1

Hohfeld on Legal Language

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1.1 INTRODUCTION

Wesley Newcomb Hohfeld is well-known for maintaining that various terms in law – "rights," most prominently – confusingly designate a number of quite different legal relationships. But what is the source of the confusion? Is it that the terms themselves are vague or ambiguous, thus making them susceptible to multiple meanings? Or is it that the lawyers, judges, and commentators who use such terms are loose thinkers, needing careful analysis in order to clear their minds and their thoughts? Or is it something else?

My goal in this chapter is to examine one possible "something else" – a "something else" identified by Hohfeld, and discussed earlier by Oliver Wendell Holmes and later by Lon Fuller and Edwin Patterson, among others. This "something else" is the tendency of law and lawyers to use for legal purposes terms that are also used by ordinary people in their ordinary language. The fact that many legal terms have both nonlegal and legal aspects was thus, for Hohfeld, at least one source of the confusion that he sought to remedy. The aim of this chapter is, first, to explore Hohfeld's suggestive thoughts on legal language as technical language; and then to relate Hohfeld's thinking on legal technical language to those of others who have worried about the same problem; and, finally, to go beyond or around Hohfeld to discuss more generally the problem of technical language as it applies, in particular, to law.

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1.2 HOHFELD'S PROBLEM AND HOHFELD'S DIAGNOSIS

Hohfeld described the goal of his two now-prominent articles as, in part, helping people to "'think straight' in relation to all legal problems."[1] Of course, Hohfeld would not have thought that helping people, particularly lawyers, to think straight was his goal were it not for his implicit belief that the lack of straight thinking was widespread and in need of a remedy – a remedy that Hohfeld sought in his writings to provide.

Hohfeld not only aimed to offer a remedy for the lack of straight thinking in law but he also had views about the source of the problem. And one source, he argued, was the failure to recognize "the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being."[2] Here, Hohfeld might be understood as implicitly recognizing a distinction later drawn by H. L. A. Hart[3] and then by the philosopher John Searle[4] – the distinction between, to use Searle's terminology, law in its *constitutive* mode and law in its *regulative* mode. With respect to the former, we know that law often creates or constitutes relations, powers, and behavior that could not exist at all without the law. Just as it is impossible to hit a home run without the rules of baseball, or to place someone in check without the rules of chess, so too does law often constitute behavior that has no pre-legal (in the logical and not only the temporal sense) existence. Without law there would be, for example, no trusts, nor corporations, nor habeas corpus. In creating and labeling such behavior, law is operating in its constitutive mode by creating the rule-based framework that provides the conceptual foundation for such activities.

By contrast, law sometimes regulates or otherwise operates on[5] behavior whose existence is conceptually antecedent to and independent of law. It is possible, for example, to drive a car at eighty miles per hour without the law, and thus the

[1] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), as published in WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 23, 25 (Walter Wheeler Cook ed., 1919).

[2] *Id.* at 27.

[3] *See* H. L. A. Hart, *Definition and Theory in Jurisprudence*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21 (1983). *See also* M. Black, *The Analysis of Rules*, *in* MODELS AND METAPHORS 95, 123–25 (1962); B. J. Diggs, *Rules and Utilitarianism*, 1 AM. PHIL. Q. 32, 40 (1964); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

[4] JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 33–42 (1969). Searle couched his analysis as one about *rules*, but his distinction is equally applicable to language and to law. Indeed, it is possible that the distinction is not between types of rules but (and especially relevant here) between types of (or usages of) language. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 108–13 (2d ed. 1990) (1975); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL ANALYSIS OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 7 n.13 (1991).

[5] "Operates on" is infelicitous, but the idea is that law has the ability to authorize, empower, facilitate, and encourage as well as to constrain and to prohibit. In the broad sense, all of these deontic modalities may be thought of as forms of regulation, and although the terminology is not important, it is useful to understand that there are many things other than restricting or prohibiting that law can do with respect to antecedently defined and antecedently existing behavior.

legally-imposed speed limit regulates behavior whose very existence is analytically, conceptually, and empirically independent of the law. Similarly, people killed each other before the law even existed, and although "murder" may have a technical legal meaning (about which much more will be said presently), the laws against murder provide another example of law regulating conceptually antecedent behavior.

Against this background of the distinction between constitutive and regulatory law, Hohfeld's articles can be understood, at least with respect to the quotation above, as focusing largely on regulatory law. When Hohfeld refers to "the physical and mental facts that call such relations into being," he appears to be describing some state of affairs – we should not take the idea of "physical and mental facts" too literally – that pre-exists the law, and on which law then applies its rules and procedures. At the outset of his analysis, therefore, we see Hohfeld's recognition of the distinction between antecedent behavior, on the one hand, and the law's regulation of it, on the other.[6]

But what would lead Hohfeld to suppose that people would fail to recognize this distinction? For him, one source of the confusion was the similarity between the physical and mental facts, on the one hand, and the legal relationship between the two, on the other. In identifying this seeming similarity between two phenomena which he believed to be fundamentally different, Hohfeld might be understood as suggesting something closer to the realm of the constitutive, at least insofar as he appears to be implying that what law creates is different from that which exists without law. But here Hohfeld is hardly clear about what he has in mind, and his quotations from Pollock and Maitland do not help very much in clarifying the matter.[7]

Thus, Hohfeld is more than a bit opaque when he discusses the "extremely close" but apparently misleading "association" of the physical and mental relations with the legal relation, but he becomes considerably clearer when he turns to the other possible cause of the confusion – "the ambiguity and looseness of our legal terminology."[8] An especially good example, and one that Hohfeld himself uses, is the word "property." That word, he suggests, is used in one way in ordinary talk, where people tend to understand the word "property" as referring to something concrete, or tangible, as for example a piece of land or a physical object. But when the legal system talks of property, Hohfeld insists, it is referring not to something

[6] See also Hohfeld's observation that failing to distinguish "license" from "privilege" is "simply another of those innumerable cases in which the mental and physical facts are so frequently confused with the legal relation which they create." *See* Hohfeld, *supra* note 1, at 49–50. Hohfeld's use of the word "create" is curious, because it is not at all clear what it is for a pre-legal physical or mental fact to "create" a legal relation. Charitably, we might best understand Hohfeld as referring simply to the physical and mental facts that are the object of legal relations when law is operating in its regulative mode.

[7] Hohfeld, *supra* note 1, at 27–28.

[8] *Id.* at 28.

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physical, but instead to a collection of rights, responsibilities, duties, and relations, the collection of abstractions that we now often understand by use of the classic "bundle of sticks" metaphor.[9] The problem, Hohfeld suggests, is that the same word – "property" – is used both to refer to the ordinary and pre-legal facts – the object or the piece of land – and to the decidedly nonordinary and legally created relationships that law tends to group under the heading of "property." Failing to recognize this distinction, Hohfeld says, is a substantial cause of unclear thinking about law and about legal relations.

After developing the property example with an array of quotations from Coke, Blackstone, and many American judicial opinions, Hohfeld then argues that this confusion between the pre-legal entity and the relations that the law attaches to that entity (or to the physical and mental facts about it) is further exacerbated by the way in which the language that refers to both was originally used to refer only to the physical things, with the legal usage consequently being in some way "figurative or fictional."[10] And although "property" provides a particularly good example of Hohfeld's point,[11] one can see many other manifestations of the same phenomenon. Consider, for example, the idea of a sale. In Hohfeld's sense of the physical (a term which is itself a bit figurative or metaphorical in this context), a "sale" might be a physical – that is, pre-legal – act, as when someone transfers possession of some object in exchange for money. But a "sale" according to the Uniform Commercial Code (UCC) is something else, such that there might be sales in the pre-legal sense that are not sales according to the UCC,[12] and there might be sales under the UCC that people would not think of as sales in their ordinary pre-legal discourse.[13] So too with "security," where the definition of a security under, say, the Securities Act of 1933 is both under- and over-inclusive vis-à-vis the ordinary nontechnical sense of security that people might use in everyday discourse.[14] Or consider the idea of a "cause," where the legal understanding, in both the law of torts and the criminal law, varies from the pre-legal

[9] *See* Benjamin N. Cardozo, The Paradoxes of Legal Science 129 (1928); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?* 66 Vand. L. Rev. 869 (2013); William R. Vance, *The Quest for Tenure in the United States*, 33 Yale L.J. 248, 270 (1924). Hohfeld is often credited with creating the metaphor, but there seems little evidence to support that view. *See* Pierre Schlag, *How to Do Things with Hohfeld*, 78 Law & Contemp. Probs. 185, 190 n.17 (2015).

[10] Hohfeld, *supra* note 1, at 30.

[11] It is of some interest – or irony – that those who object these days to the enforcement of intellectual property rights by way of copyright law, especially, often trade on the same confusion, arguing that the very phrase "intellectual property" falsely suggests that words and images are similar to land and physical objects. *See, e.g.*, Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 539 (1999).

[12] *See Leake* v. *Meredith*, 267 S.E.2d 93 (Va. 1980) (alleged sale was under the UCC a non-sale lease transaction).

[13] *See Ebrahimi* v. *Rahmanan*, 566 N.Y.S.2d 26 (App. Div. 1991) (seeming partnership was, in fact, a sale).

[14] *See, e.g.*, *S.E.C.* v. *W.J. Howey Co.*, 328 U.S. 293 (1946) (share in an orange grove was a security for purposes of the Securities Act of 1933).

understanding and usage.[15] And the same applies to the conceptions of "search,"[16] "seizure,"[17] and "speech," for example, in constitutional law, where each of these words has a legal meaning that is again both under- and over-inclusive when compared to the ordinary nontechnical meaning. There are, for example, activities that are "speech" in ordinary language that are not "speech" under the First Amendment, as with the words of an oral contract or the words used to fix prices in violation of the Sherman Act.[18] And there are activities that are not "speech" in a pre-legal sense but are considered as "speech" for free speech purposes,[19] such as wearing an armband,[20] waving or burning a flag,[21] or dancing in the nude in an "adult" theater.[22]

Although Hohfeld uses the term "fictional" to describe legal usages that depart from ordinary usages, it is important to distinguish these legal technical usages from the classic idea of legal fiction. Although the term "legal fiction" is now, unfortunately, often used to refer to an assertion of fact, typically in a judicial opinion, with which some commentator disagrees,[23] the narrower and more traditional usage is different. Traditionally, what is described as a legal fiction is the knowing deployment of a false factual conclusion in order to bring some set of facts within the ambit of a legal rule, or to exclude some facts from the ambit of some legal rule, in either case for the purpose of avoiding the poor outcome that would ensue from accurately placing the actual facts within the operative rule.[24] In the famous instance of *Mostyn v. Fabrigas*,[25] for example, Lord Mansfield determined that the island of Minorca was in London, which it is not, in order to provide otherwise unavailable relief for an aggrieved individual who without the fiction would have had no remedy for his politically inspired and plainly unjust imprisonment.[26]

[15] *See* H. L. A. Hart & Tony Honoré , Causation in the Law 26–61 (2d ed. 1985) (distinguishing legal and "common sense" notions of causation).

[16] *See United States* v. *York*, 895 F.2d 1026 (5th Cir. 1990) ("search" in the ordinary sense might not be a search for Fourth Amendment purposes); *United States* v. *Andreas*, 1998 WL 42261 (N.D. Ill., Jan. 30, 1998) (same).

[17] *See Dillingham* v. *Millsaps*, 809 F. Supp. 2d 820, 836 (W.D. Tenn. 2015) (restriction on movement is a seizure for Fourth Amendment purposes even if no person or no property is actually taken).

[18] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765 (2004).

[19] *See* Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 Cleve St. L. Rev. 271 (1989).

[20] *See Tinker* v. *Des Moines Independent School Dist.*, 393 U.S. 503 (1969).

[21] *See Stromberg* v. *California*, 283 U.S. 359 (1931); *Texas* v. *Johnson*, 491 U.S. 397 (1989).

[22] *See Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000).

[23] *See, e.g.*, Peter J. Smith, *New Legal Fictions*, 95 Geo. L.J. 1435 (2007).

[24] *See* Lon L. Fuller, Legal Fictions (1967); Roderick Munday, *The Bridge that Choked a Watercourse, or Repetitive Dictionary Disorder*, 29 Statute L. Rev. 26 (2008).

[25] [1774] 1 Cowper 180 (K.B.).

[26] *See* Frederick Schauer, *Legal Fictions Revisited*, *in* Legal Fictions in Theory and Practice 113 (Maksymilian Del Mar & William Twining eds., 2015). *See also* Sidney T. Miller, *The Reasons for Some Legal Fictions*, 8 Mich. L. Rev. 623 (1910).

Legal fictions in this narrow and traditional sense are important, but Hohfeld's usage is different. He assumes that, as a linguistic matter, the ordinary usage is in some sense primary, making the legal usage figurative or fictional by virtue of its divergence from ordinary use. And here, Hohfeld's understanding of what it is for a usage to be figurative or fictional is similar to that which we see in Jeremy Bentham's writings a century earlier.[27] In excoriating the common law for its use of fictions (and, of course, for much else),[28] Bentham was thinking of the common law's presumption of legitimacy, in which a child born to a married woman is presumed to be the child of the husband, even though that might not in fact (biologically) be the case, or in which a corporation is treated as a natural person for certain purposes, even though a corporation is not a natural person in ordinary pre-legal understanding.[29]

It is also important to distinguish Hohfeld's broader claim from a more trivial point about the pervasive presence of terms of art in law. It is well known that law contains countless terms of art – terms whose definitions are context specific, and in law, serve as the labels for complex areas of legal doctrine.[30] Sometimes, such terms of art announce their character by being in Latin, or in some other way by having no everyday language counterpart. Ordinary people simply do not use terms like "assumpsit," or "covenants running with the land," and so the very presence of such expressions warns the reader or hearer that the phrases are to be understood as covering terms for vast swaths of doctrine. And at other times, some terms are so well understood as terms of art that much the same applies even if they are written in language that appears on the surface to be ordinary. In 2022, for example, "freedom of speech" might have that status, even if it did not earlier, and even if that status might not be fully understood by those outside of the legal or constitutional culture.

Hohfeld's point goes beyond the conventional idea of terms of art in part because his writings are addressed to lawyers and not lay people. It might be an interesting and important exercise to explain to nonlawyers that many legal terms have

[27] *See* C. K. Ogden, Bentham's Theory of Fictions (1932).

[28] *See* 7 Jeremy Bentham, Works 283 (1843).

[29] The example is timely, because many of the complaints about the Supreme Court's *Citizens United* decision (*Citizens United* v. *Federal Elections Commission*, 588 U.S. 310) take the Court to task for fictionally believing that corporations are the same as natural persons for free speech purposes. But even if that was what the Court decided, which is not exactly the case (*see* Frederick Schauer, *Constitutions of Hope and Fear*, 124 Yale L.J. 528 (2014)), the best understanding of what transpired is that corporations, labor unions, and other collectivities were *deemed* to be persons for free speech purposes, in much the same way as the child of a married woman was deemed to be the legitimate child of the marriage for inheritance and other purposes, even though the child might not be so deemed for other purposes. The complaints notwithstanding, therefore, *Citizens United* did not hold that corporations *are* natural persons. Rather, the Court held that corporations and other collectivities would be treated the same as natural persons for First Amendment purposes. Whether this conclusion is correct or incorrect is a matter of free speech theory, but is not dependent on any claim that corporations simply *are* natural persons.

[30] *See* Caleb Nelson, Statutory Interpretation 84–86 (2011); Robert Fugate, *Defining Terms of Art in Legal Writing*, 72 Texas B.J. 748 (2009).

meanings that depart from what nonlawyers think those terms mean, but this is not Hohfeld's agenda. Rather, Hohfeld appears to believe that even lawyers are deceived by the two-faced nature of much of legal language, looking in one way at legal usage and in another at the pre-legal ideas that the law intends to regulate. And so although Hohfeld believes that this aspect of language is by no means the only cause of the problem he aims to remedy, he believes that it is at least one of the causes. As such, it may be valuable to say more about this aspect of legal language, without claiming that it is the only, or perhaps, even the primary source of the kind of conceptual confusion that prompted Hohfeld's analysis.

1.3 PREDECESSORS AND SUCCESSORS

Not many years before Hohfeld published the first of his "Fundamental Legal Conceptions" articles, Oliver Wendell Holmes had expressed a similar worry in "The Path of the Law."[31] Concerned that a seeming identity in "phraseology" would encourage people, mistakenly, to move from the moral domain to the legal, Holmes speculated that it might be preferable if all words with moral connotations were to be removed from the law, in order that such confusion might be avoided. Holmes writes: "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[32]

Plainly, Holmes did not intend that his suggestion be taken too seriously. He obviously knew that it was too late in the legal day to expect such a linguistic purge to take place in law, and he recognized that any gain would be more than offset by the loss of legal language's historical usages and associations. Nevertheless, Holmes's earlier warning resonates with Hohfeld's later one. Both of them believed that legal language and legal concepts were well-designed, in the normal run of things, to serve important purposes, and thus both feared that failing to recognize legal language for its context-specific function would detract from the ability of law to do what law was designed to do. Indeed, Holmes's concern surfaces even more notably in another part of the "Path of the Law," where he recounts the almost certainly apocryphal story of the Vermont justice of the peace and the churn:

> There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.[33]

[31] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[32] *Id.* at 463.

[33] *Id.* at 474–75. For my commentary on and analysis of the story and its importance, *see* Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434 (2017); Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998).

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Holmes's goals in telling this story were surely multiple. One, we suspect, was making fun of rural and unsophisticated Vermont and Vermonters, a favorite pastime of well-bred Bostonians in Holmes's era. Another was disparaging those without legal training, which was what Holmes had in mind with the image of the country justice of the peace – typically a person with no formal legal training and no experience in the actual practice of law. But the point of mocking those without legal training or sophistication was to emphasize that legal knowledge, however obtained, was necessary for the comprehension of legal language and legal categories. The "master" of law would have recognized the claim as one for conversion under the law of bailments, and would have recognized that the appropriate category for the action was thus conversion and not churns. Thus:

> The same state of mind is shown in all our common digests and textbooks. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as shipping or equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master if it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.[34]

In this addendum to the churn story, Holmes makes clear that he thinks that judges actually do make decisions according to the categories of law, and that predicting judicial decisions accordingly requires deep knowledge of the legal categories that judges will genuinely use. And one interpretation of Hohfeld follows the same line of thought. Hohfeld's concern with the contamination of legal language by erroneous associations with the physical objects that the legal language is about represents an implicit endorsement, in the same vein as Holmes, of law's use of law-specific categories. It is not, after all, as if Hohfeld believed that the different jural relations designated by his four categories of rights[35] were relations that did not already exist in law. Rather, he believed that these various jural relations existed in law, and that they existed for a good purpose. It was just for Hohfeld that the language that law used to designate these relations was insufficiently precise, which, when coupled with the fact that the language – and the label of "rights" – possessed an antecedent nonlegal meaning. And it was the existence of this antecedent lay meaning that Hohfeld believed led, even for lawyers, to the confusion that he was attempting to alleviate.

[34] *See* Holmes, *supra* note 31, at 475.

[35] *See* Hohfeld, *supra* note 1. Hohfeld's four categories and the relations among them have generated an industry of commentary, sometimes expository, sometimes appreciative, and sometimes critical. Some noteworthy representatives are Julius Stone, Legal Systems and Lawyers' Reasonings 137–61 (1964); J. W. Salmond, Jurisprudence, ch. 7 (P. J. Fitzgerald ed., 7th ed., 1966); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 Yale L.J. 163 (1919); Roscoe Pound, *Fifty Years of Jurisprudence*, 50 Harv. L. Rev. 557, 571–76 (1937); Max Radin, *A Restatement of Hohfeld*, 51 Harv. L. Rev. 1141 (1938); Roy L. Stone, *An Analysis of Hohfeld*, 48 Minn. L. Rev. 313 (1963).

This interpretation of Holmes and Hohfeld casts some doubt on the claim that both are best understood as close allies of 1920s and 1930s Legal Realists such as Jerome Frank,[36] Joseph Hutcheson,[37] and Karl Llewellyn.[38] Arguments about who is or is not a Realist are often pointless, partly because it is not clear and still contested as to just what Legal Realism is,[39] and partly because it is often uncertain about what views particular candidates for the Realist label actually held.[40] Still, insofar as one strand of Realism holds that judges actually decide cases according to the situations (hence Llewellyn's idea of "situation sense"[41]) and categories of the pre-legal world,[42] and another that this state of affairs is both inevitable and normatively desirable, the sympathy that both Holmes and Hohfeld held for law's own law-created categories consequently emerges as having a decidedly non-Realist cast.

Hohfeld's and Holmes's Realist credentials aside, it is plain that Holmes anticipated Hohfeld's concerns about the confusions that would be created when the legal and nonlegal worlds shared the same language. The concern was echoed later when Edwin Patterson, in his never-completed treatise on contract law,[43] suggested that the basic operative words of contract law – "offer," "acceptance," and "contract" itself, among others – be replaced with new law-specific terminology (as in "spik-bond" for an acceptance) in order to keep people from thinking, for example, that the legal idea of an offer was satisfied just because some behavior had taken place that ordinary people using ordinary language would have described as an "offer."[44]

[36] *See* Jerome Frank, Law and the Modern Mind (1930).

[37] *See* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274 (1929).

[38] *See* Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study (1930); Karl N. Llewellyn, The Theory of Rules (Frederick Schauer ed., 2011); William Twining, Karl Llewellyn and the Realist Movement (2d ed. 2012).

[39] Valuable analyses of Realism include: Hanoch Dagan, Reconstructing American Legal Realism and Rethinking Private Law Theory (2013); Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy (2007); Twining, *supra* note 38. *See also* Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning 124–47 (2009); Frederick Schauer, *Legal Realism Untamed*, 91 Texas L. Rev. 749 (2013).

[40] Indeed, these were Llewellyn's complaints as far back as 1931. *See* Karl N. Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931).

[41] *See* Twining, *supra* note 38, at 216–27.

[42] *See* Brian Leiter, *Legal Realism*, *in* A Companion to the Philosophy of Law and Legal Theory 261 (Dennis Patterson ed., 1996); Brian Leiter, *Positivism, Formalism, Realism*, 99 Colum. L. Rev. 1138 (1999). This Realist theme of reliance on pre-legal or extra-legal categories is most obvious in Leon Green's Realist-era torts casebook (Leon Green, The Judicial Process in Torts Cases (1931)), which was organized not around traditional and traditionally legal torts categories as such as negligence, causation, and strict liability, but instead around pre-legal categories such as Transportation, Animals, and (!) Women, Green believing that an event falling within (or without) such categories was more outcome-determinative than how the event would be treated according to the traditional categories and doctrines of tort law.

[43] *See* Edwin L. Patterson, Treatise on the Law of Contracts 1 (unpublished manuscript available at the Columbia Law School Library).

[44] For Patterson's earlier ideas on legal language as technical language, see Edwin L. Patterson, Jurisprudence: Men and Ideas of the Law 252–58 (1953).

As with Holmes, there is no indication that Patterson seriously intended to implement his idea of replacing law's two-faced terminology with new law-specific words and phrases. But as with Hohfeld, Patterson offered his nonserious suggestion as a way of pointing out the confusions that could occur when there was insufficient attention paid to the use by and in law of language that referred to pre-legal or extra-legal ideas, objects, relations, and behavior.

Writing at more or less the same time as Patterson, Lon Fuller also lamented the confusions arising out of law's use of nonlegal language to convey distinctively legal ideas and relationships.[45] Fuller, however, was even more normative (or prescriptive), arguing that law advances to the extent that it develops its own language – language that would reflect law's deeper purposes and the methods that those purposes generated.[46] Fuller, too, recognized the practical limitations of his proposal, but, like Hohfeld, Holmes, and Patterson, he believed that the use by law of language that the legal system shared with the nonlegal world would stand as an impediment to the advancement of law as a form of social organization.

An interesting contrast is thus presented. Although Holmes, Hohfeld, Patterson, and Fuller all identified more or less the same problem and the same source of confusion, the solution for Holmes, Patterson, and Fuller, even if one offered in a plainly utopian voice, was to create language that would accurately reflect law's categories and concepts. Hohfeld, however, was more practical. Creating entirely new words and phrases – new law-specific language – was, we suspect he thought or would have thought, both unnecessary and impractical. Better simply to have lawyers and judges understand the multiple relationships lurking behind simple words with nonlegal associations. Were this to transpire, we interpret him as believing that creating a new language would have been unnecessary. Thus, we might understand Hohfeld's dissection of jural relationships, and his division of them into separate groups, as an attempt to alert lawyers to a problem that could be solved more easily by clear thinking and close analysis than by the creation of new legal language.

1.4 THE PROBLEM OF TECHNICAL LANGUAGE, IN LAW AND ELSEWHERE

The problem with which Hohfeld and the others just mentioned were wrestling is, more broadly, the problem of technical language – a problem hardly exclusive to law. Interestingly, and perhaps ironically, the problem was most explicitly identified and discussed during the heyday of so-called ordinary language philosophy. The philosopher Charles Caton, for example, noted that many disciplines used technical language, but that technical language was at the same time both different from and

[45] *See* FULLER, *supra* note 24. *See also* Kenneth Campbell, *Fuller on Legal Fictions*, 2 LAW & PHIL. 339 (1983).

[46] FULLER, *supra* note 24, at 23–27.

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related to (or parasitic on) ordinary language.[47] The technical English of physics, of literary criticism, and of automobile mechanics, for example, is related to ordinary English in ways that it is not related to ordinary Bulgarian or Swahili, but, in other ways, it differs in fundamental ways from the ordinary English of "the man on the Clapham omnibus."[48]

Even earlier than Caton, the philosopher Friedrich Waismann devoted considerable attention to what he called "language strata."[49] Different enterprises within a larger linguistic community, he suggested, had in many respects different languages, and not just in the different meanings they attached to various nouns, verbs, adjectives, etc. Rather, different enterprises and different contexts generated languages with different deep structures – structures reflecting the role that language served within that particular enterprise.

Waismann's suggestion, although at best loosely worked out by Waismann himself and even more loosely by others, seems especially applicable to legal language. To the extent that the language of the law reflects law-specific ideas of separation of powers (in the nontechnical sense), of burden of proof, and of defeasibility,[50] for example, then the comprehension and interpretation of that language will differ from that of other languages or other uses of what appear to be the same words and phrases. Thus, if Waismann's lead is to be followed, the problem of technical language is not only the problem of discerning the meaning of specific nouns, verbs, adverbs, and adjectives but also the problem of the meaning of the entire linguistic structure of law. When Lon Fuller, for example, suggested that what we think of as a vehicle in ordinary language might not be a vehicle at all when applied to a certain object of a certain legal regulation,[51] he was positing that the entire meaning of legal language, syntax and all, might be such as to incorporate all of the goals of law itself. For Fuller, the very reference of the word "vehicle" was different

47 Charles Caton, *Introduction*, *in* PHILOSOPHY AND ORDINARY LANGUAGE v, viii–xii (Charles Caton ed., 1963).

48 *See* PETER M. TIERSMA, PARCHMENT, PAPER, PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION 120 (2010); Frederick Schauer, *Is Law a Technical Language?* 52 SAN DIEGO L. REV. 1 (2015); Frederick Schauer, *On the Relationship Between Legal and Ordinary Language*, *in* SPEAKING OF LANGUAGE AND LAW (Lawrence M. Solan et al. eds., 2015).

49 The idea appears at numerous points in Waismann's writings, but the most concentrated treatment can be found in F. Waismann, *Language Strata*, *in* LOGIC AND LANGUAGE (SECOND SERIES) 11 (Antony Flew ed., 1953). *See also* F. WAISMANN, THE PRINCIPLES OF LINGUISTIC PHILOSOPHY 252–56 (R. Harré trans., 1965); F. WAISMANN, HOW I SEE PHILOSOPHY 172–207 (R. Harré trans. 1968); F. Waismann, *The Linguistic Technique*, *in* PHILOSOPHICAL PAPERS 150 (Brian McGuinness ed., 1977).

50 That is, of the idea that legal rules (necessarily, according to some writers, and contingently, according to others) can be set aside when following them would lead to absurd, morally wrong, or otherwise suboptimal results. On the topic generally, see THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY (Jordi Ferrer Beltran & Giovanni Battista Ratti eds., 2012); LUIS DUARTE D'ALMEIDA, ALLOWING FOR EXCEPTIONS: A THEORY OF DEFENCES AND DEFEASIBILITY IN LAW (2015); Frederick Schauer, *On the Open Texture of Law*, 87 GRAZER PHILOSOPHISCHE STUDIEN 195 (2013).

51 Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). On this specific point, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008).

when that word appeared in a legal regulation than when the same word appeared in a different context, and thus a "vehicle" designated by a legal regulation prohibiting vehicles in this or that location was only that object whose prohibition would be consistent not only with the purpose of the particular legal regulation at issue, but also of the legal system in its entirety.

Fuller's suggestion was extreme, and reflected his own ideas about the obligation of all interpreters of legal language to interpret the language so as to produce all-things-considered reasonable results in accordance with the largest purposes of the entire legal order. But one of the things that makes Fuller's ideas about legal meaning extreme, and that makes his views about the development of legal technical language with no affinities with ordinary language extreme as well, is that law does not only speak to lawyers and judges. Law speaks as well to its subjects, and it often does so without the intermediation of legal experts. Indeed, when Jeremy Bentham in all seriousness suggested that perhaps it ought to be illegal to give legal advice for money,[52] it was his way of arguing that law at its best would avoid the unnecessary complexities that made most lawyers and most judges necessary, and that prohibiting the profit-motivated provision of legal advice would eliminate what Bentham thought was the chief reason that laws were drafted with such inordinate complexity and obscurity as to make the intervention of "Judge and Co." necessary. Were law simpler and more accessible to the ordinary person, Bentham believed, law would operate more transparently, more efficiently, and more to the overall benefit of society at large.

Bentham's suggestions were, of course, no more realistic than Fuller's. Law often does need to speak directly to its subjects, but as law develops, it often takes on and creates more complex relationships that need complex language and categories to perform satisfactorily. Perhaps this is what Hohfeld recognized. In a complex society, there is a genuine need for each of the Hohfeldian concepts – claim-rights, privileges (liberties), powers, and immunities – and it would be a step backwards to think otherwise. But law is an institution of and dependent on language, and embodying, reflecting, and operationalizing these different relationships is, in part, the job of legal language. If we were to follow Bentham and try to explain and embody all of this in simple ordinary language, the value of the different relationships might be lost. But if we were to follow Fuller and Patterson and accordingly attempt to have new and distinct terms for each of these ideas, the ability of law to speak to its subjects might then be lost. Negotiating these conflicting goals – determining the extent to which legal language should be ordinary or technical, and should or should not track the categories of what Hohfeld called the "physical" world – is no easy task. Nevertheless, one way of understanding Hohfeld's concern with the confusion between the physical world and the law's

[52] *See* Jeremy Bentham, *Scotch Reform*, *in* 5 THE WORKS OF JEREMY BENTHAM 1 (John Bowring ed., 1843).

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imprint on it is as an initial attempt to at least identify the relationships that law's use of nontechnical language often obscures.

1.5 CONCLUSION

Vast amounts have been written about Hohfeld's disaggregation of legal rights into claim-rights, privileges, powers, and immunities, and about his related ideas of the jural opposites and jural correlatives for each of these categories.[53] But one question, and one about which less has been written, is why Hohfeld thought that clarification was necessary, and another, about which still less yet has been written, is what Hohfeld thought was the cause of the confusion he set out to remedy. Hohfeld's writings suggest that he believed the confusion to emerge from multiple sources, but there is little doubt that he thought that one source – not the only source, to be sure – was the failure to differentiate between the ordinary and the technical connotations of the words that appear in law, and of the words that are used to describe the law. By scrutinizing Hohfeld's scant but suggestive ideas about the law-specific dimension of legal language, we may learn a great deal about the still under-studied topic of the technical (or not) language of the law.

[53] *See supra* note 35 and accompanying text.

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