General and Particular Jural Relations

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Hohfeld set out to precisify jural relations in a series of articles culminating in a book.¹ His basic scheme of rights, privileges, powers, and immunities and their correlatives and opposites is hard to dispute and helps bring clarity to law. The project, however, was not complete at the time of his death and leaves several important questions unanswered. One problem Hohfeld mentioned in his final article was the problem of “common (or general) and specific (or particular) relations.” In this essay, I will speculate about what he might have said about these subcategories of relations and what difficulties they might have raised for his overall scheme.

A. General Rules and Particular Cases

Before turning to Hohfeld’s picture of law, I will briefly summarize a problem that affects any mature system of law: the problem of general rules. For this purpose, the term “rules” refers to rules that are general in application and determinate enough to be understood in most cases. The rules under discussion in this essay are also good rules, meaning rules that, if always

¹Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913)(hereinafter Hohfeld, FLC 1); Wesley Newcomb Hohfeld, *The Relations Between Law and Equity*, 11 Mich. L. Rev. 537 (1913)(hereinafter Hohfeld, Equity); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917)(hereinafter Hohfeld, FLC 2). An informal precis of topics to be covered appears in Hohfeld, FLC 2, *supra*, at 712.

followed, produce a better sum of results than individual actors otherwise would achieve by following their own best unregulated judgment about what to do in each case.² Of course, not all legal rules meet this test, but my discussion focuses on those that do.

Rules, so defined, have significant value. Assuming that they are good rules, they reduce error when regularly followed. Most importantly, they w reduce the type of error that results from lack of coordination. Actors can plan much more effectively if they know what other actors will do. There is no way to look into other peoples' minds, but when a rule has a reasonably clear meaning and is widely followed there is good reason to think that most people will do as it requires.

The problem of rules arises because all general, determinate rules, including good rules, will prescribe some results that are or appear to be wrong, all things considered. A general rule must be announced in advance of conduct, and so will cover some cases the rulemaker did not anticipate. Due to the imperfections of language, a rule that is determinate enough to govern conduct will also be overbroad, sweeping in cases to which the rule ought not apply. Nevertheless, if the rule is a good rule, the sum of outcomes will be best if individual actors follow the rule unreflectively. Not only is human reasoning imperfect, but a common form of cognitive bias makes salient facts appear more significant than background probabilities such as the long-term impact of a rule violation on the coordination value of the rule.³ Consequently,

²I leave open what counts as a good result. Raz, in his "service conception" of authority, proposes that rule-making authority is justified to the extent that individual actors will better conform to reasons for action applicable to them if they follow the rules. Joseph Raz, *The Morality of Freedom* 129-131 (Oxford: OUP 1986).

³*See generally* Daniel Kahneman, Paul Slovic, & Amos Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* 163)(CUP 1982); Daniel Kahneman, Paul Slovic, & Amos

individual actors exercising particularized judgment about whether to follow a rule will tend both to err and to err systematically against following the rule.

The result of this dilemma is a gap between the perspective of the rule-making authority and those who must follow or apply the rules.⁴ From the authority's point of view, it will appear that all those subject to the rule should follow it in all cases. From the point of view of an individual actor called on to follow the rule, it will sometimes be, or seem, clear that following the rule is a mistake. Judges are often rule-makers, but in their role as appliers of rules in individual cases, their perspective will resemble that of actors. Strict enforcement of the rule may appear to be at odds with the rule's purpose or simply unfair in the circumstances of the case. Accordingly, it may appear from this point of view that the best course of action is to follow the rule in all cases except this one.

The gap just described never completely closes. Particularistic decision-making does not close the gap because, as noted, human decision-makers are not omniscient and so cannot judge accurately when it is best to follow the rule. Rule-sensitive particularism, meaning particularistic decision-making that takes into account the effect of a rule violation on the rule's coordination value, fails to close the gap for the same reason.⁵ Sanctions do not close the gap because

Tversky, (eds) *Heuristics & Biases: The Psychology of Intuitive Judgment* (CUP 2002)

⁴Further discussion can be found in Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* 11-36 (Durham: Duke 2001), Joseph Raz, *The Morality of Freedom* (Oxford: OUP 1986) 49-50; Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* 1-121, 149-55 (Oxford: Clarendon 1991).

⁵Frederick Schauer coined the term "rule-sensitive particularism." Schauer, *supra* note 3, at 94-100; Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J. L. & Pub. Pol'y 645, 676 & n. 66 (1991). His own position, at least at the time, was "presumptive positivism," which adds a

sanctions are imposed by judges who are likely to view strict enforcement as irrational and unjust.

B. Equity

Our legal system historically was divided between law and equity. Procedural merger ended the system of separate courts but did not eliminate judicial consciousness of distinctive doctrines, remedies, and principles traceable to the equity side of legal history. Although general and determinate rules can be found in both legal and equitable doctrine, one feature that is often associated with the equity doctrine is equity in the Aristotelian sense, meaning correction of the errors that sometimes result from strict application of rules.⁶ Some commentators have characterized this softening of legal rules through equity as a supplemental function that does not bring equity into conflict with the law.⁷ Others, including Hohfeld, have viewed it as an override. Either way, the effect is to alter the outcomes of legal rules when they appear too harsh.

The association between equity and correction of rules survived the merger. In post-

presumption in favor of rule-following to rule-sensitive particularism. See Schauer, *Rules and the Rule of Law*, *supra*, at 691-94.

⁶Aristotle, *Nicomachean Ethics* ¶1138b25 (Hackett Pub., Terence Irwin, ed. & trans., 1985) (“And this is the nature of what is decent - rectification of law in so far as the universality of law makes it deficient.”).

⁷For views on the relation between law and equity, see, e.g., III William Blackstone, *Commentaries* *430 [1769]; Henry Home, Lord Kames, *Principles of Equity*, Introduction p. vii (Alexander Kincaid, 1760); F.W. Maitland, *Equity and also the Forms of Action at Common Law* 2-11 (CUP, J.H. Chaytor & J. Whittaker, eds., 1929); I Joseph Story, *Commentaries on Equity Jurisprudence* §§ 5, 8, 12, 13, 33 (4th ed. 1846).

merger law, the corrective function of equity sometimes carried out directly, by means of indeterminate exceptions to rules. For example, courts may give relief against contractual forfeiture provisions in mortgage contracts when an accident or mistake makes enforcement unconscionable.⁸ Equitable correction also may take the form of special, relatively indeterminate defenses to equitable remedies, such as unclean hands, disproportionate hardship, and unilateral mistake resulting in unconscionability. Equitable defenses theoretically do not affect the claimant's ability to obtain a legal damage remedy, but because damages often are inadequate to provide full relief, equitable defenses place significant limits on enforcement of claims.⁹

Equitable correction of the outcomes of rules does not eliminate the gap between the long-term benefits of enforcing determinate legal rules and the desire for just results in individual cases. Assuming the rule in question is a good rule in the sense described earlier, overall results will be best if judges refuse to engage in equitable correction and instead enforce the rules according to their terms. Moreover, in any legal system in which legal decisions are fully available to the public, corrective equity will tend over time to reduce the effectiveness of legal rules. Each instance of equitable correction undermines the apparent reliability of the applicable rule and so reduces the rule's capacity to coordinate future conduct. Thus, equitable correction in particular cases satisfies the desire to do justice when good rules produce bad results, but only at the cost of long-term harm to the value of rules.

⁸See, e.g., *Graf v. Hope Bldg. Corp.*, 171 N.E. 884 (N.Y. 1930)(Cardozo, C.J., dissenting)(discussed below at notes XX-XX).

⁹For a full discussion of equitable defenses to contract claims and citation to many cases, see Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* 73-126 (1989 & Supp. 2010).

At least for a time in our legal history, the relative obscurity of the equitable remedies and doctrines through which correction of general rules took place may have limited the harm done to rules. Judges typically characterize equity as supplemental to law and equitable remedies as extraordinary.¹⁰ Further, even in a publicly accessible legal system, equity tends to remain obscure. Equitable remedies, the mechanisms by which they are enforced, and the special defenses that apply to them are relatively complex in comparison to the money remedies available at law. As long as equity remains in the background of the legal system, ordinary actors may continue to look to the rules for guidance.¹¹ As a result, equitable correction can enter in at the remedial stage without immediate impact on the coordination value of determinate rules.¹²

In the United States, one of the effects of American Legal Realism has been to de-

¹⁰*Tower City Grain Co. v. Richmond*, 232 N.W.2d 61 (N.D. 1975)(denying specific performance of a contract for sale of grain). See also [add Story;] F.W. Maitland, *Equity and Also the Forms of Action at Common Law* 19 (CUP, J.H. Chaytor & J. Whittaker, eds., 1929)(describing equity as a “collection of appendixes” to law).

¹¹For a discussion of the possibility that decision rules applied by judges may remain “acoustically separate” from the conduct rules that guide actors, see Meir Dan-Cohen, *Conduct Rules and Decision Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984).

¹²Henry Smith, in collaboration with John Goldberg and others, has depicted equity as performing a second-order function in the legal system, enabling judges to police transactions ex post for signs of opportunism without directly challenging rules of conduct. See, e.g., See, e.g., John C.P. Goldberg and Henry E. Smith, *Wrongful Fusion*, forthcoming in *Equity: Fusion or Fission?* (CUP 2017); Henry E. Smith, *Why Fiduciary Law Is Equitable*, in *Philosophical Foundations of Fiduciary Law* 261 (Andrew S. Gold & Paul B. Miller, eds., Oxford U. Press 2014); Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. of Institutional and Theoretical Economics 137 (2014); Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413 (January 15, 2015).

emphasize the role of determinate rules in the legal system and to make explicit the more fact-specific principles traditionally applied in equity.¹³ The Realists took the view that rules are neither effective nor desirable as guides to decision-making. They proposed, among other things, that “law” is not a set of established general rules but the outcome of judicial decision-making in response to the facts of particular cases and sound notions of social and economic policy. The written law should either be reformulated in fact-specific terms or stated in the form of broad principles that prompt judges to assess in detail the situations that come before them. The hallmark of law and legal decisionmaking should be candor: courts should explain as clearly as possible the real grounds for their decisions. Realism, in other words, left no room for, and had no interest in maintaining, a covert system of equitable correction superimposed on determinate legal rules.

C. Hohfeld and Rules

This quick summary of the problem of general and particular rules and the related problem of law and equity leads up to the questions I would pose to Hohfeld about jural relations. Hohfeld clearly was aware of the emerging Realist movement, but at least on the face of things he does not appear to have been a rule skeptic. To the contrary, he presented jural relations as relations that can be identified, at least preliminarily, based on legal materials that precede particular interactions or judicial decisions. He was classifying relations that are regularly and predictably recognized by courts, not just after the fact but as a matter of abstract

¹³For a similar argument focusing on procedural reforms following the advent of Realism, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987).

doctrine.¹⁴

Hohfeld's discussion of jural relations is filled with specific examples. His examples, however, are not drawn from the outcomes of particular disputes; instead they assume a background of rules governing property, contract, and tort, which he often described in if-then terms.¹⁵ Although he frequently criticized judicial opinions and treatises, his quarrel was not with the authors' doctrinal assumptions but with their mischaracterization of the jural relations that result.

Hohfeld's treatment of operative and evidential facts provides further evidence that he was comfortable with fixed rules of law that predate disputes. One of the first points he made in discussing jural relations was that "purely legal relations" must be distinguished from "the physical and mental facts that call such relations into being."¹⁶ Facts, in turn, are divided into "operative" facts and "evidential" facts. Operative facts are those that, "under the general rules that are applicable," establish or alter jural relations; evidential facts are those that tend to prove other facts.¹⁷ Operative facts may be general, as when used to plead a cause of action, or they may be specific, as they appear in real life.¹⁸ Either way, they presuppose a body of relatively

¹⁴To cite just one example, Hohfeld states that an offer "*ipso facto* creates a legal relation" consisting of a power in the offeree and a liability in the offeror. Hohfeld, FLC1, *supra* note 1, at 51.

¹⁵For example, conditional statements of law run throughout Hohfeld's shrimp salad hypothetical (borrowed from John Chipman Gray). *Id.* at 34-36.

¹⁶*Id.* at 20.

¹⁷*Id.* at 25.

¹⁸*Id.*

fixed and determinate law that picks out certain facts as operative.

Hohfeld's attitude toward legal rules is also evident in his discussion of "multital" rights, a term he coined in hopes of dispelling the confusion surrounding rights *in rem*.¹⁹ Multital rights are rights that belong to a class of similar "actual and potential" rights. The term multital describes not only property rights, but also rights against tortious harm.²⁰ Each multital right is distinct, in the sense that it correlates to one person's duty not to transgress the right, and each violation results in a particular remedial right against the violator.²¹ A particular violation of multital rights, however, leaves intact the set of inchoate multital rights the victim may have against other parties.²² Thus, although multital rights are inert before they are individuated by a particular event, they presuppose a set of rules defining the conditions under which the corresponding duty is breached.

Finally, Hohfeld's discussion of equity implicitly assumes that there are rules of law with which equity may conflict.²³ As discussed in the next section, Hohfeld argued that equity overrides legal rules and thus eliminates their role in defining jural relations. I will suggest, however, that the extent and consequences of this equitable override are uncertain.

D. Hohfeld and Equity

¹⁹See Hohfeld, FCL2, *supra* note 1, at 718 (defining terms).

²⁰*Id.* at 733.

²¹*Id.* at 740, 752.

²²*Id.* at 743.

²³See Hohfeld, Equity, *supra* note 1.

Hohfeld wrote his short article on the relation between law and equity partly in response to Frederick Maitland's argument that there is no conflict between law and equity.²⁴ Maitland suggested that equity simply supplements the law without direct contradiction: it upholds legal doctrine but softens its effect in hard cases.²⁵ Hohfeld argued, to the contrary, that a

“large part of the rules of equity. . . conflict with legal rules and, a matter of substance, annul or negative the latter *pro tanto*. . . . [Whenever] such conflict occurs, the equitable rule is . . . paramount and determinative. . . . [T]he so-called legal rule . . . has, *to that extent*, only an apparent validity and operation as a matter of *genuine* law. Though it may represent an important stage of thought in the solution of a given problem . . . as regard the very relation in which it suffers direct competition with a rule of equity, the law is, *pro tanto*, of no greater force than an unconstitutional statute.”²⁶

Yet, the reasons Hohfeld gives for the equitable override of law are surprisingly technical.

²⁴Hohfeld, Equity, *supra* note 1. The body of the article is short; the attached appendix outlining and annotating Hohfeld's lectures on equity is not so short. Hohfeld was also responding to an address by Walter Wheeler Cook, in which Cook advocated full incorporation of equity doctrines into cognate areas of law. In this address, Cook cited Hohfeld's entry in the Stanford course catalog as a “typical, and in no respect whatever exceptional or peculiar” example of the current “belated and reactionary” treatment of equity as a separate system. Walter Wheeler Cook, The Place of Equity in Our Legal System, 3 Am. L. School Rev. 173, 174 (1912). But cf. Hohfeld, FLC2, at 712 n.6 (referring to Cook at a later point as his “friend and colleague”).

²⁵See F.W. Maitland, Equity and Also the Forms of Action at Common Law 2-11 (CUP, J.H. Chaytor & J. Whittaker, eds., 1929) at 18-19 (“if the legislature had passed a short act saying ‘Equity is hereby abolished,’ we might still have got on fairly well, in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights . . . would have been decently protected.” *Id.* at 19).

²⁶Hohfeld, Law and Equity, *supra* note 1 at 543-44 (emphasis in original). In later comments, Hohfeld acknowledged that equity traditionally used fictions to override the law functionally without directly contradicting it. Thus, for example, a trustee of real property, as legal owner of the property, has a legal privilege to cut trees, but an equitable duty not to the trust beneficiary not to cut trees. Hohfeld insisted, however, that these fictions should be dropped and the equitable override acknowledged directly. Hohfeld, FLC2, supplemental note at 769-70 (we should “recognize this venerable fiction as such *ad see* through it to ultimate jural realities”).

The synopsis for Hohfeld's Equity course, appended to the article, refers to certain substantive principles associated with equity, such as "conscience" and "good faith," and cites 11 standard equitable maxims expressing broad principles of justice.²⁷ But Hohfeld does not argue that these principles and maxims are substantively superior to the requirements and objectives of legal rules. Instead, he states a general principle that a system of law can have only one set of jural relations; then he cites the equity courts' contempt power and King James' 1616 decision in favor of common injunctions to explain why, in cases of conflict, the prevailing set of relations must be the equitable set.²⁸

Hohfeld also qualified his claim that equity overrides law by suggesting that the equitable override is "pro tanto" in several different ways. It is limited to the extent of overlap between legal and equitable doctrine, and it is also limited to particular instances of overlap. Apparently, then, the override affects only the jural relations between particular parties, and has no broader effect outside the context of a given interaction.²⁹ Legal rules are overridden as applied, not on their face.

E. A Closer Look at the Equitable Override of Law

Hohfeld divided the relations between law and equity into two main categories, those in

²⁷Hohfeld, Equity, synopsis III(I)(A) and (III)(I)(B), pp. 549-550.

²⁸Id., synopsis IV(C).

²⁹Referring to an equitable waste case, Hohfeld said that "[w]hen . . . it is said that the legal rule is 'annulled' pro tanto. . . this refers to the very jural relation under consideration and to that alone. It is meant simply that . . . Y is under a duty not to cut ornamental trees." Id. at 571.

which law and equity concurrently recognize a jural relation and those in which law and equity recognize conflicting jural relations.³⁰ He further divided each category into subcategories of primary relations, remedial relations, and adjective relations. Hohfeld provided numerous examples within each subcategory.

Despite the wealth of cases cited, however, Hohfeld's examples of conflict between law and equity are limited in that the equitable doctrines on which they rely are relatively stable and determinate. In one type of case, well-established equitable doctrines override legal rules in predictable ways. The equitable rights of a trust beneficiary take priority over certain legal privileges of the trustee; or the established doctrine of equitable waste replaces a life tenant's duty with a privilege and the remainderman's right with a no-right.³¹ In another type of case, a single set of primary legal relations is enforceable by legal and equitable remedies and choice of an equitable remedy overrides the secondary jural relations that otherwise would be available at law. In the case of a land sale contract, for example, the promisee's secondary equitable right to specific performance overrides the promisor's secondary legal privilege to pay rather than convey.³² Thus, Hohfeld's main argument, that equity overrides law in cases of conflict, is illustrated by cases in which equity doctrines generate a predicable set of equitable relations.

Hohfeld's reliance on relatively determinate equitable doctrines to illustrate the dominance of equity avoids the problem of general rules and particular outcomes discussed at the

³⁰Concurrent relations appear to be legal relations with which equity courts will not interfere by means of common injunction. See, e.g., *id.* at 555 ex. 23 (contract).

³¹*Id.* at 555 (examples 34, 35).

³²*Id.* at 556 (example 53).

beginning of this essay. If equity is fairly concrete, then the primacy of equity means only that between two sets of pre-existing rules, the equitable set prevails unless jurisdictional limits exclude its operation. The jural relations that result remain general in form, and are later particularized only in the sense that particular parties come to stand in them from time to time.

Hohfeld's examples are also consistent with his conviction that over time, the accumulation of precedents has converted open-ended equitable principles into determinate equitable rules.³³ Nevertheless, modern courts apply a variety of relatively indeterminate doctrines, many of which can be traced to the equity side of the legal system, that continue to serve the corrective function traditionally associated with equity. When these doctrines come into play, the result is a conflict between legal rules that establish rights, privileges, powers, and immunities in relatively determinate form and more indeterminate standards of decision, usually equitable in origin, that alter the effect of the rules as applied. A full account of jural relations would have to explain what relations result when this type of conflict occurs. One reading of Hohfeld's reference to general and particular jural relations at the outset of his last article is that he intended eventually to address this question.

Several examples may help to illustrate the problem. First, suppose that B gives A a mortgage to secure payment of a construction loan. The mortgage provides for interest payments on certain dates and for acceleration of the principle debt if B fails to pay any installment of interest within 20 days after the due date. Through a series of errors, an employee of B sends A

³³Id., synopsis III(I)(C), at 550 ("The general principles and specific rules are now for the most part defined by a large and well organized body of precedents, so that the above general ideas and maxims are, at the present time, of comparatively slight importance"). At the same time, Hohfeld acknowledged that even when legal remedies are inadequate, equity may refuse a remedy based on "special impolicy or inexpediency."

an interest check in the wrong amount while B is away. A rejects B's subsequent tender of the correct amount due, accelerates the loan, and sues to foreclose. The court denies foreclosure, stating that "a court of equity may intervene to prevent the creditor from taking an unconscionable advantage of the letter of his bargain."³⁴

In this case legal rules (or more precisely, the established rules of equity governing mortgage agreements) gave A a power to accelerate and foreclose according to the terms of the mortgage and B a liability to acceleration and foreclosure. The court's decision, however, replaces A's power with a disability. It also gives B a power to reinstate the mortgage by paying the sum due.

Next suppose that A and B own adjoining beachfront properties improved with houses. B's house, built by a predecessor in title, encroaches on A's lot. When B bought his lot, neither B nor A was aware of the encroachment; the encroachment came to light much later when A surveyed his lot for unrelated reasons. A requests an injunction ordering B to remove the encroachment. To comply, B will need to destroy and rebuild his house. The court holds that A is entitled to damages for loss of value but denies an injunction, finding that an injunction in the circumstances would impose a disproportionate hardship on B and give A unwarranted bargaining power in subsequent negotiations.³⁵

In this case legal rules gave A a primary right that B must not enter A's land without permission and imposed on B a duty not to enter. Following the court's decision, B has a

³⁴This example is based on *Graf v. Hope Bldg Corp.*, 171 N.E. 884 (N.Y. 1930). The court in this case declined to give relief, over Justice Cardozo's classic dissent.

³⁵This example is based on *Peters v. Archambault*, 278 N.E.2d 729 (Mass. 1972)(Tauro, C.H., dissenting).

privilege to enter and soon, by adverse possession, will have a right against A and others that they must not enter. A will have no-right against B and soon will have no-right against others who enter the land. A has a secondary right to damages against B but no secondary right excluding B from the portion of land encroached. Meanwhile, damages are likely to be of little value because a small irregular amount of land has little market value.

In the next case, A, an actress, enters a contract with B to perform exclusively for B for an agreed period of time at a fixed salary. At the time, A is technically a minor, entitled by statute to repudiate contracts. While still a minor, A enters a contract with C for a higher salary. C does not know of A's prior agreement with B. When A turns 21, she repudiates her contract with B, intending to work for C. B then persuades C, by means of threats and payments, to break its contract with A. A sues B, asking for an injunction prohibiting B from interfering with her contractual relations with C.

The court agrees that A was entitled by statute to repudiate her contract with A, that A's subsequent conduct was tortious, and that A was entitled to damages against B. But it refuses to grant an injunction on the ground that, although A was not legally required to honor her contract with A, "she was under a moral obligation to abide by" the contract. "One who comes into equity must come with clean hands, and her hands are not clean."³⁶

In this case, legal rules initially gave A a power to repudiate her contract with B and an immunity against enforcement of that contract. They also gave her a primary multital right against interference with her contract with C and placed a primary duty on B (and others) not to interfere. The court's equitable decision replaces A's primary right against interference by B

³⁶This example is based on *Carmen v. Fox Film Corp.* 269 F. 928 (2d Cir. 1920).

with a secondary right to damages, leaving A with no-right against interference by B and B with a privilege to interfere.

In the final example, A agrees to sell B a house. Evidence suggests that the price stated in the written contract of sale (which A did not read) is about half what A believed to be the price offered. Evidence also suggests that B committed no fraud and did not engage in other conduct that would support rescission under applicable legal rules. A sues for specific performance and B defends on the ground that he made a unilateral mistake about the price. The court denies specific performance but indicates that the contract remains valid and that A has a right to damages for the lost expectancy. The stated reason for the decision to deny equitable relief is that “[w]here the enforcement of a contract for sale of land would be harsh, oppressive, or manifestly unjust to one of the parties, specific performance will not be decreed.”³⁷

In this case, legal rules appeared to give A a primary legal right to performance of the contract and to place on B a primary duty to perform. A now has a secondary right to recover damages if B does not perform, and B has a legal duty to pay; but A has no right to performance and B has a privilege not to convey. The difference in jural relations is significant because damages may be of little value to A: B may have little money, A may want the particular land, and a jury’s assessment of damages is likely to be low.

In each of these examples, judges relied on highly indeterminate equitable doctrines to make significant changes in the parties’ jural relations as they appeared at the point of conduct. The question the examples raise is to what extent the particular equitable outcome decreed by a court supercedes general, rule-based jural relations. It may be that Hohfeld was content to show

³⁷This example is based on *Panco v. Rogers*, 87 A.2d 770 (N.J. Ch. 1952).

that his basic framework was capable of describing the relations in place at any point in time, without drawing any broad conclusions about how jural relations change at different stages in the legal process. Thus, for any question of law there might be a set of abstract jural relations prior to relevant conduct, a set of more concrete jural relations immediately following conduct, and a set of fully specified jural relations following a judicial decision. Hohfeld's table of relations, correlatives, and opposites seems quite capable of this descriptive task.

On the other hand, Hohfeld may have intended to develop a unified theory explaining how these different sets of jural relations interact over time within a legal system. Hohfeld took on a related task in his discussion of equity, concluding that, for mainly historical and procedural reasons, relations established by rules of equity supercede conflicting relations established by rules of law. The task becomes more difficult, however, when, as in the examples just given, the relations based on indeterminate decision rules appear to conflict with relations based on more determinate rules governing conduct.

F. Conclusion: What Would Hohfeld Do?

In the example cases described above, one possible conclusion is that the only true jural relations between two parties are the relations likely to result from adjudication, taking into account any equitable adjustments the adjudicator might make to correct the outcomes prescribed by legal rules. In other words, the expected outcome of particularized decisionmaking supercedes what previously appeared to be the applicable rules of conduct. This conclusion is consistent with Hohfeld's assertions that there is room for only one set of jural relations in any legal system and that equity must prevail over law. If courts commonly invoke principles of

equity to correct unjust results of rules, then the jural relations between A and B are defined by the final adjustment.

This result would be acceptable to a thoroughgoing Realist, but I doubt it would have satisfied Hohfeld.³⁸ Equitable correction in cases of the type described above is the product of highly indeterminate standards of decision applied to particular facts. It follows that the relations that appear to be in place when the parties interact are not reliable guides to conduct. An understanding of jural relations that eliminates or greatly reduces the role of general rules in defining jural relations is at odds with many of Hohfeld's examples, with his descriptions of pre-existing multital rights, and with the distinction he draws between operative and evidentiary facts. Nor does the Realist view of law as outcomes follow from Hohfeld's conclusion that jural relations recognized in equity displace conflicting jural relations recognized at law. The equity doctrines on which Hohfeld relied took the form of relatively fixed and determinate rules rather than licenses for discretionary decisionmaking.

Alternatively, Hohfeld might have concluded that the primary jural relations in place when parties interact continue to stand as general guides to conduct, but are subject to later adjustment at the time of decision by the set of secondary relations fashioned by a court. On this view, the jural relations of particular parties may change, but the change is *ex post* and affects only their remedial positions. The set of primary jural relations remains in place to govern conduct in advance of decision. In this way, the two sets of relations, one general and one

³⁸One way out, which might have appealed to Hohfeld, would be to press for significantly more rigid equitable rules of decision. The great advantage of traditional equitable principles, however, has been their capacity to reach unforeseen cases that cannot be captured in useful rules. Another possible way out is to press for a reduction in the scope of equity's mandate. See, e.g., Smith, *Equity as Second-Order Law*, *supra* note 12.

particular, can coexist within a legal system.

The difficulty with this second theory is that in a system in which adjudication is fully accessible to the public, parties have access to both primary and secondary jural relations at the time they first take action. Rational parties will take indeterminate decisional standards into account from the outset and will discount the set of primary jural relations as incompletely reliable. Consequently, the supposed primary jural relations will be less effective as a source of guidance and a less useful as a basis for interpersonal coordination. Thus, although separating primary jural relations from secondary jural relations, or conduct rules from decisional standards, avoids a full endorsement of the Realist understanding of law, it is difficult to identify a mechanism that might allow for this type of separation in a public system of law.

It appears, therefore, that Hohfeld ultimately would have confronted the basic problem of general rules and particular cases discussed at the beginning of this essay. Nothing in his ingenious and enlightening system of jural relations provides a clear way out. One of the advantages of his system, however, is that it brings the problem to light and illustrates the difficulty of avoiding it.