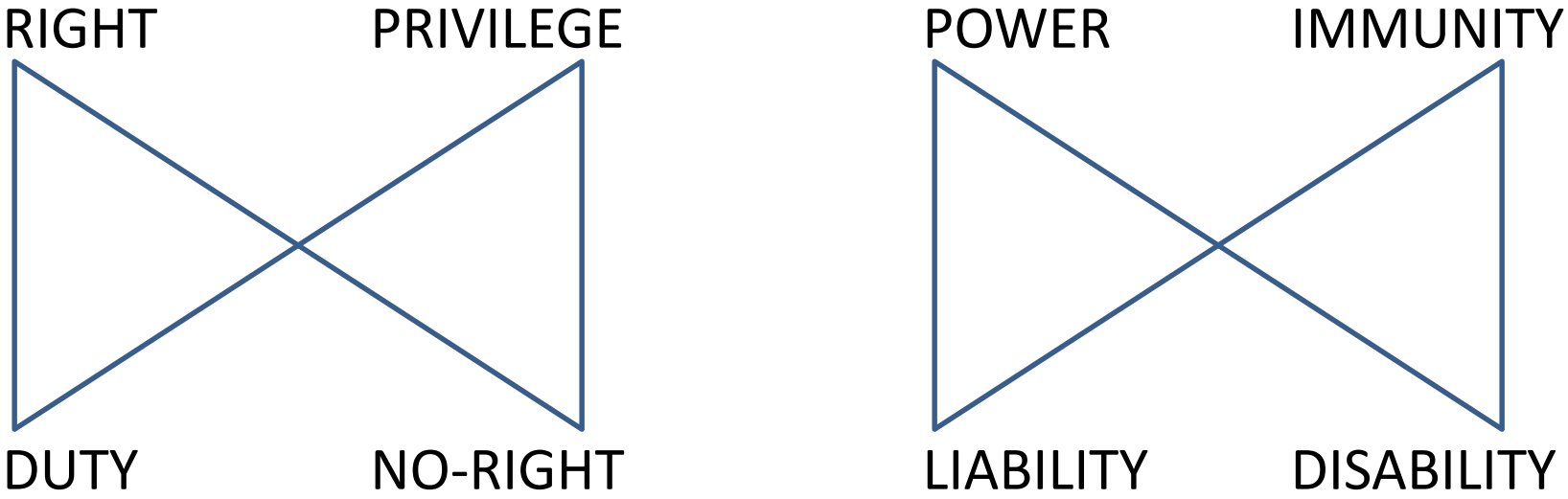
Summer School on Law and Logic
Session 3.2.2
9 July, 2018
Scott Brewer

Hohfeld relations and Logocratic Analysis

projection 07-09-18

The Man . . .

The Logician. . .



The Professor. . .

(Hohfeld in later years)

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From Yale Law School colleague Arthur Corbin:

“Hohfeld's teaching at Yale began in the autumn of 1914. He was a severe taskmaster, requiring his students to master his classification of "fundamental conceptions" and to use accurately the set of terms by which they were expressed. They found this, in the light of the usage of the other professors, almost impossible. There is no more difficult job for any teacher. All people resent the criticism of their usage and the effort to reform it. Not realizing the benefit to be obtained, they regard the effort as unnecessary. "We are getting along well enough with the good old English language as it is." They are much like the orthodox but untutored "fundamentalists" in theology who resent tampering with their accustomed King James version of the Bible and assert that "God's language is good enough for us." The students called him bad names and complained bitterly. I once saw Dean Henry Wade Rogers (himself a Prussian taskmaster) put a fatherly hand on Hohfeld's shoulder and heard him say: "Be kinder to them, Hohfeld."

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From Yale Law School colleague Arthur Corbin:

"The seniors in the courses on trusts and conflict of laws became truly fearful that they could not satisfy Hohfeld's requirements and would fail in his examinations. Rumors of the terms of his contract with Yale reached them and Jed to the belief that he had only a one-year appointment. Most of them signed a petition addressed to President Hadley asking that his appointment be not extended. . . . [T]he President had called Hohfeld to his office and informed him of the petition. Hohfeld was severely shocked and grieved. Without making any argument, on leaving the President's office he went straight to Western Union and sent a. final resignation to Stanford."

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Outline of our discussion of Hohfeld

(1) Brief *explanation* of the *nature of explanation*, and of Hohfeld's system as a type of *philosophical explanation of the logic of legal rights.*

(a) This will include presenting Hohfeld's system as a system of *rights as logical axioms*

(2) Application of the Hohfeld philosophical explanatory system to two examples:

(a) Hohfeldian philosophical explanation of "contract" in *Wright v. Newman* (Georgia S. Ct.)

[time permitting, or in Q&A] (b) Hohfeldian philosophical explanation of *Przybyla v Przybyla* (Wisconsin Ct. App. 1978)

Outline of our discussion of Hohfeld

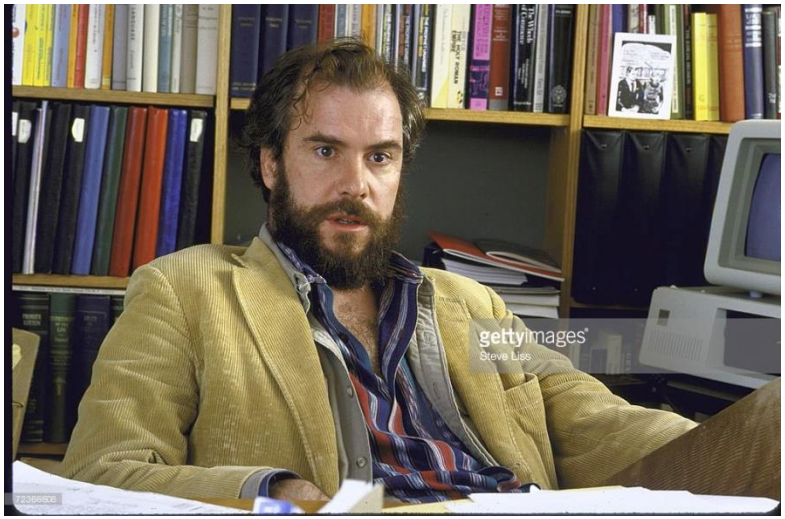
(3) To show an interesting and important limit of Hohfeld's system of philosophical explanation by comparing it to the "Logocratic Method," also a system of philosophical explanation of argument (legal and otherwise)

Outline of our discussion of Hohfeld

(4) Conclude (likely) with a discussion of why

was Legal Modernist Hero to the likes of

. . . not to mention . . .



but if time permits

(5) Brief discussion of “Agonophilia” in Hohfeld and Logocratic philosophical abductions

Hohfeld's system provides a systematic method of *explaining* legal phenomena, phenomena he calls "**jural relations**."

In Hohfeld's system jural relations have a *logical structure*, and they are the relations he offers to *explain all legal phenomena* (or at least all Anglo-American legal phenomena).

Explanation in Hohfeld's system, like all explanation, is achieved by use of the tool of ***argument.***

Thus, in order to understand Hohfeld's system, we should understand it as a **specific type of argument**, an argument whose conclusion is an *explanation* of the phenomena that Hohfeld refers to as 'legal relations'.

Before looking in detail at the Hohfeld relations, let's very briefly characterize the type of argument that Hohfeld enables an analyst to make using his system.

The type of argument is called 'abduction' – also referred to in the literature of argument theory as 'inference to the best explanation.'

example of an argument

set of premises		

example of an argument

set of premises		
set of conclusions (1-member in the set)		

example of an argument

set of premises	premise ε_1	All men are mortal
set of conclusions (1-member in the set)		

example of an argument

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	premise ε_2	Socrates is a man
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set of conclusions (1-member in the set)	h	Socrates is mortal

example of argument, a representation of the main argument in *Wright v. Newman* (distributed)

set of premises		

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set of conclusions (1-member in the set)		

example of argument, a representation of the main argument in *Wright v. Newman* (distributed)

set of premises	**premise ε_1**	A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
set of conclusions (1-member in the set)		

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	premise ε_2	[If the evidence authorizes a proposition, then the proposition is true]
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	premise ε_2	[If the evidence authorizes a proposition, then the proposition is true]
	premise ε_3	"The evidence authorizes the finding that Wright promised both Newman and her son that he would assume all of the obligations and responsibilities of fatherhood, including that of providing support".
set of conclusions (1-member in the set)		

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set of conclusions (1-member in the set)		

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	premise ε_4	"The evidence further authorizes the finding that Newman and her son relied upon Wright's promise to their detriment".
	premise ε_5	If, after 10 years of honoring his voluntary commitment, Wright were now allowed to evade the consequences of his promise, an injustice to Newman and her son would result.
set of conclusions (1-member in the set)		

example of argument, a representation of the main argument in *Wright v. Newman*

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	premise ε_5	If, after 10 years of honoring his voluntary commitment, Wright were now allowed to evade the consequences of his promise, an injustice to Newman and her son would result.
set of conclusions (1-member in the set)	**conclusion h**	The promise from Wright to Newman to support Newman's son is enforceable

Hohfeld's system is the type of argument called "abduction"
How many types of argument are there?

There are exactly four types of argument.

We call them "logical forms"

They are:

deduction

induction

analogy

abduction [also called 'inference to the best explanation']

What distinguishes one type of argument (logical form) from another?

As we've noted, in an argument the set of premises provides, or can be taken to provide, support for the set of conclusions.

The premises of arguments may usefully be thought of as *evidence for the truth, or likely truth, of the argument's conclusion.*

premises are *evidence* for truth, or likely truth, of a conclusion: example

For example, in this argument . . .

ε_1 All men are mortal

ε_2 Socrates is a man

h: Socrates is mortal

. . . the set of premises ε_1 and ε_2 provide *evidential support* for the conclusion h.

In fact the premises of this particular argument provide the strongest possible **evidential support** for the conclusion, because if all the premises are true the conclusion must be true.

Back to the question, how do the types (logical forms) of argument differ from one another?

They differ in two basic ways

(1) In the **degree** of evidential support that the set of premises provides for the set of conclusions

(2) In the **pattern** of evidential support that the set of premises provides for the conclusion

four logical forms and their interaction

Although these logical forms are distinct and irreducible, sometimes one logical form interacts within another.

For example, abduction always plays a role within analogical argument.

Abduction also always plays a role in induction.

four logical forms and their interaction

On one view (jurisprudentially disputed – but it is my view,

four logical forms and their interaction

On one view (jurisprudentially disputed – but it is my view, ***i.e., the correct view***)

four logical forms and their interaction

On one view (jurisprudentially disputed – but it is my view, ***i.e., the correct view***), deduction plays a role within legal abduction (inference to the best legal explanation).

Deduction also always plays a crucial role within *Hohfeldian abduction.*

For example, Hohfeld's scheme explains that is it a mistake to deduce rights from privileges – we will look closely at this explanation below

Explaining the nature of our inquiry into Hohfeld's system

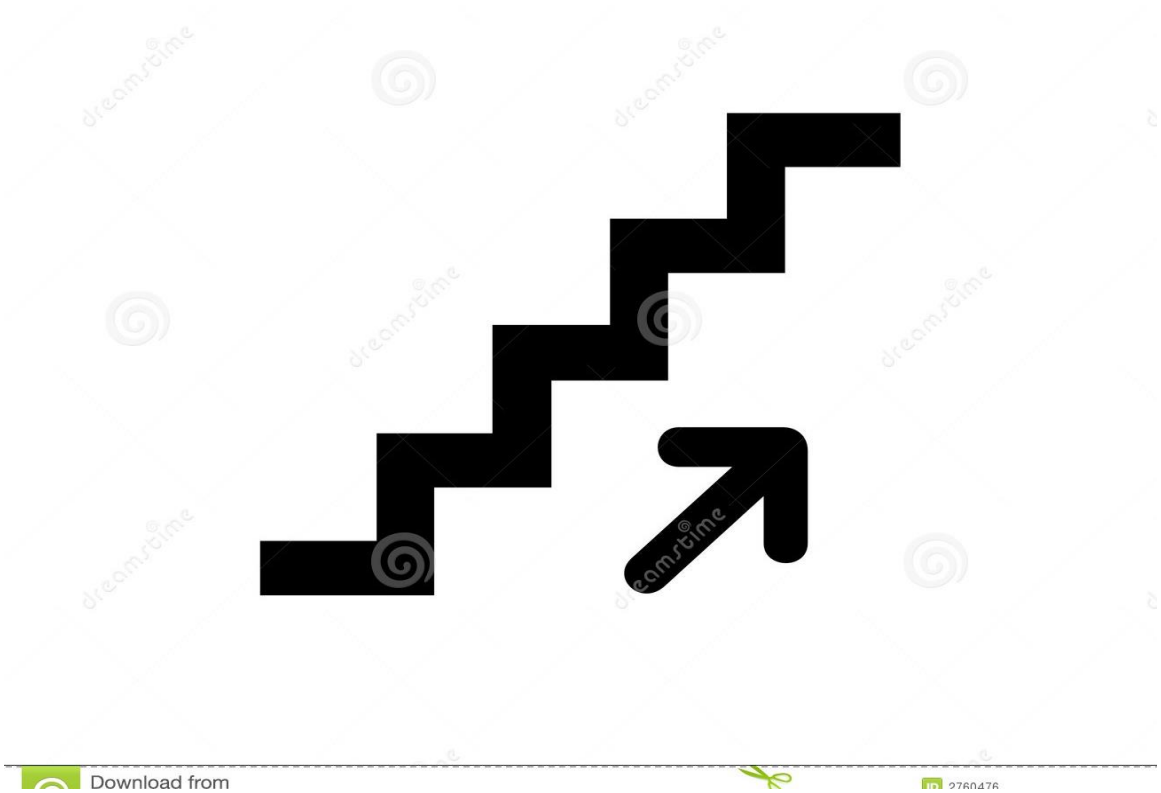
Later I'll offer more details about abduction because doing so will better enable us to *explain,* that is, to offer an *argument* that enables us to understand, Hohfeld's system.

Hohfeld's system is a philosophical abduction (or, synonymously, an *inference to the best philosophical explanation)* of legal relations

My explanation *of Hohfeld* is also a philosophical abduction (an *inference to the best philosophical explanation) of Hohfeld's* philosophical abduction of legal relations.

Mine is an abduction of his abduction, a "meta-abduction"

“Anything you can do, I can do meta”



Arthur Allen Leff, “Unspeakable Ethics, Unnatural Law”

In my outline . . .

I have now completed

(1) Brief explanation of the nature of explanation

and I now turn to

(a) presenting Hohfeld's system as a system *rights as logical axioms*

Example offered to explain the motivation of Hohfeld's axiomatic abduction of the logic of rights: disambiguation of the term 'rights' into the basic Hohfeldian terms 'right', 'privilege', 'power', and 'immunity'

1. A party to a binding contract has a right to the other party's performance.

[Hohfeld's system: A party to a binding contract has a **claim-right** to the other party's performance.]

2. Since flag burning is protected speech, a person has a right to burn a flag.

[Hohfeld's system: Since flag burning is protected speech, a person has a **privilege** to burn a flag.**]**

3. The state of Massachusetts has a right to call me to jury duty (since Massachusetts is my domicile).

[Hohfeld's system: The state of Massachusetts has a **power** to call me to jury duty.**]**

4. I have a right not to be called to jury duty in Rhode Island (since Rhode Island is not my domicile).

[Hohfeld's system: I have an **immunity** from being called to jury duty in Rhode Island.]

from Nyquist, "Teaching Wesley Hohfeld's Theory of Legal Relations" (hereafter, "Nyquist, Teaching")

Further note on abduction

As I shall explain in greater detail later, there are many type of abduction, including:

the type of explanatory argument used in interpretation (interpretive abduction or inference to the best interpretive explanation)

the type of explanatory argument used in philosophical analysis (philosophical abduction or inference to the best philosophical explanation)

Hohfeld abductions are of this type

the type of explanatory argument used in application of legal rules to actual or hypotheticals fact patterns (legal abduction or inference to the best legal explanation)

Varying interpretive abductions of Hohfeld's system

As Pierre Schlag notes ("How To" 190) , there are been a great many interpretations of Hohfeld's system.

"If one delves broadly into the literature on Hohfeld, the experience can be jarring because one encounters a lot of different, and frequently discordant, expositions of his thought. In part that is because Hohfeld's work has proven interesting to different strands of legal thought, each of which seems to pursue its agenda largely in isolation from the others. The result is that, over time, each strand has constructed its own "Hohfeld." **For those readers who arrive on the scene expecting to find just one Hohfeld, it's all rather bewildering.**

Three important, self-contained strands warrant mention at the outset.

The "**analytical strand**" consists of those analytical thinkers who strive to clarify and ascertain whether Hohfeld's tables of fundamental jural conceptions are right or not. . . .

The "**property strand**" consists of property theorists who have enlisted Hohfeld's thought to help theorize property. These theorists. . . generally view Hohfeld as the author of the "bundle of sticks" conception of property—an approach that, in its most extreme versions, denies that property has any essential aspects and must instead be seen as a mutable aggregation of different entitlements and disablements. . . .

Finally, the "**critical strand**" consists of those legal realists (e.g., Arthur Corbin, Walter Wheeler Cook, Karl Llewellyn, Robert Lee Hale) and critical thinkers (e.g., **Joseph Singer and Duncan Kennedy**), who view Hohfeld as having provided an analytical framework that reveals tendentious legal reasoning flaws and that exposes the inexorably practical, moral, policy, and political aspects of law."

Varying interpretive abductions of Hohfeld's system

In the terms we're developing, these are all **interpretive abductions** (explanations) of Hohfeld's abduction (explanation) of legal phenomena.

Many of these interpretive abductions are substantially the same, that is, they offer substantially the same interpretation of the Hohfeld system ***as contained in Hohfeld's texts*** ("interpretanda," "thing to be interpreted" and "explananda," "thing to be explained" in the terms of intepretive abduction)

Like any rich text, however, interpretations will sometimes diverge and compete.

Varying interpretive abductions of Hohfeld's system

Here are few interpretive abduction of the Hohfeld axioms that (more or less) agree:

Nyquist, "Teaching Hohfeld": (with correlative): A person with a Hohfeldian **right** against another person (who is under a duty) has a claim if the other does not act in accordance with the duty.

Singer, "From Bentham to Hohfeld": 'Rights' are claims, **enforceable by state power,** that others act in a certain manner in relation to the rightholder.

Nyquist (with correlative): A person with a **privilege** may act without liability to another (who has a **no-right**).

Singer, "From Bentham to Hohfeld": 'Privileges' are permissions to act in a certain manner without being liable for damages to others **and without others being able to summon state power to prevent those acts.**

Nyquist (with correlative): A person with a **power** is able to change a legal relation of another (who is under a **liability**).

Singer, "From Bentham to Hohfeld": 'Powers' are **state-enforced abilities** to change legal entitlements held by oneself or others

Nyquist (with correlative): A person with an **immunity** cannot have a particular legal relation changed by another (who is under a **disability**).

Singer, "From Bentham to Hohfeld": 'immunities' are security from having one's own entitlements changed by others.

Example offered to explain the motivation of Hohfeld's philosophical abduction: disambiguation of the term 'rights' into the basic Hohfeldian terms 'right', 'privilege', 'power', and 'immunity'

Hohfeldian correlatives, using the Nyquist disambiguation example

1. A party to a binding contract has a right to the other party's performance.

[A has a **right** against B that B does action X.]

[B has a **duty** to A that B does action X.]

2. Since flag burning is protected speech, a person has a right to burn a flag.

[A has a **privilege** against each B ["multital"] to burn a flag without transgressing a legal obligation]

[Each B has a **no-right** toward A that A not burn a flag]

3. The state of Massachusetts has a right to call me to jury duty (since Massachusetts is my domicile).

[The state of Massachusetts has a **power** to call me to jury duty.**]**

[I have a **liability** toward the state of Massachusetts to be called to jury duty.]

4. I have a right not to be called to jury duty in Rhode Island (since Rhode Island is not my domicile).

[I have an **immunity** from being called to jury duty in Rhode Island.]

[The state of Rhode Island has a **disability** to call me to jury duty in Rhode Island.]

Nyquist interpretive abduction: present - future distinction of two pairs of correlatives

Defining legal issues under Hohfeld's system demands clarity about which grid is being addressed. **The question Does Curt Nyquist have to report for jury duty in Massachusetts today? is a question focused on the right/duty or privilege/no-right grid and the answer is no, I have a privilege of not reporting since I have not been summoned.** **The question Might Curt Nyquist have to report for jury duty in Massachusetts in the future? is a question focused on the power/liability or immunity/disability grid and the answer is yes, I have a liability of being summoned.**	"The two legal relations on the left side of Hohfeld's table of correlatives (right/duty and privilege/no-right) form a grid that is focused on a current state of affairs. A person who burns a flag, for example, either is privileged to do so or has a duty to refrain."		"The relations on the table's right side (power/ liability and immunity/disability) form a second grid that is focused both on a current state of affairs and on a potential future state. My relationship with Massachusetts on the jury issue, for example, is that I am under a liability to be called if Massachusetts follows the proper procedure for summoning me. My liability is a statement both about a current situation and about the future. “	
Jural Correlatives ↕	**right**	**privilege**	**power**	**immunity**
	duty	**no-right**	**liability**	**disability**

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system (Corbin, "Jural Relations and Their Classification (1921) ("Corbin, Jural Relations")

What eight single words shall we choose? By all means follow established usage if there is any. As usage is not in fact uniform, follow the usage that is the more common so far as that can be done, and yet avoid duplication and doubt. After a careful consideration of the prevailing legal verbiage, **Hohfeld made a choice on the foregoing principles. He chose words already used in judicial reasoning and he allowed them to keep one of their customary meanings. Since they had several customary meanings, he tried in the interest of clearness and certainty of expression to slay all the extra meanings and to force us to adopt invariably the single meaning that he thought the most useful. His method of doing this was not by formal definition, but by arranging his terms in a table of correlatives and a table of opposites or negatives.**

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system (Corbin, "Jural Relations and Their Classification (1921) ("Corbin, Jural Relations")

"It is not meant by the foregoing that this is the only possible usage of the terms in question. It is believed to be the actual usage, and that it is of advantage to abide by it. **According to this usage, there is no law and there can be no legal relations of any sort where there is no organized society. The fact that is essential is the existence of societal force; and the question that is of supreme interest is as to when and how that force will be applied.** What will the community of citizens cause their agents to do. It is this multitude of busy little fellow citizens who constitute "society" or "the state," and **it is their cumulative strength that constitutes the personified giant whose arm may be so powerful to aid or to destroy. In law, the ultimate question is, what will this giant do?**

Now with respect to the little individual, who will be called A, in whose fortunes we may be interested, this giant either will or he will not act; there is no third possibility (although a wide variety is possible in the kind of act that he may do).

And **the little individual, A,** himself either can or he cannot do something that will stimulate the giant to act or not to act. The giant sleeps; can I wake him? He wakens; can I soothe him to inaction?"

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

"Of course we are deeply interested in the particular sort of act the giant will do, and in the various ways in which A and B are able to affect the giant's conduct. So deeply are we interested in them that we have used them as a basis for classifying our huge legal mass into property and contract, crime and tort, equity and admiralty and common law and law merchant, substantive law and adjective law. **All these classes cross and re-cross and overlap each other; but underneath them all we have eight fundamental conceptions with respect to any two little individuals, A and B."**

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And the little individual, A, himself either can or he cannot do something that will stimulate the giant to act or not to act. The giant sleeps; can I wake him? He wakens; can I soothe him to inaction?

From this it appears that we have four interesting possibilities:

The giant will act so as to affect A
or
The giant will not act so as to affect A
&
A can influence the giant's conduct
or
A cannot influence the giant's conduct "

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

"Introduce a second little individual, B, and you at once double these interesting possibilities."

[all Hohfeldian "Jural Opposites"]

A HAS RIGHT AGAINST B

The giant will act for A as against B

or

A HAS NO-RIGHT AGAINST B

The giant will not act for A as against B

&

A HAS PRIVILEGE AGAINST B

the giant will not act for B as against A

or

A HAS DUTY TO B

the giant will act for B as against A

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

"Introduce a second little individual, B, and you at once double these interesting possibilities." [all Hohfeldian "Jural Opposites"]

A HAS A POWER AGAINST (?) B

A can influence the giant's action with respect to B

or

A HAS A DISABILITY WITH RESPECT TO (?) B

A cannot influence the giant's action with respect to B

&

A HAS AN IMMUNITY TO B

B cannot influence the giant's action with respect to A

or

A HAS A LIABILITY TO B

B can influence the giant's action with respect to A

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

[Corbin characterizations reconfigured to state Hohfeld's Jural Correlative axioms]

(1) A has a right against B

The giant will aid A against B

if and only if

B has a duty to A

the giant will aid A against B

&

(2) A has a privilege against B

the giant will not aid B against A

if and only if

B has a no-right against A

the giant will not aid B against A

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

[Corbin characterizations reconfigured to state Hohfeld's Jural Correlative axioms] 2

(3) A has a power against (?) B

A can stimulate the giant's conduct with respect to himself and B

if and only if

B has a liability to A

A can stimulate the giant's conduct with respect to himself and B

&

(4) **A has an immunity to B**

B cannot stimulate the giant's conduct with respect to himself and A

if and only if

B has a disability with respect to (?) A

B cannot stimulate the giant's conduct with respect to himself and A

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

[Corbin characterizations reconfigured to state Hohfeld's Jural Opposite axioms]

A HAS A RIGHT AGAINST B

The giant will aid A against B

or

A HAS A NO-RIGHT AGAINST B

the giant will not aid A against B

&

A HAS A PRIVILEGE AGAINST B

the giant will not aid B against A

or

A HAS A DUTY TO B

the giant will aid B against A

Arthur Corbin's "Giant" interpretive abduction of Hohfeld's system ("Corbin, Jural Relations")

[Corbin characterizations reconfigured to state Hohfeld's Jural Opposite axioms]

A HAS A POWER AGAINST (?) B

A can stimulate the giant's conduct with respect to himself and B

or

A HAS A DISABILITY WITH RESPECT TO (?) B

A cannot stimulate the giant's conduct with respect to himself and B

&

A HAS AN IMMUNITY TO B

B cannot stimulate the giant's conduct with respect to himself and A

or

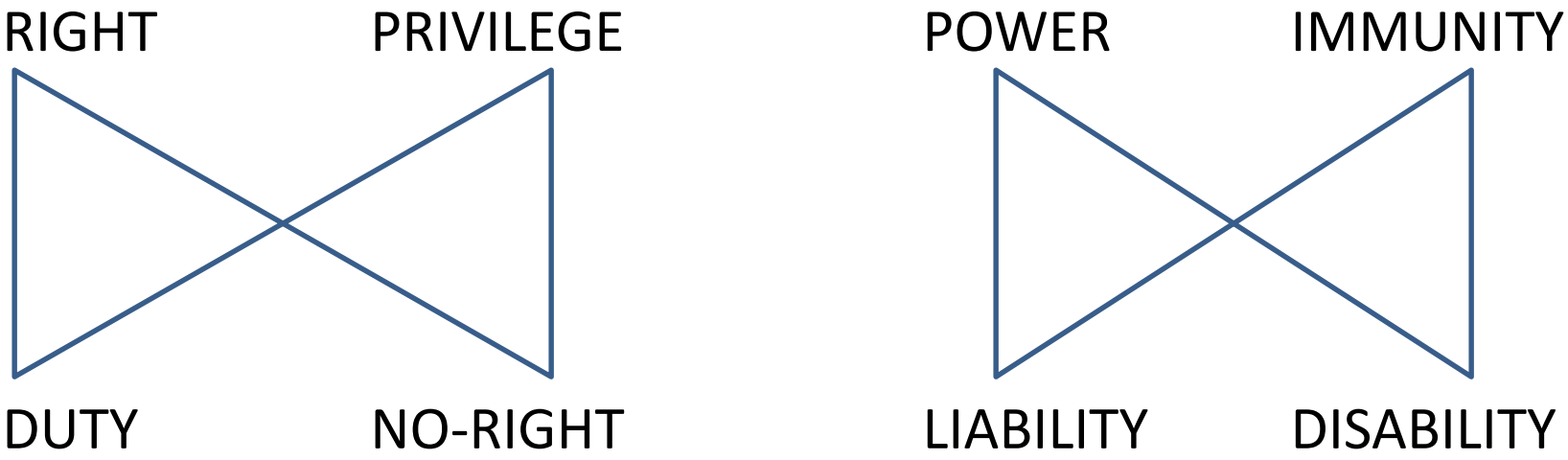
A HAS A LIABILITY TO B

B can stimulate the giant's conduct with respect to himself and A

Glanville Williams useful *graphic* interpretive abduction of Hohfeld's system

Glossary: ' | ' signals correlative relation

'\' or '/'signals opposite relation



In my outline . . .

I have now completed

presenting Hohfeld's system as a system of *rights as logical axioms*

and I now turn to

(2) Application of the Hohfeld philosophical explanatory system to

(a) "contract" in *Wright v. Newman* (Georgia S. Ct.)

Hohfeldian philosophical abduction of *Wright v. Newman*

- In this case Kim Newman sought to recover child support for Newman's daughter and son from Bruce Wright, with whom she had for time cohabited, but to whom she was not and had never been married. Wright admitted that, as DNA testing indicated, he was the natural father of the daughter.
- But the DNA test also indicated that he was not the natural father of Newman's son, and after supporting the boy for some time, he discontinued that support when his relationship with Newman ended. Newman brought an action for Wright to pay child support for both children.
- The trial judge found in favor of Newman. In ordering Wright to pay support also for Newman's son the judge referred to Wright's "actions in having himself listed on the child's birth certificate, giving the child his surname and establishing a parent-child relationship....," which actions, in the judge's view, "allow[ed] the child to consider him his father and in so doing deterr[ed Newman] from seeking to establish the paternity of the child's natural father[,] thus denying the child an opportunity to establish a parent-child relationship with the natural father."

Hohfeldian philosophical abduction of *Wright v. Newman*

- On appeal to the Georgia Supreme Court, Wright challenged the trial judge's order requiring him to pay child support for Newman's son. Justice Carley, for the majority, affirmed the trial judge's award to Newman for Wrights payment for her son. There was a concurrence by Justice Sears and a lone dissent by Chief Justice Benham.
- Justice Carley, for the majority, considered several possible legal explanations of the relation between Newman and Wright under which Wright would be legally obliged to pay support for the boy:

  (1) if Wright were the boy's natural father

  (2) if Wright had formally adopted the boy

  (3) if Wright had "virtually adopted" the boy.

- The justice concludes that none of these three explanations was adequate in this case – Wright was neither the natural nor the formally adoptive nor the virtually adoptive father.

Hohfeldian philosophical abduction of *Wright v. Newman*

- But the court considered two other possible explanations of the legal relation between Newman and Wright according to which Wright might be obliged to pay support for the boy – explanations that seem not to have been raised or litigated at the trial level:

  (4) if Wright had made a promise to pay for child support that was part of a bargained for exchange and met the requirement of a writing

  (5) if Wright had made a promise to pay for child support that was enforceable under a reliance doctrine in the state's statutorily codified promissory estoppel law

- Justice Carley concludes that explanation (4) was not adequate in this case because "[t]here was no formal written contract whereby Wright agreed to support Newman's son."
- However, the justice concludes that explanation (5) was adequate, both because state law on promissory estoppel was available to explain the legal relation between Newman and Wright *and* because the facts of the case, as found by the Supreme Court – even though this theory of the case (legal explanation (5)) was never argued below, so that the trial court did not find any fact explicitly under the criteria specified by state the statutory promissory estoppel rule -- permitted imposition of child support on Wright for the boy.

Hohfeldian philosophical abduction of *Wright v. Newman*

Consider the legal relations between Newman (mother) and Wright (boyfriend) before Wright made the promise and before Newman relied on it in the way specified by the Georgia promissory estoppel statute

In the Hohfeld explanatory scheme

The question 'Did Wright have an obligation to pay Newman child support for the boy?' is a **duty-or-privilege question** **[duty-privilege Hohfeldian axiomatic jural opposites]** question

> **the Hohfeldian answer** is no, Wright was **privileged** not to pay and **Newman had a no-right** to recover child support from him for the boy **[privilege-no-right Hohfeldian axiomatic jural correlatives -- the Giant would not help Newman]**

The question 'Did Wright have an obligation to promise to pay child support for the boy?' is focused on the same grid

> **the Hohfeldian answer** again is no, Wright was **privileged** not to promise and **Newman had a no-right** against him that he promise **[privilege-no-right Hohfeldian axiomatic jural correlatives -- the Giant would not help Newman]**

Hohfeldian philosophical abduction of *Wright v. Newman*

Consider the legal relations between Newman (mother) and Wright (boyfriend) before Wright made the promise and before Newman relied on it in the way specified by the Georgia promissory estoppel statute

In the Hohfeld explanatory scheme

The question 'Was there anything Newman could do (without Wright's participation) to change Wright's privilege of not paying child support for the boy?' is a power/liability **[power-liability Hohfeldian axiomatic jural correlatives]** or immunity/disability **[Hohfeldian axiomatic jural correlatives]** question

> **the Hohfeldian answer is no** there was nothing Newman could do, other than implore, cajole, etc. [**the Giant would not help Newman]**

Newman was **disabled [power-disability Hohfeldian axiomatic jural opposites]** from changing Wright's **privilege** of not paying support for the boy and **Wright had an immunity [immunity-liability Hohfeldian axiomatic jural opposites]** to Newman's capacity to change that **privilege** into a **duty [privilege-duty Hohfeldian axiomatic jural opposites]**

In other words, as Wright interacted with Newman at this point, he could *explain* to himself, in Hohfeld terms, "I have a **privilege** of not paying Newman for support of the boy, and there is nothing Newman can do to change that state of affairs – the Giant won't help her by changing my **privilege** into its **opposite**, namely a **duty** to her to pay support for the boy"

In Hohfeld terms, this inner dialogue of Wright would be a way of saying Wright had an **immunity** to having his **privilege** of not paying child support for the boy changed by Newman into a **duty (privilege-duty Hohfeldian jural opposites)** .

Hohfeldian abduction of *Wright v. Newman*

Now consider the legal relations between Newman (mother) and Wright (boyfriend) *after* Wright made the promise and before Newman relied on it in the way specified by the Georgia promissory estoppel statute

In the Hohfeld explanatory scheme

When there is, in the view of the Giant, *sufficient evidence* Newman relied on Wright promise in the way specified by the Georgia promissory estoppel statute:

The legal relationship changes since Newman now had a **power** of changing Wright's **privilege** not to pay support for the boy into a duty to pay support for the boy.

From Wright's perspective, after he makes the promise to pay support for the boy, he is then under a **liability** of having his **privilege** of not paying support for the boy changed to a **duty [privilege-duty Hohfeldian axiomatic jural opposites]**

In my outline . . .

I have now completed

(2) Application of the Hohfeld philosophical explanatory system to *Wright v. Newman* (Georgia S. Ct.)

and I turn to

(3) To show an interesting and important limit of Hohfeld's system of philosophical explanation by comparing it to the "Logocratic Method," also a system of philosophical explanation of argument (legal and otherwise)

Logocratic Analysis of Legal abduction, contrasted to Hohfeldian abduction of *Wright v. Newman*

To understand the difference between the *Logocratic analysis of legal abduction* and Hohfeldian abduction of *Wright v. Newman*, consider what the Giant must be persuaded to accept in order to help Newman by changing Wright's privilege not to pay support for the boy into a duty to pay support for the boy.

The Giant [the Georgia Supreme Court] must be *persuaded* that there is sufficient evidence of each element Georgia promissory estoppel statute (the first rule):

§ 13-3-44. Promise reasonably inducing action or forbearance

(a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

P: There is a promise.

R: There is a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person

D: There is a promise which does induce such action or forbearance action or forbearance on the part of the promisee or a third person

I: Injustice can be avoided only by enforcement of the promise.

K: There is contractual obligation [i.e., there is an enforceable promise, see Restatement (Second) of Contracts § 1]

Logocratic Analysis of Legal abduction, contrasted to Hohfeldian abduction of *Wright v. Newman*

According to the Logocratic Method (itself a philosophical abduction, as is Hohfeld's), a legal abduction of *Wright v. Newman* (an inference to the best legal explanation) involves determining whether each there is sufficient evidence of each logical element of the applicable statutory rule.

This **legal abduction** is a very different kind of abduction than Hohfeld's **philosophical abduction**, although the Hohfeld abduction is a function of the legal abduction.

Corbin, "Jural Relations" makes this point (quoted by Schlag "How To" p. 189):

"In all our discussions of legal analysis, in all our attempts at defining terms or at coining them, we should never cease to bear in mind and give warning that mere legal analysis does not by itself enable us to tell what the law is in a single case. The ability to recognize and to define rights and duties, powers and privileges, and the other relations, does not tell us whether or not they exist in a given case or what facts operate to create them. Rules of law are not constructed by mere analysis and mere logic. As a basis for such construction the judges may appeal to "natural justice" or some similar abstraction, to public policy, to "eternal" justice, to the "right" as opposed to wrong, to the settled convictions of the community, to business and social custom, to the mores of the time."

The legal abduction involves a use of deduction, to apply the rule to the facts

§ 13-3-44. Promise reasonably inducing action or forbearance

(a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

P: There is a promise.

R: There is a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person

D: There is a promise which does induce such action or forbearance action or forbearance on the part of the promisee or a third person

I: Injustice can be avoided only by enforcement of the promise.

K: There is contractual obligation [i.e., there is an enforceable promise, see Restatement (Second) of Contracts § 1]

J: Justice requires a limit on the remedy granted for breach

L: There is a limit on the remedy granted for breach

Rule 1

$(P \bullet R \bullet .D \bullet I) \supset K$ [(If P and R and D and I) then K]

Rule 2

$J \supset L$ [If J then L]

Justice Carley's legal abduction of *Wright v. Newman* facts

§ 13-3-44. Promise reasonably inducing action or forbearance

(a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Justice Carley's rulification (we must use interpretive abduction here):

ε1 "The evidence authorizes the finding that Wright promised both Newman and her son that he would assume all of the obligations and responsibilities of fatherhood, including that of providing support".

ε2 "The evidence further authorizes the finding that Newman and her son relied upon Wright's promise to their detriment".

ε3 If, after 10 years of honoring his voluntary commitment, Wright were now allowed to evade the consequences of his promise, an injustice to Newman and her son would result.

A type of critique of Justice Carley's legal abduction that is distinct from Hohfeld's "Logocratic Critique"

The Logocratic critique is best explained by reference to the concept of "Logocratic Virtue"

Logocratic Method and Logocratic Virtues

Logocratic Method

The Logocratic Method is a systematic method for assessing the strengths and weaknesses of arguments (in precisely defined senses of 'strength' and 'weakness') – which can enable any analyst of argument (including, for legal arguments, lawyer, law student, judge, scholar, citizen) expertly – virtuously -- to assess, analyze, and deploy arguments for the paradigmatic uses that analysts have for arguments.

Logocratic Method

The Logocratic method is applicable to any type of argument

The method helps develop and sharpen skills for evaluating the virtues and vices of arguments including the strengths and weaknesses of arguments (including, but not limited to legal arguments)

The conceptions of *virtue* that inform and animate the concept of Logocratic virtue

As we shall use the term, "virtue" is *functional excellence*.

Starting point for the conception of virtue at use in the Logocratic Method: Aristotle's conception of *arete* (Greek: ἀρετή), translated 'virtue' or 'excellence'

If some object x is an F (e.g., a knife), then the virtue of x as an F is that characteristic of x that makes x a **good F** (e.g., in a knife its virtue will be cutting well, durability, etc., that make it a good knife)

x's virtue reflects its good performance of the function of Fs

Many different types of entities can have virtues – that is, they can be *bearers of virtue (or vice)*.

Some examples of bearers of virtue

(i) objects -- knives, hammers, spoons . . .

(ii) institutions schools and universities, *legal institutions* . . .

example of an analysis of the virtue of legal institutions

"Regarding the rule of law as the inherent or specific virtue of law is a result of an instrumental conception of law. The law is not just a fact of life. It is a form of social organization which should be used properly and for the proper ends. **It is a tool in the hands of men differing from many others in being versatile and capable of being used for a large variety of proper purposes. As with some other tools, machines, and instruments a thing is not of the kind unless it has a least some ability to perform its function. A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently**. Like other instruments, the law has a specific virtue which is being morally neutral as to the end to which the instrument is put. **It is the virtue of efficiency; the virtue of an instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such."**

Raz, *The Rule of Law and Its Virtue*

Many different types of entities can have virtues – that is, they can be *bearers of virtue (or vice)*.

(iii) students

(iv) citizens

(v) politicians

(vi) professionals – lawyers, doctors, judges, professors . . .

(vii)Arguments* and *arguers

(viii)there are various kinds of *purpose* one might have for arguments, and those purposes guide our judgments about what is *virtuous,* that is, what is *functionally excellent* in arguments.

Logocratic Virtues

We are concerned centrally with two "bearers of virtue" (and vice):

(1) **Arguments** as functionally excellent (or not) instruments

(2) **Arguers** as functionally excellent (or not)

- (a) analysts of arguments
- (b) wielders of, manipulators of arguments.

Note that skill in (a) promotes skill in (b)

Note that skill in (b) includes the capacity to engage effectively in *dialectical competitions* of arguments, of which adversarial legal argument is a paradigm example (but not the only example)

Logocratic virtues

There are four "modes of logical inference" (also "logical forms") of arguments:

(i) Deduction

(ii) Induction

(iii) Analogy

(iv) Abduction (also, "inference to the best explanation")

includes inference to the best *legal* explanation, the fundamental logical form of applying law to facts – example in paper from *Wright v. Newman*

I have been arguing (abducing) that Hohfeld relations are a type of abduction

Logocratic virtues

Mode-general (also called, “mode-independent”) virtues are virtues (or vices – please note, for every reference to virtue there is a corresponding conceptual antonym, “vice”) that are properties of any argument in any logical form.

Logocratic virtues

Mode-specific (also called, “mode-dependent”) virtues are virtues that are properties that pertain to one of the specific modes of logical inference (logical forms), deduction, induction, analogy, or abduction.

mode-specific (mode-dependent) virtues of arguments: deduction

Validity: whenever all the premises are true, the conclusion must be true, or, it's not conceivable that all the premises are true and the conclusion is false.

mode-specific (mode-dependent) virtues of arguments: induction

What makes an inductive argument (and, for that matter, an analogical and abductive argument) virtuous or not is the subject of considerably less agreement than there is regarding validity as the virtue of a deductive argument.

Among the criteria that I (and many) analysts consider virtues of inductive generalizations are a sufficient number of instances generalized over, so as to avoid the "fallacy of hasty generalization"; but there is no one number of instances required in all virtuous inductions, and the number will vary according to argumentative context in a way that itself must be discerned using the very same methods, under the aegis of what Rawls, following Nelson Goodman, labelled "reflective equilibrium." See Goodman, Fact, Fiction, and Forecast

Among the other important virtues of inductive generalizations are that there is some kind of explanatory relation between the predicates that the inductive hypothesis ('all S are W', or whatever its specific form) links. Nelson Goodman's "grue" paradox illustrates this point.

mode-specific (mode-dependent) virtues of arguments: analogy

In order to have rational cogency, arguments by analogy operate by discovering (analogical abduction), articulating, and then applying a *rule* (by **deduction** or instead by **defeasible modus ponens**) that links the presence of the shared characteristic to the inferred characteristic (call this the "analogy-warranting rule.")

Perhaps the most important virtue of an analogical argument is that the analogy-warranting rule is adequately justified by another rule (called the 'analogy-warranting rationale') that establishes a good reason to license an inference from possession of the shared characteristics in sources and targets of the analogy to possession of the inferred characteristic.

mode-specific (mode-dependent) virtues of arguments: abduction

cogent application of the expert point of view from which an explanation is offered -- only a start on a complex abduction of abduction, but . . .

I'm now in a position to illustrate the Logocratic critique of Justice Carley's legal abduction in *Wright v. Newman*

Recall Justice Carley's legal abduction of *Wright v. Newman* facts

§ 13-3-44. Promise reasonably inducing action or forbearance

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Justice Carley's rulification (we must use interpretive abduction here):

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ε3 If, after 10 years of honoring his voluntary commitment, Wright were now allowed to evade the consequences of his promise, an injustice to Newman and her son would result.

Logocratic Critique of Justice Carley's legal abduction

Justice Carley's interpretation of these rule elements (which *we* must interpret, and so abduce) in effect **substantially rewrites** the statutory element from what I've labelled

> '**I**': *injustice can be avoided only by enforcing the promise*

to the less demanding

> **T**: *there is an injustice*.

Logocratic vice in Justice Carley's abduction

With this rewriting in mind, notice again his abduction:

ε1 "The evidence authorizes the finding that Wright promised both Newman and her son that he would assume all of the obligations and responsibilities of fatherhood, including that of providing support".

ε2 "The evidence further authorizes the finding that Newman and her son **relied upon Wright's promise to their detriment".**

ε3 If, after 10 years of honoring his voluntary commitment, Wright were now allowed to evade the consequences of his promise, **an injustice to Newman and her son would result**.

Logocratic vice in Justice Carley's abduction

Perhaps the Justice can be forgiven, since the statute (and *Restatement (Second) of Contracts § 90*) seem to have made the literal element of the rule too strong for what this equitable rule was intended to accomplish, and then rushed to ameliorate it with a qualification in a second rule, "The remedy granted for breach may be limited as justice requires," which I've represented above in non-deontic propositional deductive logic.

This is at the very least in some tension with the rest of the provision, since by the time a judge as concluded that all of the jointly sufficient conditions (elements P, R, D, and I) for enforcement (element K) are true, she seems perforce to have concluded that there is no way to meet the requirements of justice other than by enforcing the promise – what, consistent with that conclusion already reached, could be a "limit that justice requires"?

I note here, however (is this an "however" circumstance?), the force of this observation by Pierre Schlag: "The main problem here, as I see it, is that the achievement of cogent legal analyses on the one hand and workable legal regimes on the other are in many respects antithetical ideals: "[I]f legal regimes had to follow the precise dictates of analytical probity, their efficacy and usefulness would suffer greatly, the converse is also true: if legal analysis had to hew to the semantics and grammar of the official judicial idioms, intellectual endeavor would be greatly compromised." Schlag, "How To" p. 226

Distinction of but also relation of Logocratic vice (in Logocratic abduction, inference to the best Logocratic explanation) from Hohfeldian mistake

Justice Carley does not seem to make any Hohfeldian "mistakes," that is, commit any of the conceptual errors that are the central concern Hohfeld's abduction.

Distinction of but also relation of Logocratic vice (in Logocratic abduction, inference to the best Logocratic explanation) from Hohfeldian mistake

What is an example of a Hohfeldian mistake, according to Hohfeldian abduction?

An example of what Schlag calls “abuse of deduction” will illustrate a Hohfeldian mistake.

This example will also allow me to relate Hohfeldian mistakes to Logocratic vices.

Intersection of Hohfeldian and Logocratic vice: "abuse of deduction"

Here's an example of a mistake in legal reasoning that would consitute both a **Hohfeldian mistake** according to the Hohfeld abduction and a **Logocratic vice** according to Logocratic abduction.

I have a "right" to park in an empty space by a Cambridge street meter.

But in the Hohfeld abduction, this is, by itself, a Hohfeldian **privilege**, not a **claim right**.

And the Giant (the Cambridge government – police and judiciary) has the **power** to bundle with my **privilege** to park there a **duty on others** to allow me to park there.

According to Hohfeld axioms, someone else has a **duty** to allow me to park in the space if and only if I have a **claim-right** to park in that space.

So if the Giant (Cambridge government) did bundle with my **privilege** to park in the space a duty on others to allow me to park there, that would mean that I have **not only a privilege** to park there, **but also a claim right to do so**.

Hohfeldian mistake: “abuse of deduction”

At risk of flogging an understood concept, I’ll represent this same point:

When I have the **privilege** to park there, it is *not the case that I therefore have a **claim-right** to park there.*

Put another way, it would be a Hohfeldian mistake to *infer, deductively,* from my **privilege** to park there that I have a **claim-right** to park there.

Recall that one Hohfeldian axiom says that I have a **claim-right** to do some action (like parking in an empty spot) **if and only if and only if** someone else, or some whole group of people (**multital** rights against a group), has a **duty** to allow me to park there.

But if Cambridge (the Giant) give me the privilege to part there but does not also bundle that privilege with a claim-right to park there, along with, necessarily, a duty on others to let me park there, then it would be a mistake – an “abuse” in Schlag’s terms of *deduction* to infer by deductive inference from my privilege to park there a claim right to part there and a correlative *duty on others* to part there.

Hohfeldian mistake: “abuse of deduction”

If I did have a **claim right**, then, under Hohfeldian correlative axioms, others -- a group $B_1, B_2, B_3 \ldots B_n$ in “multital” relations -- would be under a duty to let me park there.

Although there are *some* **duties** on other people bundled with my privilege to park there (specified by, at least, tort and criminal law – they can’t for example ram my car to prevent me from parking there lest they rise angering the Giant) , there is no general **duty** on them to allow me to park there.

Note that there is a commonly known practice by which private persons or corporations do sell a bundle of claim-rights and privileges for parking.

Can someone think of an example of this legal structure?

Answer: if I buy, for example, from a garage corporation, a particular parking space.

Hohfeldian mistake: “abuse of deduction”

Summary: My privilege to park in a metered space on the Cambridge street *could* be bundled by the Giant (Cambridge) with a duty on others to allow me to park three

But that would require a separate exercise of a **power** from the Giant that bundled to my privilege to park there with a claim right against others that they allow me to park there.

Without this extra grant, by itself, my privilege to park there does not by itself, automatically, conceptually, include a general duty on others to allow me to park there.

Hohfeldian vice: “abuse of deduction”

To reason otherwise, trying to infer deductively from my **privilege** to park there a **duty** on others to allow me to park there would be to make a **Hohfeldian mistake**.

This is the kind of vice that Hohfeld discusses in his analysis of *Quinn v. Leathem*, Hohfeld (1913)

Also presented in detail by Schlag, “How To”

Hohfeld on abuse of deduction in *Quinn v. Leathem (from* Schlag, "How To . . " p. 205 (see also Wikipedia entry)

Quinn v. Leathem, British House of Lord decision 1901

Defendant, Quinn, a union organizer, sought to have a butcher replace his employees with union labor.

Quinn and his fellow organizers threatened to strike one of Leathem's customers, another butcher, if the latter did not stop buying meat from Leathem.

This other butcher, Munce, complied with Quinn's threat, and Leathem sustained losses, thus leading to his lawsuit against Quinn.

Hohfeld uses this case and Lord Lindley's opinion to illustrate the fallacious conflation of **rights** and **privileges**.

Hohfeld on abuse of deduction in *Quinn v. Leathem (from* Schlag, "How To . . " p. 205 (see also Wikipedia entry)

Lord Lindley reasoning in *Quinn* (as quoted by Hohfeld (1913):

"The plaintiff had the ordinary ***rights*** of the British subject.

He was ***at liberty*** to earn his living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people.

This ***liberty*** involved *the* ***liberty*** to deal with other persons who were willing to deal with him.

This ***liberty*** is *a* ***right*** recognized by law; **its *correlative* is the general *duty* of every one not to prevent the free exercise of this *liberty* except so far as his own liberty of action may justify him in so doing**.

But a person's ***liberty*** **or** ***right*** to deal with others is nugatory unless they are at **liberty to deal with him if they choose to do so**. Any interference with their liberty to deal with him affects him."

Hohfeld on abuse of deduction in *Quinn v. Leathem (from* Schlag, "How To . . " p. 205 (see also Wikipedia entry)

The Hohfeldian mistake here (from Hohfeld (1913)):

"A "**liberty**" considered as a **legal relation** (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as **privilege**, and certainly that is the fair connotation of the term as used the first three times in the passage quoted.

It is equally clear, as already indicated, that such a **privilege or liberty** to deal with others at will **might very conceivably exist without any peculiar concomitant rights against "third parties" as regards certain kinds of interference**.

Whether 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.

The only correlative logically implied by the privileges or liberties in question are the "no-rights" of "third parties."

It would therefore be a *non sequitur* to conclude from the mere existence of such liberties that "third parties." are under a *duty* not to interfere, etc.

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Legal Realist modernist claims inspired and enabled by Hohfeld's analysis, e.g.:

Holmes

Dewey

Felix Cohen

Arthur Corbin

Holmes banefully overbroad and influential version of this Hohfeldian point

OLIVER W. HOLMES, Jr. THE COMMON LAW 1 (1881).

"The object of this book is to present a general view of the Common Law. To accomplish that task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

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Problem: sloppily vague use of term ‘logic’ and false opposition of “logic” and “experience”

Here’s the truth!:

“The life of the law is, and should be, logic suffused by experience and experience tempered by logic."

from Brewer, "Traversing Holmes' Path toward a Jurisprudence of Logical Form" (2000)

(See this article for a more detailed critique of Holmes misunderstanding of “logic”)

Legal Realist fellow traveler John Dewey's similar (and more surprising) confusion, in Dewey, "Logical Method and Law"

"Take the case of Socrates being tried before the Athenian citizens, and the thinking which had to be done to reach a decision. Certainly the issue was not whether Socrates was mortal; the point was whether this mortality would or should occur at a specified date and in a specified way. Now that is just what does not and cannot follow from a general principle or a major premise. Again to quote Justice Holmes, "General propositions do not decide concrete cases." No concrete proposition, that is to say one with material dated in time and placed in space, follows from any general statements or from any connection between them."

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Wrong!

Immediate and fairly straightforward counter-example

Premise: Everything is identical to itself at all times and in all places.

Conclusion: Socrates was identical to himself in Athens in 399 B.C.

This argument has the logical form of what logicians refer to as the inference rule of "universal instantiation"

$$(x)\ Fx$$

$$\therefore Fa$$

If so, is Dewey committed to denying that the conclusion of this argument follows deductively from its premise?

It's hard to imagine a more general proposition than the proposition asserted in the premise of this argument.

And the conclusion also seems to be a paradigm instance of a "concrete proposition" in Dewey's sense.

For further analysis of Holmes and Dewey on this point, see Brewer, On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey, 34 John Marshall L. Rev. 9, 10-11 (2000).

A much more trenchant and coherent Legal Realist Modernist inspiration from Hohfeld:

Holmes, "Privilege, Malice, and Intent," 8 HARV. L. REV. I, 7 (1894) :

"Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree."

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"In numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof.

They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defense is ready."

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A much more trenchant and coherent Legal Realist Modernist inspiration from Hohfeld:

Felix Cohen, The Ethical Basis of Legal Criticism (1931)

suggesting that judges should

"shift the focus of our vision from a stage where social and professional prejudices wear the terrible armor of Pure Reason to an arena where human hopes and expectations wrestle naked for supremacy."

A much more trenchant and coherent Legal Realist Modernist inspiration from Hohfeld:

Corbin, "Jural Relations":

"In all our discussions of legal analysis, in all our attempts at defining terms or at coining them, we should never cease to bear in mind and give warning that mere legal analysis does not by itself enable us to tell what the law is in a single case. The ability to recognize and to define rights and duties, powers and privileges, and the other relations, does not tell us whether or not they exist in a given case or what facts operate to create them. Rules of law are not constructed by mere analysis and mere logic. As a basis for such construction the judges may appeal to "natural justice" or some similar abstraction, to public policy, to "eternal" justice, to the "right" as opposed to wrong, to the settled convictions of the community, to business and social custom, to the mores of the time."

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Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

(i) Hohfeldian analysis does not by itself tell one whether in a given case, actual or hypothetical, there are any

Hohfeldian correlatives:

right-duty

privilege-no-right

power-liability

immunity-disability

or any Hohfeldian opposites

right-no-right

privilege-duty

power-disability

immunity-liability

Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

(ii) To determine actual Hohfeld relations, one must do legal abduction, as we did, e.g., with *Wright v. Newman*

(iii) *Logocratic philosophical abduction* tells us that (ii) is true, as well as showing us how to do *legal abduction*

(I use and teach legal abduction centrally in my Contracts and Evidence classes – though I don't teach Hohfeldian analysis)

Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

(iv) There is, however, and important overlap between Logocratic method and Hohfeldian analysis, namely:

(a) *if* we accept the Hohfeld axioms for correlatives and opposites, and

(b) if we accept Hohfeld's *argufication* of, e.g., Justice Lindley's argument in *Quinn* using the Hohfeld axioms as a guide to his "fair formal representation" of Lindley's argument enthymeme, then Lindley's argument does have the Logocratic vice of being *internally weak*

Even though it was dialectically strong and rheorically strong

Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

From a Logocratic point of view, Justice Lindley's argument in *Quinn* was *internally weak* because it was, according to Hohfeld's analysis, a deductive argument that did not have the characteristic virtue of such an argument – namely, that whenever all the premises of the argument are true, the conclusion must be true

This is Hohfeld's point here:

> "The only correlative logically implied by the privileges or liberties in question are the "no-rights" of "third parties." It would therefore be a non sequitur to conclude from the mere existence of such liberties that "third parties" are under a duty not to interfere, etc. Yet in the middle of the above passage from Lord Lindley's opinion there is a sudden and question-begging shift in the use of terms. First, the "liberty" in question is transmuted into a "right," and then, possibly under the seductive influence of the latter word, it is assumed that the "correlative" must be "the general duty of every one not to prevent," etc."

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Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

From a Logocratic point of view, Justice Lindley's argument in *Quinn* was *dialectically strong* because it won the competition of legal abductions in which the argument for the conclusion that that the defendant union worker was liable for damages won against the argument that he was not.

Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

From a Logocratic point of view, Justice Lindley's argument in *Quinn* was also *rhetorically strong* in part because it **persuaded** the **authoritative referee** of the competition of arguments (the majority of the House of Lords Justices hearing the case to accept the legal abductions whose conclusion was that the defendant union worker was liable for damages.

Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

Regarding rhetorical strenght, note also that Hohfeld, in his genius, also offers an insight into the rhetorical seductiveness of Justice Lindley's argument:

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Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

Compare Hohfeld's point here about the rhetorical appeal of trying to infer claim-rights from privileges to a classic paper in philosophy of language, C.L Stevenson, "Persuasive Definition."

Logocratic Method philosophical abduction and Hohfeldian philosophical abduction compared and contrasted

Also compare Hohfeld's point here about the rhetorical appeal of trying to infer claim-rights from privileges to a very seductive argument in free-market evangelicalism (the reference to religion here seems to me literal, not metaphorical, see

Logocratic abduction and Hohfeld abduction: dialectical strength of arguments and the methodological significance of agony

"Conceptual agonophilia"

In general, conceptual agonophilia uses the fact of some kind of contest to **explicate a concept –** what kind of contest will depend on the concept at issue.

In jurisprudence, for example, conceptual agonophilia uses the fact that law is a product of conflict and contest as an effort to offer the best philosophical explanation of the concept of law.

Hohfeld's abductions are deeply conceptually agonophilic (emphasized by Legal Realists, Corbin, Cook, e.g., and CLS, as well explained by Singer and Schlag and many others)

Philosopher Stephen Toulmin's conceptually agonophilic, Logocratic friendly conception of the concept of argument

Even more pertinently for Logocratic abduction is philosopher and theorist of argument Stephen Toulmin "conceptually agonophilic" explication of *the concept of argument.*

Toulmin's agonophilic conception of the concept of "argument" (cont.)

"Indeed, one may ask, is this really an analogy at all? When we have seen how far the parallels between the two studies can be pressed, we may feel that the term 'analogy' is too weak, and the term 'metaphor' positively misleading: even, that law-suits are just a special kind of rational dispute, for which the procedures and rules of argument have hardened into institutions. Certainly it is no surprise to find a professor of jurisprudence taking up, as problems in his own subject, questions familiar to us from treatises on logic—questions, for instance, about causation—and for Aristotle, as an Athenian, the gap between arguments in the courts and arguments in the Lyceum or Agora would have seemed even slighter than it does for us."

"agonophilia" and "agonophobia“: instrumental

In addition to conceptual agonophilia, there is also *instrumental* agonophilia.

Instrumental agonophilia: Valuing contest as an instrument for achieving some goal.

Examples of instrumental agonophilia

(i) allegedly, truth in the adversary systems of evidence and procedure.

(ii) the basic "testimonial infirmities" of the U.S. hearsay rule

(iii) the U.S Constitution Sixth Amendment Confrontation Clause: "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

dialectical strength and the methodological significance of agony

"agonophilia" and "agonophobia": stylistic

In addition to conceptual and instrumental agonophilia there is also *stylistic* agonophilia.

Stylistic agonophilia: Sharp confrontational style of writing, speaking, arguing.

Examples of stylistic agonophilia,

(i) U.S. Supreme Court Justice Antonin Scalia (388)

> "Asked in 2013 why he writes such sharp dissents, Scalia replied that he writes them for law students: "They will read dissents that are breezy and have some thrust to them." The clarity and vigor of Scalia's opinions call to mind Nietzsche's comment that "it is not the least charm of a theory that it is refutable" (then it "attracts more subtle minds"): Scalia opinions definitely have charm, and they definitely draw attacks in the academy and in popular media (you can judge for yourself whether the attackers have "more subtle minds"). See generally Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Princeton University Press 1998) (essays on originalism by Scalia, Gordon Wood, Mary Ann Glendon, and Ronald Dworkin)." [from Mueller and Kirkpatrick, Evidence Under the Rules (8th ed. 2015]

(ii) Nigel Farage, speech to European Parliament immediately after "Brexit" vote [opening, and especially 4'15" ff] or here

There is great explanatory value in recognizing the category of contest in the dialectical competitions of arguments, including these "agonophilic heuristics"

-- for any dialectical competition of arguments, one should be aware of:

(i) The rules of the competition (formal or informal) – note that in law, some of the most important rules of dialectical competition of argument are supplied by rules of evidence and procedure.

(ii) Elections in "democratic" polities can also be usefully modeled as dialectical competitions of arguments – the rules for winning are the voting rules of the election (often what arguments are voted on is harder to discern than, e.g., law-court competitions of litigants or multi-member judicial panels (see, e.g., *Wright v., Newman* majority and dissenting arguments)

(iii) The set of eligible competitors (internal competition, judge, philosopher, lawyer, external competition, prosecutor or plaintiff-defendant)

There is great explanatory value in recognizing the category of contest in the dialectical competitions of arguments, including these "agonophilic heuristics"

-- for any dialectical competition of arguments, one should be aware of:

(iv) Hohfeld abductions: relations between agents and patients (A.R. Anderson, The Logic of Hohfeldian Propositions (1970): "In each case the answer will involve a *patient* of some sort, some entity which is the **beneficiary**, or **maleficiary**, or perhaps just the **recipient**, of the act said to have been executed by the agent, i.e., of *what the agent did to, or for, him.*"

Logocratic abduction contrasted with Hohfeld abudction

In the Logocratic system, for any dialectical competition of arguments, one should be aware that:

One of the most philosophically significant examples of dialectical competition is in *arguments about what is true*.

Thus, the "external" dialectical strength of an argument – *its arguably accurate version of the world*, is a counterpart to the "internal" strength of an argument. (E.g., the counterpart to the difference between valid and sound deductive arguments.)

Hohfeld offers no account of the dialectical contests of truth.

mode-general (mode-independent) virtues of arguments: rhetorical strength

Another logical-form independent goal-purpose for argument: use argument to persuade a target audience or audiences. An argument that achieves this goal-purpose has *rhetorical strength*

Rhetorical strength

Logocratic concept: "**rhetorical constructivism**" – an appeal to deeper values held by the audience, shared (or claimed to be shared) by arguer, using those deeper values as leverage for changing other more lightly held values by audience members

e.g, Martin Luther King, Jr's classic “I have a dream” speech (28 August, 1963) appeal to equality, iconic Declaration of Independence (“all men, yes white men as well as white men, were guaranteed the unalienable right to life, liberty and the pursuit of happiness”), Lincoln's Gettysburg Address ("fivescore years ago . . . ") to appeal to whites to change their less deeply held believe that Jim Crow and other kinds of racial discrimination were socially, politically, legally acceptable.

Logical independence of three mode-independent types of argument strength (internal/epistemic/inferential, dialectical, rhetorical) with one important exception

The three types of strength are logically independent

This is Plato's complaint about Sophists, masters of rhetoric: "make the weaker argument appear to be the stronger"

Make internally/inferentially/epistemically weak argument

Dialectically strong (court, deliberative assembly)

Rhetorically strong (court, deliberative assembly)

Logical independence of three mode-independent types of argument strength (internal/epistemic/inferential, dialectical, rhetorical) with one important exception

One exception to this independence:

The "referee" of dialectical competition (e.g., judge, judge + jury, electorate) must be persuaded to accept a dialectical competitor's abduction, e.g., a litigant's legal abduction

example in *Wright v. Newman:* majority – voting rule of dialectical competition – must be persuaded to accept promissory estoppel as legal abduction of Wright's and Newman's transactions

Hohfeld offers no account of the role of rhetorical strength of argument in motivating "the Giant"

A perhaps surprising conceptual agonophilic omission in the Hohfeld abduction: no account of "the Giant"

Noted in Finnis, "Some Professorial Fallacies About Rights" (1972):

> "I remain throughout within the Hohfeldian framework, treating legal relations as three-term relations between two persons and one activity.
>
> Hohfeld "Axiom 1": "Each Hohfeldian relation (e.g. of claim-right: duty, or of privilege: no-right) concerns only one activity of one person."

Corbin, Arthur L., JURAL RELATIONS AND THEIR CLASSIFICATION (1921): "It is pleasant to observe Professor Kocourek's recognition of the fact that a jural relation is always that of one individual person to another. "

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Corbin, JURAL RELATIONS AND THEIR CLASSIFICATION (1921):

"It is not meant by the foregoing that this is the only possible usage of the terms in question. It is believed to be the actual usage, and that it is of advantage to abide by it. **According to this usage, there is no law and there can be no legal relations of any sort where there is no organized society. The fact that is essential is the existence of societal force; and the question that is of supreme interest is as to when and how that force will be applied.** What will the community of ***228** citizens cause their agents to do. It is this multitude of busy little fellow citizens who constitute "society" or "the state," and **it is their cumulative strength that constitutes the personified giant whose arm may be so powerful to aid or to destroy. In law, the ultimate question is, what will this giant do ?**"

A perhaps surprising conceptual agonophilic omission in the Hohfeld abduction: no account of "the Giant"

(1) A has a right against B

The giant will aid A against B

iff

B has a duty to A

the giant will aid A against B

&

(2) A has a privilege against B

the giant will not aid B against A

iff

B has a no-right against A

the giant will not aid B against A

&

(3) A has a power against (?) B

A can stimulate the giant's conduct with respect to himself and B

iff

B has a liability to A

A can stimulate the giant's conduct with respect to himself and B

&

(4) **A has an immunity to B**

B cannot stimulate the giant's conduct with respect to himself and A

iff

B has a disability with respect to (?) A

B cannot stimulate the giant's conduct with respect to himself and A

A perhaps surprising conceptual agonophilic omission in the Hohfeld abduction: no account of "the Giant"

Finnis, "Some Professorial Fallacies About Rights" (1972):

"The relevance of "legal remedies" to the defining terms of his schema is left entirely undetermined by Hohfeld. Further stipulative definitions (which he never provided) are required before the schema can be applied to the analysis of any concrete legal situations"

A perhaps surprising conceptual agonophilic omission in the Hohfeld abduction: no account of "the Giant" – Joe Singer's abduction of Hohfeld

"Hohfeld identifies eight basic legal rights: four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities).

'Rights' are **claims**, **enforceable by state power,** that *others* act in a certain manner in relation to the rightholder.

'Privileges' are **permissions** to act in a certain manner without being liable for damages to others and **without others being able to summon state power to prevent those acts**.

'Powers' are **state-enforced abilities** to change legal entitlements held by oneself or others, and

'immunities' are security from having one's own entitlements changed by others."

The structure of "abduction"

There is fair convergence among logicians and other theorists of argument about the basic structure of inference to the best explanation (abduction). In mid twentieth century philosophy, one of the first epistemologists and philosophers of science to put this logical form on the map, as it were, following the work of Charles Sanders Peirce, is Norwood Russell Hanson, who explicated the form of inference to the best explanation as follows:

Premise ε_1	Some surprising phenomenon *P* is observed.
Premise ε_2	P would be explicable as a matter of course if *H*
Conclusion h	Hence there is reason to think *H* is true

N. Hanson, *Patterns of Discovery* 86 (reprint 1979).

The structure of "abduction"

In still more recent discussions, one finds expressions of the convergent idea about the steps of inference to the best explanation (a friendly amendment, one might say, of Hanson's explication of the structure) in a work by philosophers and logicians such as in Josephson and Josephson, *Abductive Inference:*

"Abduction, or inference to the best explanation, is form of inference that goes from data describing something to a hypothesis that best explains or accounts for the data....

We take abduction to be a distinctive kind of inference that follows this pattern pretty nearly:

D is a collection of data (facts, observations, givens).

H explains *D* (would, if true, explain *D*).

No other hypothesis can explain D as well as H does

Therefore, H is probably true."

Josephson and Josephson, *Abductive Inference*

The structure of “abduction”

Logocratic explanation (itself a *philosophical abduction*) of abduction/inference to the best explanation

As noted, the name for this **mode of logical inference** is “inference to the best explanation” (also, “abduction”). As that name indicates, *explanation* is involved in this mode of logical inference.

Therefore, to understand IBE it will help us to have a basic understanding of he reasoning process of *explanation*:

Explanations are always offered from and according to the criteria of a "viewpoint."

The structure of Inference to the Best Explanation (“abduction”)

Literal point of view: "bird's eye"

"Literal metaphor" -- one might be said literally to have a point of view, that is, actually to occupy some position in space that gives one a particular visual vantage.

On the forest floor, one might see only trees

from a point atop a mountain, one might see the forest, and not only the trees

From a bird's-eye view (say, from an airplane), one might see the shape of a lake

from an astronaut's-eye view, the shape of the earth

The structure of Inference to the Best Explanation (“abduction”)

Expertise and "point of view"

An expert witness might tell a jury or judge what the facts are from the point of view of a

biologist

chemist

ballistician

psychiatrist

etc.

The structure of Inference to the Best Explanation (“abduction”)

Institutional or social point of view

One may also refer to the point of view of a particular type of actor in an institutional or other social setting – the point of view of:

a legislator

a judge

a lawyer

a citizen

a president

a "bad man" (see Holmes, *The Path of the* Law)

a parent

a child

a professor

a student.

The structure of Abduction (inference to the best explanation)

One might identify an enterprise conception of point of view.

- This phrase refers broadly to an enterprise in which an abductive reasoner operates.

- This point of view might even be understood as the point of view *of an enterprise*, an enterprise (using Larry Laudan model, Science and Values) in which particular **methods** of analysis are chosen and used to serve specified **cognitive goals and issue in judgments**.

Examples of such enterprises include:

systems of moral reasoning (on a cognitivist account of morality, at least, this yields the "moral point of view")

philosophical reasoning (the “philosophical point of view”)

systems of reasoning in support of business objectives (the “business point of view”)

the “military point of view”
the “economic point of view”
“the religious point of view”

Metaphysical-cum-logical point of view (issue in competing abductions of legal relations, Hohfeld, Kocourek

“the Hohfeldian point of view”

“the Hohfeldian point of view”

Hohfeld abductions are a type of philosophical abduction – an inference to the best philosophical explanation

Which understanding of philosophical explanation best explains Hohfeld’s philosophical abduction?

“Metaphysical realist” – focused on capturing mind-independent essences?

e.g., Plato, Leibniz

“Metaphysical anti-realist” – focused on capturing dependent descriptions?

e.g. Kant, pragmatists

– cf. Schlag: “To put it trenchantly, without Hohfeld, one simply misses a lot. In my view (and no, this is not the occasion in which I come out as a pragmatist), the great virtue of Hohfeld’s approach is not so much that Hohfeld’s analyses are right, but rather that they are useful and thought-provoking.