

Hohfeld on the duties in privileges and claims

Hohfeld sobre os deveres em privilégios e demandas

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ABSTRACT

Wesley Newcomb Hohfeld was an American jurist who published a series of articles that were very important for 20th century analytical philosophy of right. Since they appeared, it has become common to distinguish between four kinds of right, one for each of the four 'Hohfeldian incidents': privileges (or liberties), claims, powers and immunities. Although Hohfeld's theory has drawn much attention, very little of it has been directed to his concept of duty. In this article, I offer a clarification of this concept that takes into account both Hohfeld's original intentions and the new uses that have been made of his theory. In section I, I analyze and clarify the definition of the concept of duty that we find in Hohfeld (1913) to show that it was employed in order to denote a legal obligation and that this use is purely descriptive. In section II, I discuss what kinds of duties may appear as correlatives of privileges and claims inside a Hohfeldian model. In section III, I conclude with a brief summary of the argument.

Keywords: Hohfeld, rights, duties, privilégio, demanda.

RESUMO

Wesley Newcomb Hohfeld foi um jurista americano que publicou uma série de artigos que foram muito importantes para a filosofia analítica do direito do século XX. Desde que eles foram publicados, tornou-se comum distinguir entre quatro tipos de direitos, um para cada um dos quatro 'incidentes hohfeldianos': privilégios (ou liberdades), demandas, poderes e imunidades. Embora a teoria de Hohfeld tenha chamado bastante atenção, apenas uma parte muito pequena desta atenção foi direcionada para o seu conceito de dever. Nesse artigo, eu ofereço uma clarificação desse conceito que leva em conta tanto as intenções originais de Hohfeld quanto os novos usos que foram feitos de sua teoria. Na primeira seção, eu analiso e esclareço a definição do conceito de dever que nós encontramos em Hohfeld (1913) para mostrar que ele foi empregado para denotar uma obrigação legal, e que este uso é puramente descritivo. Na seção II, eu discuto que tipos de deveres podem aparecer como correlativos de privilégios e demandas dentro de um modelo hohfeldiano. Na seção III, eu concluo com um breve sumário do argumento.

Palavras-chave: Hohfeld, direitos, dever, privilégio, demanda.

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Wesley Newcomb Hohfeld was an American jurist who published a series of articles between 1909 and 1917 that were very important for 20th century analytical philosophy of right. Today, he is recognized as a major precursor to the deontic logic that was later formulated by Von Wright². His two major contributions were the articles “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (Hohfeld, 1913) and “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (Hohfeld, 1917), in which he analyzed how jurists and judges use the word ‘right’ to speak of the rights of groups and individuals such as the right of free speech, the right to vote, the right to abort, etc.

Since Hohfeld presented his articles, it has become commonplace among ‘Hohfeldian specialists’ to distinguish rights into four groups: privileges (or liberties), claims, powers and immunities – the so-called ‘Hohfeldian incidents’. Hohfeld correlated each of his incidents with a legal relation, and he thought that the incident and the normative relation to which it correlated were the expression of one and the same fact.

Although a good deal of attention has been paid to Hohfeld’s formulations of the four Hohfeldian incidents, not as much attention has been paid to his concept of duty. This is surprising, since two of the four ‘Hohfeldian incidents’ have duties as their correlatives, namely, privileges and claims. A clear example of privilege is a woman’s right to abort, and a clear example of a claim is the bank’s right of being repaid for a loan. According to Hohfeld, A has privilege to ϕ iff A has no duty not to ϕ (Hohfeld, 1913, p. 32), and A has a claim against B that B ϕ iff B has a duty to A to ϕ (Hohfeld, 1913, p. 33)³. But what exactly does ‘duty’ mean in these formulas?

Although Hohfeld never provided us with his own definition of duty, there is a point in Hohfeld (1913) where the author conjures such a definition from the law records for the purposes of his own analysis. The passage can be read as follows: “As said in *Lake Shore & M.S.R. Co. v. Kurt*: ‘A duty or a legal obligation is that which one ought or ought not to do’ [...]” (Hohfeld, 1913, p. 31-32). As we can see, in this passage we do find something like a definition of duty, but it is an odd one. It begins by equating duty with legal obligation, and

then it tries to explain both terms by appealing to the idea of what ought or ought not to be done. What is strange is that, although we surely refer to our legal obligations as things that ‘ought to be done’, we certainly refer to many other things as things that ‘ought to be done’. So if the duties Hohfeld has in mind are in fact legal obligations, they comprise only a very select group among the things that ‘ought to be done’. In order for us to see that clearly, all we need to do is distinguish between a few of the many ways we use the word ‘ought’ – a practice that by now has become commonplace among those who specialize in metaethics.

As we know, the starting point for the contemporary philosophical discussions concerning the term ‘ought’ is the discussion we find in Henry Sidgwick’s *The Method of Ethics* (1874). In that book, Sidgwick (1874, p. 33) argued that the famous principle according to which “ought implies can” is true for some senses of the term ‘ought’ but not for others. Sidgwick’s thesis engaged the philosophical community in a debate about this principle which is still ongoing⁴, and this debate in turn led us to reflect deeply about the similarities and the differences that we find when we analyze the many ways in which we employ the term ‘ought’⁵.

Although it would be imprudent to attempt to offer an exhaustive list of the different ways we employ this term in our everyday language, I believe we can clarify the meaning of the term ‘duty’ inside Hohfeld’s apparatus if we distinguish clearly between three of its uses.

Sometimes we say that an agent ought to do something when we make a total evaluative judgment about the agent’s situation, i.e. a judgement that takes into account all pertinent reasons the agent has for acting and states what is the course of action that is to be taken in accordance with the relative value of all those reasons – regardless of how this value is measured.

On the other hand, sometimes we say that an agent ought to do something when we believe that they have a duty or an obligation to do that something. This is what we do when we say that people ought to fulfill their promises, care for their kids, pay their taxes etc.

Now, it is clear that we may sometimes say these things as a way to convey our total evaluative judgment about the

² On this point see Saunders (1990, p. 465).

³ I take these to be pretty standard definitions of these two incidents. On the definition of claim, see Cook (1919, p. 725), Husik (1924, p. 266), Wellman (1997, p. 76), and Wenar (2015, p. 5). On the definition of privilege, see Husik (1924, p. 266), Radin (1938, p. 1149), Mull-ock (1970, p. 267), Adams (1985, p. 85), Saunders (1990, p. 468), Wellman (1997, p. 76), Rainbolt (2006, p. 1-2), and Wenar (2015, p. 4-5).

⁴ In contemporary discussions, the two authors that are more commonly cited in connection with this principle are Kant and Von Wright. In the case of Kant, the principle can be found in the following passages of his work: *Critique of Pure Reason* (2010, A548/B576, A807/B835); *Critique of Practical Reason* (1997, AA 5: 142, 5:143); *Metaphysics of Morals* (2017, AA 6: 380); *Religion within the Boundaries of Mere Reason* (1998, AA 6:47, 6:50, 6: 62, 6: 64); “On the Common Saying: That This May Be Correct in Theory, but It Is of no Use in Practice” (2008, AA 8: 276-277, 8: 278-279). In the case of Von Wright, the passage most commonly quoted is the chapter VII of *Norm and Action* (1977). Some of the main contributions to the discussion may be found in Brown (1950), Hare (1965, 172-175), Dahl (1974), Brown (1977), Sinnott-Armstrong (1984), Kekes (1984), Jacqueline (1991), Gruber (1993), Capozzi (1999), Saka (2000), Mason (2003), Stern (2004), Kramer (2005), Howard-Snyder (2006), Copp (2008).

⁵ See for example, Moore (1922, p. 314-323), Broad (1930, p. 161-166), Ewing (1947, p. 118-144), Hare (1952, p. 151-198), Rees (1953), Williams (1981), Wedgwood (2007), Schroeder (2011), Chrisman (2012, 2016), Cariani (2013).

agent's situation, but all that this shows us is that the difference between the uses we are talking about is not grammatical. The difference stands because it is still true that *sometimes* when we say that people ought to fulfill their promises, care for their kids and pay their taxes all we are trying to convey is the idea that they are obligated to do them, and not that we think that this is what they ought to do in that specific situation given every reason they have. Indeed, it seems more than plausible to say that often when we say these things we have no particular situation at all in mind.

Also, it is worth noticing that a total evaluative judgment does not produce a duty in the sense of an obligation. I can make a total evaluative judgment about my current situation according to which I ought to buy myself a new pair of shoes, but that does not give me the obligation to buy a new pair of shoes. At most it can be said that my judgement gives me a reason to buy a new pair of shoes.

Finally, sometimes we say that an agent ought to do something when we believe this something is a means to some end that the agent possesses or should possess. This is what we do when we say that somebody ought to wake up early in order not to be late for class, ought to leave now in order to catch the bus, ought to get in line early in order to get good seats etc. When we use the word ought in this way, it seems that all we are saying is that a certain means is either necessary or related in some other appropriate way to a given end.

Last but not least, it is also important to notice that in all these three cases we can employ the term 'ought' either in a purely descriptive or in prescriptive way. As we know, the difference between prescriptive and descriptive uses of moral terms was first made famous in Hare's *The Language of Morals* (1952, p. 1-17, 155-158). Following Hare, we can distinguish between these two uses of 'ought' in the cases just mentioned in the following manner.

If we make a total evaluative judgment about someone's situation according to which that someone 'ought to ϕ ', our use of the word ought will be prescriptive if this judgment is expressed by us to them in order to lead them to act accordingly. If we make a total evaluative judgment about someone's situation and state that they ought to ϕ , our use of the word ought will be purely descriptive if, for example, we make our opinion known only to a third party, or even if we make our opinion known to them, but then we add that we understand that they are in a tough situation, that we are not ourselves very sure of our own opinion, that they should make up their own mind about what to do, and that we will support their decision no matter what. The same, of course, can be said about the two other uses of 'ought' that were singled out above.

If we say to someone that 'people' ought to fulfill their promises, care for their kids, pay their taxes etc., we may either be talking descriptively or prescriptively. We will be

talking prescriptively, for example, if we say that in order to get another to fulfill a particular promise, to take care of their kids or to pay their taxes. Suppose someone brags to us about having cheated expertly in their last tax declaration. If we reply to that comment by pointing out to them that 'People ought to pay their taxes,' meaning that they should do so, we will have talked prescriptively. But if the same sentence was employed by anthropologists reporting on our customs to the other cultures they encountered, then their use would be descriptive.

Again, if we say to someone that they ought to wake up early in order not to be late for class, ought to leave now in order to catch the bus, ought to get in line early in order to get good seats etc., we will be talking prescriptively only if we are saying so in order to get them to do something. Suppose someone mentions to us that they want to go to a certain concert, but that they think it would only be worth it if they could get good seats. Suppose we reply to this comment by telling that someone that, if they really want good seats, then they will have to grab a chair and get in line three days before the concert. Although we may very well be saying that in order to get them to take a chair and get in line, we may also be saying that not to encourage, but to discourage them from doing so because, or so we would have it, it isn't really worth it to get in line three days before the concert in order to get good seats. In both cases, our use would be prescriptive.

Having made these distinctions, we can easily see that the use of the term duty in the Hohfeldian apparatus does correspond to the second use of the word 'ought' that we have identified – the one where we say we ought to do something because we have an obligation to do it – when it is used in a *purely descriptive* way.

Besides, we can also see that, since Hohfeld was only concerned with legal rights, it is only natural that we find that in his use of the Hohfeldian incidents all mentions of duty are used descriptively to refer to the presence or absence of legal obligations. Nevertheless, although some Hohfeldians still prefer to apply the Hohfeldian apparatus only to the juridical realm, this is no longer the most common position⁶. Those who apply his work elsewhere are bound to recognize the existence of other types of duties and obligations to match the ones in their Hohfeldian apparatus – those who use it to describe morality will speak of moral duties, etc.

Because of this fact, although we can still say that in every case the word duty is used descriptively and that it is used to indicate the existence and absence of a given duty or obligation, we cannot say that in every case it indicates the presence of a legal obligation. This means, of course, that the duties that are mentioned in this apparatus may vary greatly in their source. As we shall see in the next section, they may also vary significantly in their form.

⁶ Today, I believe the majority follows Wellman (1995) in recognizing at least the existence of legal and moral rights. Others go much further. According to Wenar (2005, p. 224), for example, there are rights of conduct – moral, legal, and many others – epistemic rights (rights to believe), affective rights (rights to feel) and conative rights (rights to want).

II

As I've said before, Hohfeld correlated each of his incidents with a legal relation, he thought that the incident and the normative relation to which it correlated were the expression of one and the same fact, and two of the four Hohfeldian incidents have duties as their correlatives – for, according to Hohfeld, A has privilege to ϕ iff A has no duty not to ϕ (Hohfeld, 1913, p. 32), and A has a claim against B that B ϕ iff B has a duty to A to ϕ (Hohfeld, 1913, p. 33). In the previous section, I argued that the word duty is used in these formulas to denote an obligation, and that it was used in a purely descriptive way. The question I want to ask now is what kind of duties may figure as the correlatives of privileges and claims.

In order to answer this question, I propose we take a very plausible and common way to divide between different kinds of duty and ask ourselves which of these could figure inside these two formulas. The division I am talking about is the division between duties of perfect obligation and duties of imperfect obligation⁷.

In the first group we find the duties which are correlated with claims in others, like for example the duty not to kill or the duty to fulfill our promises. Most of the times these duties are importantly different. I say most of the times because in many countries one still cannot waive another's duty not to kill oneself, but everybody recognizes that the person to whom a promise was made can waive the duty of fulfilling this promise that rests in the person who made the promise. This suggests a distinction among duties of perfect obligation between those that are waivable and those that are not – between duties of simple perfect obligation (for example, not killing) and duties of directed personal obligation (for example, fulfilling one's promises).

In the second group, on the other hand, we find the duties which are not correlated with any claim in others, for example the duties of charity and beneficence. The fact that these duties are never correlated with claims means that they can never be demanded or exacted from someone. Since we have no claim on the performance of these duties, we cannot demand people's charity or beneficence even if we are the proper objects of their charity or beneficence. We can exhort, plead and even implore people to be charitable or beneficent, but we have no claim to demand that they be so.

Some specialists have tried to explain the idea of duty in terms of the idea of 'owing' and, more specifically, of 'owing an action'. One of the most recent attempts to defend this idea

can be found in Gilbert (2012, p. 309), but the most famous ones are still the ones we find in Hart (1955, p. 179, n. 7) and Feinberg (1966). Although this idea has several merits, it is a lot easier to apply to duties of perfect obligation. These are the duties on which Gilbert and Hart focus, which explains why they say nothing about how the explanation proposed by them should be applied to duties of imperfect obligation.

Feinberg, on the other hand, does consider this second kind of duties when he considers duties of gratitude, or reciprocity, and notes the difficulties of applying the idea of indebtedness to them. In the words of the author,

Many writers speak of duties of gratitude as if they were special instances, or perhaps informal analogues, of duties of indebtedness. But gratitude, I submit, feels nothing at all like indebtedness. When a person under no duty to me does me a service or helps me out of a jam, from what I imagine to be benevolent motives, my feelings of gratitude toward him bears no important resemblance to the feeling I have toward a merchant who ships me ordered goods before I pay for them (Feinberg, 1966, p. 139).

Although one could challenge Feinberg's claim and try to show some sort of analogy between these two sorts of duties, I believe many of us are inclined to think that if there is no claim from the part of the supposed creditor, then there is a pertinent sense in which there actually is no debt in the proper sense.

A second way to explain the idea of duty is to make use not of the idea of 'owing an action' but to the concepts of 'normative rule system' and of 'prohibition'. According to Rainbolt (2006, p. 79), for example, a "normative rule system" is a unified set of normative statements that creates duties, rights and Hohfeldian incidents by classifying acts as forbidden, permitted and obligatory. According to this theory, these normative statements are what Hohfeld called operative facts, i.e. they create Hohfeldian incidents and duties among individuals which are under them. This theory allows for the existence of many normative rule systems, be it in organized sports, companies, clubs, or any other social organization. Besides, although it holds that the legal normative rule system of a country is the only normative rule system that creates legal rights, it does not forbid talk of rights in relation to other rule systems⁸.

For the purposes of this paper, we don't need to go into the details of how Rainbolt explains the equivalence between

⁷ As far as I can tell, this is the same distinction that can be found in John Stuart Mill's *Utilitarianism*. According to Mill, "[...] duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right" (Mill, 2003, p. 223). This distinction will be the same as ours provided, of course, that by 'right' we understand a claim. This is something we have good reason to do because Mill himself clarifies that by right he understands "a personal right – a claim on the part of one or more individuals, like that which the law gives when it confers a proprietary or other legal right" (Mill, 2003, p. 223).

⁸ A very similar view seems to be implied in Wenar (2013, p. 208-210).

the different normative statements that compose normative rule systems and the different Hohfeldian incidents recognized above. All we need to note is that according to this theory a normative statement creates a duty inside a rule system when it classes a given act or the omission of an act as forbidden (Rainbolt, 2006, p. 66), and to be under a duty, then, is to be under a prohibition from a normative rule system.

Last but not least, it is worth noticing that the fact that duties of imperfect obligation are never correlated with claims does not mean they can never be correlated with any Hohfeldian incident. Indeed, there seems to be good reason for thinking that, depending on how we apply the Hohfeldian model, these duties can be correlated with a privilege. For, according to Hohfeld, an individual has a privilege to *phi* when he has no duty not to *phi*, and one can occasionally have both a privilege to *phi* and a duty to *phi*. Now, if we apply the Hohfeldian model to the moral realm, as many have already done, it makes perfect sense to say that people have both the privilege of being charitable and beneficent – i.e. that they do not have the duty of not being charitable and beneficent, which means that they were allowed to do so by their normative rule system – even when we believe they also had the moral duty of being charitable and beneficent.

As we can see, in this case the duty that is the correlative of the Hohfeldian incident we are attributing to these individuals is a duty of imperfect obligation. If the division of duties proposed above is correct, it seems we should conclude that claims always have duties of perfect obligations as their correlatives, whether they are applied to the moral or to the juridical realm, and that duties of imperfect obligations can only be the correlatives of privileges. But nothing that was said here authorizes us to conclude that privileges cannot have duties of perfect obligations as their correlative.

Indeed, we know that Hohfeld himself allowed this could be so at least in some cases, for according to him a landowner's privilege of entering his own land has as correlatives the absence of claims in others to the effect that he ought not enter his own lands⁹. Therefore, it seems the safest thing to say is that privileges can have both duties of perfect obligation and duties of imperfect obligations as their correlatives.

I believe I have said enough to clarify Hohfeld's concept of duty and to determine what kind of duties can figure as the correlatives of privileges and claims. It is not time to conclude.

III

In this paper, I argued that the notion of duty is employed by Hohfeld in a purely descriptive way to denote our legal obligations, and that the same notion is to be employed in a purely descriptive way wherever we decide to apply Hohfeld's apparatus, even though we may decide to expand

its use beyond the juridical realm; that claims always have duties of perfect obligation as their correlatives, while privileges can have both duties of perfect obligation and duties of imperfect obligation as their correlatives; and that although any attempt to explain the idea of duty through the idea of 'owing and action' raises difficulties for the explanation of duties of imperfect obligation, we face no such problems when we attempt to explain the idea of duty through the concepts of 'normative rule system' and of 'prohibition'. According to this explanation, a normative statement creates a duty inside a rule system when it classes a given act or the omission of an act as forbidden, and to be under a duty is to be under a prohibition from a normative rule system.

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⁹ "[...] the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter" (Hohfeld, 1913, p. 33).

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