-occurrence as a requirement for contract formation cannot be waived. *Id.* at 755.

binding option to buy an item owned by the other party.³⁴¹ The parties might create an “immunity-disability” relationship by granting one of the parties an *immunity* where before there was a *disability* and corresponding *power*. For example, a principal and an agent might enter into a contract terminating the agency relationship and the agent’s *power* to change the principal’s legal relations with third parties.

With the formation of a contract, the parties, except as prohibited by public policy,³⁴² have the *power* and *privilege* to change their legal relations in any way they desire. Of course, it is beneficial for them to communicate their shared intention as clearly as possible so that the court is aware of their intentions and can give those intentions their intended effect. In fact, one of contract law’s primary functions is resolving misunderstandings between the parties regarding how their legal relations changed as a result of the contract they formed. But only a breach of a *duty* gives rise to a claim for breach of contract.

As previously discussed, the terms of an instrument are simply facts used to determine how the parties’ legal relations have changed as a result of the formation of a contract. The process of determining the parties’ new legal relations—the process of contract construction—is not directly implicated by Hohfeld’s theory of fundamental legal conceptions. This process is a separate endeavor, dictated primarily by the objective theory of contract,³⁴³ maxims of construction,³⁴⁴ and, when the parties reduce at least part of the terms of their bargain to an instrument, the parol evidence rule.³⁴⁵

Importantly, once a contract arises, the parties have a *duty* to perform any implied-in-fact duties as well as any implied-in-law duties.³⁴⁶ When the parties have entered into a bargain that omits essential terms, the court will supply a term as directed by a statute (such as the U.C.C.) or, in the absence of a statutory directive, a term that is reasonable in the circumstances.³⁴⁷ The process of construing an instrument, and thereby determining the resulting legal relations, is not a process of simply identifying operative facts because, similar to the issue of contract formation, the court must apply the objective theory of contract.³⁴⁸ Applying the objective theory of contract requires the court to reach legal conclusions derived

341. See RESTATEMENT (SECOND) OF CONTRACTS § 25 cmt. a, illus. 1 (1981) (“A promises B under seal or in return for \$100 paid or promised by B that A will sell B 100 shares of stock in a specified corporation for \$5,000 at any time within thirty days that B selects. This is an option contract under which B has an option.”).

342. See *id.* § 178 (rendering unenforceable terms against public policy).

343. See *id.* § 201 (setting forth how to determine whose meaning prevails).

344. See *id.* §§ 202, 203 (setting forth various rules to aid in interpretation).

345. See *id.* § 213 (setting forth the parol evidence rule).

346. See *id.* § 235(2) (“When performance of a duty under a contract is due any non-performance is a breach.”); *id.* at cmt. b (“Non-performance of a duty when performance is due is a breach whether the duty is imposed by a promise stated in the agreement or by a term supplied by the court, as in the case of the duty of good faith and fair dealing.”) (parentheses omitted).

347. *Id.* § 204.

348. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000).

from facts (i.e., how would a reasonable person construe the parties' manifestations?).

Hohfeldian analysis shows that one doctrine of contract construction—the so-called duty-to-read rule—is not really a *duty* at all (at least not in the Hohfeldian sense). Under the rule, a party who signs an instrument is considered to have manifested assent to its terms even if the party did not read it.³⁴⁹ This does not mean, however, that the other party has a *right* to have the party read the instrument. There is no government-imposed penalty for not reading it. Although the law considers the party to have manifested assent to all of the unread terms,³⁵⁰ the same result would attach if the party *had* read the instrument before manifesting assent to it. A better description of the rule would therefore be the “failure-to-read rule” because this phrase avoids the suggestion that there is, in fact, a Hohfeldian *duty* to read an instrument before manifesting assent to its terms.

The Reporter's Note to the *Restatement (Second) of Contracts* states that “[i]n Hohfeldian terms, the ‘duty’ to read is really the absence of a right to be excused because one failed to read the terms of the offer.”³⁵¹ This would suggest the offeree has a *no-right* and the offeror a corresponding *privilege* with respect to holding the offeree to the unread terms. But, if anything, the ability to enforce unread terms would be a *power* with a corresponding *liability*. Even this, however, would not really be accurate because the legal relations change upon the offeree's manifesting assent to the unread terms. It has also been asserted that although phrased as a *duty*, the duty to read is really a limitation “on what might otherwise be rights.”³⁵² This does not seem entirely correct either because what “right-duty” relationship would have arisen had the party read the instrument is unclear.

Rather, the duty-to-read rule simply has the effect of altering the legal relations according to the terms set forth in the instrument. The rule treats a manifestation of assent to an instrument as an operative fact with respect to altering the relations as indicated in the instrument, whether the party read the instrument or not.

The harm caused by the phrase “duty-to-read rule” is not merely semantic. Take, for example, the doctrine of unconscionability, under which a court has the discretion to refuse to enforce a contract term if the term is

349. *Ursini v. Goldman*, 173 A. 789, 792 (Conn. 1934).

350. *Id.*

351. RESTATEMENT (SECOND) OF CONTRACTS § 23 cmt. e, Reporter's Note (1981).

352. Charles L. Knapp, *Is there a “Duty to Read”?*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 315, 317 (Jean Braucher et al., eds., 2013).

unconscionable.³⁵³ A majority of courts hold that to establish unconscionability, a party must prove both procedural and substantive unconscionability.³⁵⁴ Procedural unconscionability consists of a lack of meaningful choice (usually because of unequal bargaining power) or defects in the bargaining process that lead to unfair surprise.³⁵⁵ Courts, when determining whether there was procedural unconscionability in the formation of a contract, often rely on the rule that a party has a “duty” to read an instrument before manifesting assent to the document.³⁵⁶

Consider the following analysis by the Fifth Circuit Court of Appeals in deciding, under Mississippi law, whether there was procedural unconscionability in a particular case:

Under Mississippi law, a contract can be unconscionable in one of two ways: procedurally and/or substantively [T]he district court based its finding of procedural unconscionability on its conclusion that the Illiterate Appellees’ professed illiteracy rendered them unable to comprehend the arbitration agreement and that they therefore lacked any form of knowledge about the agreement when they signed it. The district court also appeared to rest its finding of unconscionability on the fact that WM Finance failed specifically to inform the Illiterate Appellees that they were signing an arbitration agreement after the Illiterate Appellees had informed WM Finance of their inability to read.

We find both bases of the district court’s unconscionability conclusion unsupported by Mississippi law. First, the district court erred in concluding that the Illiterate Appellees’ inability to read rendered them incapable of possessing adequate knowledge of the arbitration agreement they signed. The Mississippi Supreme Court has held that, as a matter of law, an individual’s inability to understand a contract because of his or her illiteracy is not a sufficient basis for concluding that a contract is unenforceable Mississippi courts have consistently held that parties to an insurance contract have an *affirmative duty* to read that contract and thus, knowledge of the contract’s terms is imputed to those parties irrespective of whether they read the contract

353. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); U.C.C. § 2-302(1) (2013).

354. *Strand v. U.S. Bank Nat’l Ass’n* ND, 693 N.W.2d 918, 922-23 (N.D. 2005) (“The majority of courts . . . have held that a showing of some measure of both procedural and substantive unconscionability is required, and courts are to employ a balancing test looking at the totality of the circumstances to determine whether a particular provision is unconscionable and unenforceable.”).

355. *Id.* at 922.

356. *See, e.g., Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264-65 (5th Cir. 2004).

The same conclusion has been reached by this court and other federal courts construing Mississippi law Accordingly, we hold that under Mississippi law, the inability to read and understand the arbitration agreement does not render the agreement unconscionable or otherwise unenforceable.³⁵⁷

The court's analysis suggests that the party who did not read the instrument has breached some duty and that the penalty for such wrongdoing is enforceability of the instrument, a penalty that trumps an argument of procedural unconscionability.

Such a view, however, misconstrues the consequence of a failure to read under the duty-to-read rule, an error likely promoted by the doctrine's misleading name. The only consequence under the rule of a failure to read is that the party is considered to have manifested assent to the unread terms, a consequence that does not make reading the instrument a Hohfeldian *duty*. And whether a contract term is unenforceable under the unconscionability doctrine is an analysis that assumes the term is part of the contract. Whether a court relies on a failure to read an instrument in determining if there is procedural unconscionability is a matter of public policy (for example, under the circumstances a failure to read might not lead to "unfair" surprise or a party might be deemed to have waived the privilege of challenging the term), but the duty-to-read rule itself says nothing about it. A failure to recognize this distinction might impede a thorough balancing of the relevant policy considerations involved in the unconscionability determination by giving undue weight to the failure to read the instrument (or, even worse, giving the failure to read dispositive effect).

As previously discussed, a party's contract *duty* might be subject to a condition. When a *duty* is subject to a condition, a party usually acquires a *power* to terminate the duty if the condition does not occur and the condition's non-occurrence is not excused.³⁵⁸ In such a situation, the other party has a *liability*. The reason the non-occurrence of a condition creates a *power* to terminate the duty as opposed to providing for the duty's automatic termination is because the non-occurrence can be excused by the holder of the duty through waiver, as long as the condition was not a material part of the agreed exchange.³⁵⁹

For example, a constructive (i.e., implied-in-law) condition of a party's duty to perform is that there be no uncured, material non-performance by the other party of a contract duty that is due first.³⁶⁰ Whether there has been a "material" non-performance is not an operative fact because such a

357. *Id.* (emphasis added).

358. The prevention doctrine, equitable estoppel, repudiation, impracticability, and disproportionate forfeiture are doctrines that will excuse the non-occurrence of a condition. RESTATEMENT (SECOND) OF CONTRACTS § 225 cmt. b (1981).

359. *Id.* § 84(1).

360. *Id.* § 237.

determination requires a legal conclusion as to whether the non-performance was material.³⁶¹ The non-occurrence of this constructive condition gives the non-breaching party the *power* to suspend performance of the duty.³⁶² If the promisee cannot cure the material non-performance or does not cure it within a reasonable time, there is a so-called total breach, giving the promisor the power to terminate all of the promisor's remaining contract duties.³⁶³ But either of these powers can be waived by, for example, the non-breaching party's promise to perform despite the other party's breach.³⁶⁴ Recognizing that the other party's material non-performance gives the party a *power* reinforces the understanding that the power can be lost.

A party does not ordinarily have the *privilege* to interfere with the occurrence of a condition to its contract duty. This restriction is known as the prevention doctrine, under which a party has a *duty* to not wrongfully prevent the occurrence of the condition.³⁶⁵ The sanction for breaching the duty is having the party's substantive duty mature despite the non-occurrence of the condition (a subject previously discussed with respect to excusing performance in response to an offer of a unilateral contract when the offeror repudiates).³⁶⁶ Of course, the express or implied-in-fact terms of the contract might provide that a party does have the *privilege* to interfere with the occurrence of a condition to its duty to perform. An example is a contract involving a contest. If two parties have a contract under which the first promises to pay the second a sum of money if the second is able to beat the first in a game of basketball, the parties have impliedly agreed that the first has the privilege to attempt to prevent the occurrence of the condition to its duty to pay.

Hohfeldian analysis is particularly helpful in understanding the issue of third-party beneficiaries, and helps show why the topic is better considered an issue of the defendant's *breach of duty* as opposed to being lumped

361. See *Conditions*, *supra* note 226, at 761 ("What constitutes substantial performance must be determined with reference to the particular facts in each case. The question is always one of degree and its solution must be doubtful in many cases.").

362. See RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. a (1981) (noting that "a party's uncured material failure to perform or to offer to perform . . . has the effect of suspending the other party's duties . . .").

363. *Id.* § 242.

364. See *Conditions*, *supra* note 226, at 760 ("Where substantial performance by the plaintiff is a condition precedent to the duty of immediate performance by the defendant, and this condition has not occurred, the plaintiff can maintain no suit for the agreed price unless there is a waiver of the condition by the defendant. If there has been a true waiver by the defendant, his duty of immediate performance exists and the plaintiff can maintain an action on the express contract for the agreed price or its equivalent. In such case, however, the plaintiff should not allege full performance of conditions; if he does his proof will show a variance. The operative facts are the agreement, the incomplete performance, and the waiver, and these should be alleged. The facts that operate as a waiver may be either an expression of consent by the defendant or such conduct as gives rise to an estoppel.").

365. See *Sullivan v. Bullock*, 864 P.2d 184 (Idaho Ct. App. 1993) (discussing and applying the prevention doctrine).

366. See RESTATEMENT (SECOND) OF CONTRACTS § 225 cmt. b (1981) ("It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing . . .").

into a separate category called “third party rights and duties.” The issue involves whether the non-performance of a contract duty was the breach of a duty owed to the third party. The general rule is that a non-party does not have the privilege to sue for breach of contract,³⁶⁷ and although this rule is a policy choice, it is consistent with the Hohfeldian notion that a duty is owed to a specific person—the person holding the corresponding *right*. Thus, only a person holding the corresponding *right* has the privilege to sue for breach of the *duty*.

This, of course, was the basis for Judge Cardozo’s holding in *Palsgraf v. Long Island Railroad Co.*, in which Cardozo held that the tort duty to act with reasonable care is not owed to an unforeseeable plaintiff.³⁶⁸ Cardozo stated:

The argument for the plaintiff is built upon the shifting meanings of such words as ‘wrong’ and ‘wrongful,’ and shares their instability. What the plaintiff must show is ‘a wrong’ to herself, *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.³⁶⁹

Cardozo’s reasoning that a duty is not owed to someone who does not hold a corresponding *right* was unassailable Hohfeldian logic, but what it did not answer—what Hohfeldian logic never answers—is to whom the duty *should be* owed. Judge Friendly, discussing *Palsgraf*’s incorporation into admiralty law, explained as follows:

In *Sinram v. Pennsylvania R.R.*, 61 F.2d 767, 770 (2 Cir. 1932), which received *Palsgraf* [sic] into the admiralty, Judge Learned Hand characterized the issue in that case as ‘whether, if A. omitted to perform a positive duty to B., C., who had been damaged in consequence, might invoke the breach, though otherwise A. owed him no duty; in short, whether A. was chargeable for the results to others of his breach of duty to B.’ Thus stated, the query rather answers itself; Hohfeld’s analysis tells us that once it is concluded that A. had no duty to C., it is simply a correlative that C. has no right against A. The important question is what was the basis for Chief Judge Cardozo’s conclusion that the Long Island Railroad owed no ‘duty’ to Mrs. *Palsgraf* under the circumstances.³⁷⁰

367. *Brooks v. Trs. of Dartmouth Coll.*, 20 A.3d 890, 900 (N.H. 2011) (stating that “the general rule [is] that a non-party to a contract has no remedy for breach of contract”).

368. 162 N.E. 99 (N.Y. 1928).

369. *Id.* at 100.

370. *Petition of Kinsman Transit Co.*, 338 F.2d 708, 721 (2d Cir. 1964).

A contract duty is of course owed to the other party to the contract, the person to whom the promise was made. But Hohfeldian analysis does not answer whether the duty should or should not also be owed to a particular non-party; that can only be determined as a matter of policy.³⁷¹ Courts have answered that question by holding that a party owes a duty to perform to a non-party if a reasonable person would believe the parties to the contract entered into the contract intending that performance be for the non-party's benefit.³⁷²

The law of the assignment of contract rights is also better considered as part of the topic of *breach of duty*, as opposed to the amorphous topic of "third-party rights and duties." When a right holder assigns her contract *right* to a third party, the holder of the corresponding *duty* has his *duty* shifted to the assignee.³⁷³ Failure to provide the promised performance to the third party is, therefore, a breach of the duty. Because the assignor has the ability to change the legal relations between the parties to the contract and the third party, the assignor has a *power* to assign the contract right.

Hohfeldian analysis also explains why an assignment can be effective (i.e., change legal relations) even if it is in breach of an anti-assignment clause. Unless the contract provides otherwise, a valid anti-assignment clause does not render an assignment ineffective, but merely gives the obligor a claim for breach of contract.³⁷⁴ As explained by Nigel Simmonds:

I may have the "power" (in Hohfeld's sense) to perform an act and yet not have the liberty [privilege] to do so. In certain cases, for example, a non-owner can pass good title to a bona fide purchaser for value. In such a case, the non-owner has the power to transfer title, since his acts will be legally effective in making the purchaser the owner of the goods. *But the exercise of that power may still be a breach of duty*: although effective in transferring title, it may still be a legal wrong. Since a liberty is the absence of a duty not to do the act, it is clear that the non-owner in such a case has the power to transfer, but not the liberty to do so. Imagine how confusing it would be if we did not possess the Hohfeldian vocabulary, but had to refer to both powers and

371. Attempts to construct the rights of third parties (or lack thereof) from deductive reasoning caused doctrinal difficulties. See RESTATEMENT (SECOND) OF CONTRACTS ch. 14, intro. note (1981) ("Historically, the rights of contract beneficiaries have been the subject of doctrinal difficulties in both England and the United States.").

372. RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304, 315 (1981). The *Restatement* states that the law recognizes "the *power* of promisor and promisee to create rights in a beneficiary by manifesting an intention to do so." *Id.* ch. 14, intro. note (emphasis added).

373. *Id.* § 317(1).

374. *Id.* § 322(2)(b). An example of "when the contract provides otherwise" would be when the contract provides that any attempted assignment is "void." *Allhusen v. Caristo Constr. Corp.*, 103 N.E.2d 891, 893 (N.Y. 1952). Simply stating that the parties "promise" to not assign their contract rights (or similar language of a promissory nature) is insufficient. RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. b (1981).

liberties as rights. We would then have to say that the non-owner has the right to transfer, but does not have the right to transfer!³⁷⁵

Similarly, without Hohfeldian vocabulary, we would have to say that when a contract has an anti-assignment clause simply stating that the parties promise not to assign any contract rights, the putative assignor has the right to assign her contract rights, but does not have the right to assign her contract rights.

With respect to the delegation of duties,³⁷⁶ the issue is whether and to what extent an attempted delegation changes the legal relations of the parties to the contract and with third parties. If the delegation is ineffective, the legal relations do not change. If the delegation is effective, a performance by the delegatee has the effect of discharging the delegator's duty owed to the obligee and terminating the obligee's *right*.³⁷⁷ The delegator's duty is not, however, discharged until either the delegator or delegatee performs.³⁷⁸ Because the delegator retains the duty to perform, the legal relations between the delegator and the obligee do not change upon a delegation (thus, a party who may delegate has a *privilege* to delegate, but not a *power* to delegate). But, if the delegatee made an enforceable promise to perform, the relations between the delegator and the delegatee change (a "right-duty" relationship arises) and the relations between the delegatee and the obligee change (a "right-duty" relationship arises based on intended beneficiary law, with the delegatee owing a duty of performance to the obligee).³⁷⁹

The issue of repudiation (often called anticipatory repudiation or anticipatory breach) is particularly interesting with respect to Hohfeldian analysis. A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . . or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach."³⁸⁰ The obligor's statement or act is an operative fact, but whether the statement or act constitutes a repudiation is a legal conclusion derived from a consideration of the statement or act. The consequences of a repudiation are that even though there has not yet been a breach of the duty to perform, the repudiation gives rise to an immediate claim for (i.e., *right to*) damages for total breach, discharges the other party's remaining duties, and excuses the non-occurrence of any conditions to the repudiating party's duties.³⁸¹

375. SIMMONDS, *supra* note 123, at 299-300 (emphasis added).

376. RESTATEMENT (SECOND) OF CONTRACTS § 318 (1981).

377. *Id.* § 318(1), (2).

378. *Id.* § 318(3).

379. See *id.* § 302 cmt. d (noting that an intended beneficiary relationship can arise upon "a promise to perform a supposed or asserted duty of the promisee").

380. *Id.* § 250.

381. *Id.* cmt. a.

A repudiation is not itself a breach of the duty to perform because the performance is not due yet.³⁸² But as previously discussed with respect to a statement of revocation of an offer under an option contract, a repudiation's consequences are best viewed as a penalty for engaging in the physical act of making the statement or taking the action that constitutes a repudiation. In fact, the *Restatement* comment states that a repudiation "may impair the value of the contract to the other party."³⁸³ This comment suggests that a repudiation is considered a wrongful act, even though providing notice of a future breach will in many instances be beneficial to the non-repudiating party by, for example, permitting the party to save expenses in anticipation of performance and to obtain substitute performance sooner. Thus, if employing Hohfeldian terminology, it seems appropriate to state that a party has a *duty* not to engage in the physical acts constituting repudiation, and that the other party has a corresponding *right* not to have the party engage in such acts.

C. Defenses

There are a number of defenses that can be asserted by a defendant, and these can be divided into their legal consequences: (1) those that render a contract *voidable* by one or more of the parties; (2) those that render a contract or contract duty *unenforceable*; and (3) those that automatically *discharge* a contract duty. Each category is analyzed below within the Hohfeldian schema.

1. Voidable Doctrines

The defenses that render a contract voidable include mutual mistake,³⁸⁴ unilateral mistake,³⁸⁵ misrepresentation,³⁸⁶ duress,³⁸⁷ undue influence,³⁸⁸ the infancy doctrine,³⁸⁹ mental infirmity,³⁹⁰ and intoxication.³⁹¹ "A voidable contract is one where one or more parties have the *power*, by a manifestation of election to do so, to avoid the legal relations created by the contract" and revert to the legal relations that existed before contract formation.³⁹² Whether a party has such a Hohfeldian *power* under any of the foregoing doctrines is determined by operative facts and the legal conclusions drawn from those facts.

These doctrines provide a party with the Hohfeldian *power* to void the *contract*, with the term *contract* being used in a Hohfeldian sense. Thus, all

382. *See id.* § 235(2) ("When performance of a duty under a contract is *due* any non-performance is a breach.") (emphasis added).

383. *See id.* § 250 cmt. a.

384. *Id.* § 152.

385. *Id.* § 153.

386. *Id.* § 164.

387. *Id.* § 175.

388. *Id.* § 177.

389. *Id.* § 14.

390. *Id.* § 15.

391. *Id.* § 16.

392. *Id.* § 7 (emphasis added).

legal relations that arose because of contract formation are extinguished, and the parties' pre-contract legal relations replace them. Restitution is permitted because the duty to return or pay for benefits when it would be unjust not to do so is a duty that exists independently of a contract.³⁹³ Although a party who has the *power* to void the contract does not have a *duty* to perform, a contract still arises because the promise is consideration.³⁹⁴

Although these doctrines provide a party with a Hohfeldian *power* to terminate the contractual relations that arose out of contract formation, the power can be lost if not exercised.³⁹⁵ This is known as the doctrine of ratification, under which a party will lose the power to terminate the contractual relations if the party engages in an act inconsistent with the desire to terminate the contractual relations, or delays exercising the power.³⁹⁶ Ratification is the equivalent of a waiver.

An interesting, but solely semantic, question is whether a party is under a Hohfeldian *duty* not to make a misrepresentation or an improper threat (duress) or not to enter into a contract with a minor, person with mental defect, or an intoxicated person. In other words, is the law's grant of a power to void the contract a penalty for wrongdoing? The issue is purely semantic because the law is clear regarding the consequence of these events, and determining whether there is a Hohfeldian *duty* will not change these consequences. Because the consequence is to make the contract binding upon one party but not the other, the consequence has the nature of a penalty, though only misrepresentation and duress would seem to constitute wrongdoing in all cases (though an innocent misrepresentation might not be considered wrongdoing). Accordingly, it seems appropriate to consider the party as having a *duty* not to make a misrepresentation or to make an improper threat. Similarly, it seems appropriate to consider a party as having a *duty* to disclose facts in those circumstances where a failure to disclose constitutes a misrepresentation.³⁹⁷ But one must remember that the breach of a duty does not always provide the right-holder with a cause of action for damages.

2. Unenforceable Doctrines

A variety of grounds exist for making a contract or a particular contract duty *unenforceable*. For example, the Statute of Frauds renders certain contracts unenforceable;³⁹⁸ the unconscionability doctrine gives the

393. *Id.* § 376.

394. *Id.* §§ 85, 7 cmt. e.

395. *See id.* § 7 ("A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, *or by ratification of the contract to extinguish the power of avoidance.*") (emphasis added).

396. *See* Daniel P. O'Gorman, *Show Me the Money: The Applicability of Contract Law's Ratification and Tender-Back Doctrines to Title VII Releases*, 84 TUL. L. REV. 675, 682-85 (2010) (discussing ratification doctrine).

397. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981) (setting forth situations in which a non-disclosure is equivalent to a misrepresentation).

398. *Id.* § 138.

court the discretion to not enforce certain contracts or contract terms;³⁹⁹ and public policy might render unenforceable a particular duty within a bargain that is not entirely void.⁴⁰⁰

An unenforceable contract or contract duty is different from a voidable contract in that an unenforceable contract duty does not provide a party with the Hohfeldian *power* to terminate the contract or the particular duty.⁴⁰¹ Thus, there is no ability to ratify an unenforceable contract duty⁴⁰² (though the Statute of Frauds provides that an unenforceable contract will become enforceable if a sufficient writing is created).⁴⁰³ The unconscionability doctrine differs from the other two doctrines in that the court has discretion whether to decline enforcement.⁴⁰⁴

An unenforceable contract duty still remains a Hohfeldian *duty* because there might be negative consequences from failing to perform as promised. For example, if a debtor has an unenforceable duty to pay a creditor, the creditor might still be permitted to apply the amount owed toward any security held by the creditor.⁴⁰⁵ This is consistent with the previous discussion regarding a Hohfeldian *duty* being recognized in situations where the law attaches negative consequences other than creating the ability to sue.

Under the Statute of Frauds, the entire contract is rendered unenforceable, meaning that all of the “right-duty” relationships created by contract formation are unenforceable.⁴⁰⁶ Under the unconscionability and public-policy doctrines, the court has discretion as to whether an unenforceable, unconscionable, “right-duty” relationship has the effect of rendering other “right-duty” relationships within the contract unenforceable.⁴⁰⁷

399. *Id.* § 208; U.C.C. § 2-302(1) (2013).

400. See RESTATEMENT (SECOND) OF CONTRACTS § 8 cmt. b (1981) (“Some contracts are unenforceable because they arise out of illegal bargains which are neither wholly void nor voidable.”).

401. See *id.* § 8 cmt. a (“[T]he term unenforceable contract refers to rules under which the duty of performance does not depend solely on the election of one party.”).

402. See *id.* (“In the transactions here classified as unenforceable, some legal consequences other than the creation of a power of ratification follow without further action by either party.”).

403. *Id.* § 131.

404. See *id.* § 208 (“If a contract or term thereof is unconscionable at the time the contract is made a court *may* refuse to enforce the contract, or *may* enforce the remainder of the contract without the unconscionable term, or *may* so limit the application of any unconscionable term as to avoid any unconscionable result.”) (emphasis added); U.C.C. § 2-302(1) (2013) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court *may* refuse to enforce the contract, or it *may* enforce the remainder of the contract without the unconscionable clause, or it *may* so limit the application of any unconscionable clause as to avoid any unconscionable result.”) (emphasis added).

405. See RESTATEMENT (SECOND) OF CONTRACTS § 8 cmt. a, illus. 2 (1981).

406. *Id.* § 138.

407. See *id.* § 184(1) (“If less than all of an agreement is unenforceable [because of public policy], a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.”); *id.* § 208 (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

3. Doctrines that Discharge Duties

Some defenses result in the automatic discharge of a Hohfeldian *duty*, which is different from the voidable doctrines in that the discharge is not subject to a party exercising a Hohfeldian *power* to discharge, and different from the unenforceable doctrines in that no Hohfeldian *duty* of any kind remains. These doctrines include the doctrines of supervening impracticability⁴⁰⁸ and supervening frustration of purpose.⁴⁰⁹ Thus, it would be incorrect to state that upon the occurrence of the event the adversely affected party has the Hohfeldian *power* to void the contract or that the *duty* is rendered unenforceable. Rather, the *duty* is discharged.

Corbin considered the non-occurrence of an event rendering performance impracticable to be a condition to the Hohfeldian *duty* to perform,⁴¹⁰ but the use of the term *condition* here is problematic. Corbin rejected the term *condition* for the requirements of the formation of a contract (offer, acceptance, etc.) in part because such requirements could not be waived, unlike post-formation conditions.⁴¹¹ But under the law of impracticability and frustration of purpose, the *duty* is automatically discharged upon the occurrence of the events. Referring to the non-occurrence of these events as conditions would suggest the duty can mature despite the occurrence of the event through the doctrine of waiver. Presumably, the event's non-occurrence is not subject to waiver because it is such a significant event that the event's non-occurrence is considered a material part of the agreed exchange.⁴¹²

Under the doctrine of impracticability, the duty whose performance was impracticable is discharged, and whether this discharge has the effect of discharging the other party's remaining duties is a separate analysis.⁴¹³ Under the doctrine of frustration of purpose, all of the remaining duties of the party whose principal purpose for entering into the contract was substantially frustrated are discharged.⁴¹⁴ Like impracticability, whether this discharge has the effect of discharging the other party's remaining duties is a separate analysis.⁴¹⁵

408. See *id.* § 261 ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is *discharged*, unless the language or the circumstances indicate the contrary.") (emphasis added).

409. *Id.* § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are *discharged*, unless the language or the circumstances indicate the contrary.") (emphasis added).

410. *Conditions*, *supra* note 226, at 755.

411. *Id.*

412. See RESTATEMENT (SECOND) OF CONTRACTS § 84(1)(a) (1981) (providing that a condition cannot be waived if "occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur").

413. *Id.* § 267.

414. *Id.* § 265.

415. *Id.* § 267.

D. Remedies

A breach of a contract *duty* means that a new Hohfeldian *duty* arises to pay compensatory damages to the non-breaching party, and the non-breaching party acquires a Hohfeldian *right* to such damages.⁴¹⁶ Of course, in contract law, compensatory damages means an amount designed to put the non-breaching party in the position she would have been in had the contract been performed.⁴¹⁷ Corbin called the correlative of such a duty, which arises upon the breach of some other duty, a *secondary right* or a *remedial right*.⁴¹⁸ Farnsworth called a damages remedy “substitutional” because “it is intended to give the promisee something in substitution for the promised performance.”⁴¹⁹ There is no *right* to specific performance because such an award is within the court’s discretion.⁴²⁰

One could consider the *primary duty* as simply an option to perform or pay damages,⁴²¹ and thus consider a contract *duty* as including a Hohfeldian *privilege* to either perform or pay damages. Such a characterization is consistent with the view that failing to perform is not always wrongful, particularly when the breach results in greater overall benefits than performance.⁴²² But, as Corbin noted,

[i]t is not usual to say, however, that he has an option between these two alternatives. Society approves one of them [and] disapproves the other and penalizes it in various ways. So we say that B is not legally privileged to adopt the latter alternative. He is bound by legal duty. He has no option.⁴²³

Accordingly, in specifying the Hohfeldian *duty*, it is preferable to state that a party has a contract *duty* to perform as promised, not simply a *duty* to either perform as promised or pay damages.

The fact that the secondary duty is a *duty* distinct from the primary duty shows that the scope of the secondary duty is a policy choice that does not flow, as a matter of deductive reasoning, from the scope of the primary duty. That the remedy is a policy choice is, of course, what Lon Fuller famously pointed out when asking why expectation damages should be the

416. See *id.* § 346(1) (“The injured party has a *right* to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.”) (emphasis added).

417. See *id.* § 347 (“[T]he injured party has a right to damages based on his expectation interest . . .”).

418. *Rights*, *supra* note 86, at 515-16.

419. Farnsworth, *supra* note 244, at 734-35.

420. RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. c (1981).

421. This view has traditionally been attributed to Oliver Wendell Holmes, Jr., but Professor Perillo has shown this to be a misreading of his view. See Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1085-87 (2000).

422. This is the idea of an “efficient breach.” See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 33-36 (3d ed. 2003) (discussing efficient-breach theory).

423. *Options*, *supra* note 273, at 572.

standard remedy for the breach of a contract duty.⁴²⁴ Recognizing that the remedy is a policy choice is what also makes understandable the court's discretion to award expectation damages for the breach of a duty derived from promissory estoppel, even though the duty is made enforceable as a result of the promisee's reliance.⁴²⁵

The secondary duty is only a duty to pay for losses caused by the breach of the primary duty⁴²⁶ whose amount can be proved to a reasonable certainty,⁴²⁷ that were sufficiently foreseeable at the time the parties entered into the contract,⁴²⁸ and that could not have been avoided through reasonable efforts by the non-breaching party.⁴²⁹ Thus, these doctrines limit the scope of the secondary duty.

With respect to the limitation for those losses that could have been avoided, the phrase "duty to mitigate damages," like the phrase "duty-to-read rule," is an example where the term *duty* is not used in a Hohfeldian sense:

When A has broken his contract with B, and B can, by stopping work, easily prevent his loss from increasing, it is often said that B is under a 'duty to mitigate damages.' It has been judicially observed, however, that there is no such duty. B's failure to mitigate his loss is not penalized by society. B's right to damages was created and the amount computed as of the time of A's final breach. Thereafter B's failure to discontinue work changes in no respect his jural relations with A. Of course, B is losing money by reason of his action; but so also does he lose money when he throws it into the sea, yet he is under no duty not to throw it there.⁴³⁰

What this analysis recognizes is that the avoidable loss doctrine is really just a subset of the doctrine that the breaching party only has a duty to pay for losses caused by the breach.⁴³¹

424. See L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52 (1936).

425. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("The remedy granted for breach may be limited as justice requires."); *id.* § 90 cmt. d ("A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate [But] relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise.").

426. *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 896 (1st Cir. 1988) (en banc).

427. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

428. *Id.* § 351(1).

429. *Id.* § 350.

430. *Rights*, *supra* note 86, at 521-22.

431. Cardozo adopted this reasoning. See *McClelland v. Climax Hosiery Mills*, 169 N.E. 605, 609-10 (N.Y. 1930) ("The statement is made not infrequently in treatise and decision that a servant wrongfully discharged is 'under a duty' to the master to reduce the damages, if he can. The phrase is accurate enough for most purposes, yet susceptible of misunderstanding, if emphasized too sharply. The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this; that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the

Viewed this way, the avoidable loss doctrine does not penalize the non-breaching party, because it simply refuses to compel the breaching party to pay the non-breaching party for a loss that the non-breaching party chose to incur. If the doctrine is not viewed in this fashion, there would be the incorrect appearance that the court is penalizing the non-breaching party by not permitting a recovery for avoidable loss. A non-breaching party has the privilege to throw his money away or to save it, but the breaching party has no duty to pay for any money thrown away. Thus, there is no Hohfeldian *duty* to avoid losses.⁴³² Accordingly, a phrase preferable to the “duty-to-mitigate doctrine” is the avoidable loss doctrine.

The parties have the *power* to define the scope of their secondary duties by agreeing upon an amount of damages to be paid in the event of a breach,⁴³³ though because the parties must agree it is more accurate to say that one party has the privilege to offer such a provision to the other, thereby providing the other with such a power. This power is limited, however, to the requirement that the losses be difficult to determine and that the amount agreed upon be a reasonable estimate of the amount of loss in the event of breach.⁴³⁴

E. A Final Note Regarding Hohfeldian Analysis and Contract Law

Having surveyed the key contract doctrines through Hohfeldian terminology, an anticipated objection to the endeavor becomes apparent. Hohfeld, whose work did not address Holmes’s prediction theory of law, considered legal relations to change upon the occurrence of operative facts, without accounting for the legal conclusions that must be made by courts to decide whether legal relations had changed and, if so, to what extent. Thus, the Hohfeldian moment of contract formation will often leave the parties unsure as to whether and to what extent their legal relations have changed. Has a contract really been formed? How will the court interpret its provisions? The same is true for a breach of a contract duty. What will the court decide is an amount that compensates the injured party for the breach? Ultimately, these questions can only be answered by a court. Accordingly, as the objection would go, legal relations do not really change until a court states they have changed, even when the court does so retroactively. In other words, legal relations are legal concepts that can only be changed by the agents of the state.

Such an objection would, however, simply be a straw man argument. It assumes that Hohfeld had a greater purpose than simply seeking to avoid

chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer.”) (citations omitted), *amending remittitur*, 171 N.E. 770 (N.Y. 1930)).

432. See, e.g., U.C.C. § 2-712(3) (2013) (“Failure of the buyer to effect cover . . . does not bar him from any other remedy.”); *id.* official cmt. 3 (“Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer.”).

433. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

434. *Id.*

errors in legal reasoning. And for the purpose of avoiding such errors, Hohfeld's system is unassailable.

V. CONCLUSION

Wesley Hohfeld's theory of legal relations did much more than just provide the American legal realists with ammunition in their revolt against legal formalism. Hohfeld's theories provided law students, lawyers, and judges with the tools to avoid errors in legal reasoning. Hohfeldian analysis epitomizes "thinking like a lawyer." And because no legal system should tolerate sloppy analysis, it is imperative that Hohfeld's contributions remain a vital part of our legal system, within contract law and beyond it.