

DISTRIBUTIVE JUSTICE AND CONTRACT LAW: A HOHFELDIAN ANALYSIS

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ABSTRACT

According to Aristotle, justice consists of giving each person his due: equal members of society should be treated equally, and unequal members, unequally.¹ This justice, in turn, comes in two flavors: distributive and corrective.² Distributive justice—which has as its purview society at large—is concerned with distributing society’s shares to individuals according to merit.³ Whereas, the purview of corrective justice concerns voluntary (e.g., contracts) and involuntary (e.g., torts) transactions, and it seeks to rectify unjust alterations in the distributive scheme by returning the parties to the position they occupied before the distributive scheme was altered, which is to say, before a particular harm occurred.⁴

Even today, Aristotle’s classification of these two types of justice holds a firm grip on the judicial imagination, and perhaps nowhere is this truer than in contract law. There, it is taken for granted that the distributive shares held by members of society are determined both prior to, and outside of, contract law. The distributive question having been settled, it is believed that the proper role of contract law is merely to (a) facilitate the just exchange of these distributive shares by allowing parties to bargain and form agreements with one another and (b) rectify any unjust alteration to these previously established distributive shares. To couch this in Aristotelian terms, contract law should be concerned with enforcing the rules of corrective justice—which will facilitate and rectify the just exchange of previously allocated distributive shares—but should not be concerned with the initial distribution of those shares.

This Article challenges that view, and argues that the seemingly value-neutral rules of contract law are fundamentally distributive in nature, and that to ignore these distributive considerations is more than just bad policy—it is to misunderstand how the fundamental building blocks of the law are arranged to form contract law in the first place. Indeed, given the distribu-

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1. *See generally* ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, 3 (W. D. Ross trans.) (c. 350 B.C.E.) (“The just, therefore, involves at least four terms; for the persons for whom it is in fact just are two, and the things in which it is manifested, the objects distributed, are two. And the same equality will exist between the persons and between the things concerned; for as the latter the things concerned—are related, so are the former; if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares.”).

2. *See id.* at 2-5.

3. *See id.* at 3 (“[A]wards should be ‘according to merit’; for all men agree that what is just in distribution must be according to merit in some sense . . .”). The concept of merit, in turn, was dynamic, and varied from society to society. *See id.* (“[D]emocrats identify [merit] with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence.”).

4. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (“Corrective justice, in contrast [to distributive justice], features the maintenance and restoration of the notional equality with which the parties enter the transaction. This equality consists in persons’ having what lawfully belongs to them. Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss. The law corrects this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party.”).

tive nature of contract law, even the most non-activist judge imaginable, who sees it as his or her role to simply apply the law as written, and who views it as entirely improper to consider notions of distributive justice for the purpose of achieving a fairer distribution of wealth among members of society,⁵ nevertheless cannot help but make distributive decisions whenever he or she selects among or administers the rules of contract law, which have embedded within their very structure a deeply entrenched view of distributive justice.⁶

This is because every determination of law, including the determination of which rights ought or ought not to exist, or ought to be applied in a particular contractual setting, is the product (intentional or otherwise) of a policy decision regarding not whether the legal relationship in question ought or ought not to be regulated,⁷ but how that relationship should be regulated. And this regulation, in turn, requires that judges⁸—even judges who adamantly view themselves as non-activist judges—make an *ex ante* distributive decision regarding which rights ought and ought not to exist, which rules ought and ought not to apply, and how those rights and rules ought and ought not to be protected. These decisions, in turn, must all be made as a matter of policy rather than law.

Teasing out the implications of these insights can fundamentally alter the way we view and understand contract law. For instance, once we realize that the various legal rules that govern contract law are made up of a conglomeration of policy decisions regarding how to regulate (rather than whether to regulate) the relationship between the contracting parties, one of the largest obstacles to regulation—that of the perceived judicial interference with the rights of the parties—is removed as the need for regulation is now seen as mandatory rather than permissive. And because regulation is mandatory, the real question ought to be how we should understand, if not change, the manner in which the selection, application, and interpretation of contract rules affects the distributive arrangements between the parties to a contract.

5. This, for example, is the view held by many libertarians, who maintain that distributive considerations should never be taken into account in formulating the rules of contract law, because the state is never “justified in forcibly redistributing wealth from one individual or group to another.” Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 473 (1980) (“[R]edistribution of wealth restricts liberty and inappropriately attempts to align compensation with moral worth.” (citing FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 93-102, 133-61 (1960))); see also James M. Buchanan, *Political Equality and Private Property: The Distributional Paradox*, in *MARKETS AND MORALS* 69-84 (G. Dworkin et al. eds. 1977) (noting that individual freedom is inconsistent with forced economic equality); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 149-53, 167-74 (1974) (arguing that property rights, established by principles of acquisition and transfer, should be inviolate); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293-94 (1975) (noting that contract law provides individuals with a “sphere of influence” in which they are not required to justify their activity to the state). According to Kronman, “[t]he libertarian’s opposition to the use of contract law as a mechanism for redistribution derives from his general belief that the compulsory transfer of wealth is theft, regardless of how it is accomplished.” Kronman, *supra*, at 473-74.

6. Although this Article only addresses contract law, the thesis presented here (and outlined in the previous paragraph) applies with equal vigor to many other areas of law as well, ranging, for example, from criminal law to tort law to constitutional law.

7. Indeed, one cannot even speak of having a “right” capable of protection until a court or legislature first determines that a party’s conduct ought to be regulated in such a way that recognizes that party’s right to begin with.

8. Or legislatures, where the rules of contract law are not made into law by common-law courts, but enacted into law by legislatures, as in the case of the Uniform Commercial Code or the Convention on Contracts for the International Sale of Goods.

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I. INTRODUCTION

It is a well-known shibboleth in contract circles that most of the rules that make up contract law are default rules;⁹ rules that become part of the contract unless the parties contract around them by expressing their intent to the contrary.¹⁰ It is also well understood that parties making

9. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 1.10, at 37 (4th ed. 2004) (“[T]he great bulk of the general rules of contract law, including those of the Uniform Commercial Code and the Vienna Convention, are subject to contrary provision by the parties.”).

10. See, e.g., U.C.C. § 1-302 (AM. LAW INST. & UNIF. LAW COMM’N 2014) (differentiating between default rules, which may be contracted around, and immutable rules, which may not: “(a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement. (b) The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement. (c) The presence in certain provisions of [the Uniform Commercial Code] of the phrase ‘unless otherwise agreed’, or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.”).

contracts with one another often fail to express their intent completely,¹¹ so that most of the terms in a resulting contract are actually made up of default terms rather than party-supplied terms. When a dispute arises that cannot be settled by reference to a party-supplied term, courts are frequently called upon to supply these default terms, which they do according to several well-accepted methods.

The most common method used by courts in selecting a default rule is to select a rule that is thought to best reflect the parties' *ex ante* intentions.¹² This can be done, for example, by choosing a rule that, in the judgment of the court or legislature, the parties themselves would have chosen had they foreseen the dispute that actually arose and bargained with one another over the terms that would govern their dispute.¹³

A second method for choosing a default rule gives primacy not to the parties' intent, but to economic considerations. According to this view, courts should facilitate the making of more efficient contracts by counter-intuitively choosing a default rule that "the parties would *not* want."¹⁴ Why would a court do this? It is thought that by selecting a "penalty default rule"—so named because the rule is designed to penalize parties who fail to negotiate their own terms by implying default terms at odds with what they probably would have intended—the parties will be incentivized to contract around these odious terms, thereby providing their own express terms to govern future disputes.¹⁵

11. There is no such thing, in other words, as a "perfectly contingent contract" in which the parties have "allocate[d] explicitly the risks [of] future contingencies." Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 267 n.10 (1985).

12. See, e.g., FARNSWORTH, *supra* note 9, § 7.16, at 485 ("The first basis for implication [of a default term] is the actual expectations of the parties. If the court is persuaded that the parties shared a common expectation with respect to the omitted case, the court will give effect to that expectation, even though the parties did not reduce it to words.")

13. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 413 (6th ed. 2003) (arguing that default rules should "economize on transaction costs by supplying standard contract terms that the parties would otherwise have to adopt by express agreement"); see also Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 361 (1988) (offering as default rule "the contract that most well-informed persons would have adopted if they were to bargain about the matter").

14. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (emphasis added).

15. By adequately incentivizing parties to supply their own terms, it is thought that penalty default rules would operate to reduce ambiguity in the resulting contract regarding what rule the parties actually desired. This, in turn, would not only reduce judicial error when interpreting the resulting contract, but, more importantly for those viewing the matter from the economic perspective, it would encourage the disclosure of previously undisclosed information during the bargaining process, thereby resulting in more efficient contracts. See generally Ayres & Gertner, *supra* note 14, at 91. The famous case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), one of the classics in the contracts canon, is frequently cited as an example of a court using this approach. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 735 n.24 (1992). But see Eric A. Posner, *There are no Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 563 (2005) ("[T]here are no plausible examples of penalty default rules that solve the information asymmetry problem

There is, however, a third possibility, one that has been little explored and, where explored, frequently dismissed. That third possibility is that courts should choose default rules according to distributional considerations, for example with an eye towards the manner in which the default rule affects the distributive arrangements between the parties, making one party better off vis-à-vis another party.

In an article written in 1980,¹⁶ Professor Kronman explored this issue in depth, asking whether it is ever appropriate for courts to choose or design contract rules with an eye to their distributive consequences. Although Kronman ultimately answered this question in the affirmative, even more remarkable was the unstated premise underscoring his work: that a judge's consideration of the distributive effects of a default rule was thought by many to be so presumptively inappropriate that it warranted a lengthy treatment, in the form of an apology, arguing that distributional considerations should at least sometimes be taken into account. But why is it that so many believe it is inappropriate to take the distributive consequences of default rules into account?

Part of the reason stems from those who accept Aristotle's dichotomy between distributive and corrective justice,¹⁷ and his view that only the latter type of justice is applicable to voluntary transactions, i.e., contract law. But there are other, more modern justifications for this view as well. For instance, if one were to ask a libertarian why it is inappropriate to take distributive considerations into account, he or she might answer by saying something like: "Freedom of contract is a sacrosanct principle of contract law, and when free individuals come together to form an agreement, it is a court's job to enforce these agreements as they find them,¹⁸ rather than to make them anew."¹⁹ "Indeed," he or she might continue, "doing anything more than interpreting the agreement made by the parties would constitute impermissible government interference, an interference that would infringe not only on the institution of contract law, but on individual liberty itself!"²⁰

identified by Ayres and Gertner. The penalty default rule is a theoretical curiosity that has no existence in contract doctrine.").

16. See Kronman, *supra* note 5.

17. See *supra* Abstract.

18. See, e.g., NOZICK, *supra* note 5, at iv ("[A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified.").

19. See, e.g., Kronman, *supra* note 5, at 476 ("Taking distributional effects into account . . . is inconsistent with the libertarian conception of individual freedom and violates the basic entitlement on which that conception rests.").

20. Indeed, some libertarians have carried these principles to such an extent that they have argued that all government interference with a party's freedom to contract is inappropriate. For instance, some libertarians have even described as inappropriate interference that comes in the form of legislation preventing employers from discriminating against their employees, which, in their words, "clearly involves interference with the freedom of individuals to enter into voluntary contracts with one another." MILTON FRIEDMAN WITH ROSE D. FRIEDMAN, *CAPITALISM AND FREEDOM* 95 (1962). According to this admittedly extreme view, distributive

As I shall argue below, however, this view mistakenly assumes that parties contract with one another against a background in which regulations constitute an infringement on liberty. However, if it can be shown that regulation is inevitable, as I argue in Part III, then this argument falls by the wayside. Indeed, to preview the argument a bit more, in even the most libertarian state imaginable, parties must necessarily contract with one another against a regulatory background of default rules reflecting unique distributive arrangements, and these arrangements, which are established by judges whenever they select, apply, or interpret default rules, constitute a distinctive (though often unstated) scheme of distributive justice. And, with respect to contract law, the very act of reaching an agreement with another party, providing express terms in place of the default terms supplied by the law, can be best understood as the parties' attempt to replace the distributive arrangement chosen by society with a distributive arrangement of their own choosing.²¹ If this view is correct, as I argue in greater depth in Part IV, then the role of distributive justice in contract law is not only sometimes appropriate, as suggested by Professor Kronman, but, given its ubiquity, inescapable.²²

justice not only has no place in contract law, but is hard pressed to find a place for itself anywhere in our legal regime. *See, e.g.*, MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO 60-61 (2009) ("The libertarian theory of rights rules out any law that requires some people to help others, including taxation for redistribution of wealth The state has no more right to force affluent taxpayers to support social programs for the poor than a benevolent thief has the right to steal money from a rich person and give it to the homeless.").

21. Parties begin their negotiations, of course, from the starting position conferred on them by their initial entitlement of distributive shares, thereby illustrating yet again one of the many instances in which the sphere of distributive justice affects the analytically distinct (and seemingly independent) sphere of corrective justice. Of course, contract law only tolerates such interference to an extent, and has put in place certain protective mechanisms to prevent a party from impermissibly drawing on its superior distributive arrangement to achieve results that ought to be governed by entirely different principles. Examples of these protective mechanisms include contract law's prohibitions against contracting with those of reduced mental capacity, for example see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995), or using deception, for example see FARNSWORTH, *supra* note 9, § 4.9, at 234 ("In a system of contract law based on supposedly informed assent, it is in the interest of society as well as of the parties to discourage misleading conduct [or coercive behavior] in the bargaining process."). *See, e.g., id.* § 4.9, at 235 (noting that "[c]oercive behavior . . . is a particularly odious form of overreaching in a system of contract law based on assent supposedly freely given," in the bargaining process).

22. Indeed, as argued in greater depth in Part IV, in setting up the rules of contract law, courts and legislatures are, in fact, setting up a metastructure that distributes justice among the parties before they ever meet one another by providing a background against which certain of their actions will or will not be enforced, or by which certain of their defenses will or will not be allowed, or by which certain remedies will or will not be given in the case of breach by one of the parties. These background rules, in turn, make up the framework of contract law; a framework that distributes the rights and obligations between the parties before the parties ever meet one another and haggle over which of these rights and obligations ought to be tinkered with, and in what way (we call this "forming an agreement"). The framework against which the parties negotiate, however, will have existed long before the parties came face to face to form an agreement, or to bargain over some term in their agreement, as a matter of distributive justice.

In the process of making the arguments outlined above, I will be completely ignoring the (important) question of whether it is appropriate, as a normative matter, for courts to consider the distributional effects of default rules. Instead, by drawing on the tools developed by Professor Hohfeld, and particularly on his concepts of “rights,” broadly defined, I will argue that, as a matter of logic, courts cannot help but to prefer one distributive arrangement to another whenever they select a particular default rule to govern a legal relationship between two parties.

More specifically, I will argue that the idea of distributionally “neutral” contract rules is a legal unicorn, no matter how innocuous such default rules may appear to be on their surfaces. Rather, the very act of selecting default rules consists, at its core, of choosing between two or more competing notions of distributive justice, so that the question is no longer whether courts ought to take distributive justice into account when choosing a default rule (for every rule reflects a distinct distributive preference), but rather how courts should balance the distributional consequences of their decisions with other worthwhile considerations, such as party intent and economic efficiency.

II. THE DISTRIBUTIVE NATURE OF CONTRACT RULES

There are several, well-accepted aims of contract law, such as establishing rules governing when parties intend to be bound to their agreements,²³ rules distinguishing between enforceable and unenforceable promises,²⁴ and rules governing the remedies available to parties in the event of breach.²⁵ More controversial, however, is whether the courts and

Indeed, the very question regarding the extent to which a party should be allowed to take advantage of his or her superior information, resources, or bargaining power, on the one hand, or the relative lack of information, resources, or bargaining power of his contractual adversary, on the other hand, including that other party’s youth, or inexperience, or diminished mental capacities, is not a product of freely chosen rules agreed upon by the parties, but rather is a product of the rules emanating from the superstructure of contract law. There will never be an exact equilibrium between the parties, and so the law must, of necessity, allow one party to take advantage of another, to some extent. Where the law tries to draw the line is not in preventing one party from taking advantage of another, but in their taking unfair (read, contractually prohibited) advantage of another, or taking advantage of them beyond a point. Wherever this line is drawn, and for whatever ostensible reasons for drawing it, the decision will have distributive consequences.

23. *See, e.g.*, *A/S Apothekernes Laboratorium v. I.M.C. Chem. Grp.*, 873 F.2d 155, 157 (1989) (“Under Illinois law, courts focus on the parties’ intentions to determine whether an enforceable contract comes into being during the course of negotiations, or whether some type of formalization of the agreement is required before it becomes binding.”).

24. In the common law, the most common test for distinguishing enforceable from unenforceable promises is supplied by the doctrine of consideration. *See, e.g.*, *In re Owen*, 303 S.E.2d 351, 353 (N.C. Ct. App. 1983) (“Consideration is the glue that binds the parties to a contract together.”).

25. The traditional rule states that the non-breaching party is entitled to be put in the position it would have occupied had the breaching party performed its obligation under the contract. *See, e.g.*, U.C.C. § 1-305(a) (AM. LAW INST. & UNIF. LAW COMM’N 2014) (“[R]emedies . . . must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.”).

legislatures forming these rules ought to consider matters of distributive justice to achieve a more fair distribution of wealth among the members of society.²⁶

The first scholar to systematically examine this question was Professor Kronman, who asked in an influential article whether “it [was] ever appropriate to use the law of contracts . . . as an instrument of redistribution,” or whether “the legal rules that govern the process of private exchange [should instead] be fashioned without regard to their impact on the distribution of wealth in society?”²⁷ In posing the question in this manner, Kronman distinguished between two types of rules—distributional and non-distributional—and attempted to determine whether, and to what extent, it was appropriate to consider the former.

Consider, for instance, state usury laws prohibiting a party from lending above a certain rate of interest,²⁸ laws requiring that certain goods be sold with warranties,²⁹ and laws against employing someone below a particular wage.³⁰ These laws, according to Kronman, were clearly designed with the object of “shift[ing] wealth from one group—lenders, sellers, landlords, employers—to another—borrowers, buyers, tenants, workers—presumably in accordance with some principle of distributive justice.”³¹ To what extent can these obviously distributive rules be defended?

According to some, the answer is both simple and unequivocal: they cannot. For instance, a libertarian might argue that all of the above rules, and other distributive rules of their ilk, can never be defended because the state is never “justified in forcibly redistributing wealth from one individual or group to another.”³² Why not, one might ask? Be-

26. See Kronman, *supra* note 5 (citations omitted).

27. See *id.* at 473.

28. See, e.g., CAL. CIV. CODE § 1916-1 (West 2015) (limiting the contractual legal maximum rate of interest to twelve percent); N.Y. GEN. OBLIG. LAW § 5-501(1) (McKinney 2011) (limiting the legal maximum rate of interest to six percent); TEX. FIN. CODE ANN. § 302.002 (West 2015) (limiting the legal maximum rate of interest to six percent).

29. See, e.g., U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014) (“Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”); *id.* § 2-315 (“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”).

30. See, e.g., 29 U.S.C. § 206(a)(1)(C) (2007) (establishing a national minimum wage of \$7.25 per hour).

31. Kronman, *supra* note 5, at 473.

32. See *id.* (“[R]edistribution of wealth restricts liberty and inappropriately attempts to align compensation with moral worth.”) (citing HAYEK, *supra* note 5, at 93-102, 133-61 (1960)); NOZICK, *supra* note 5, at 167-74 (arguing that property rights, established by principles of acquisition and transfer, should be inviolate); Buchanan, *supra* note 5, at 69-84 (arguing that individual freedom is inconsistent with forced economic equality); Epstein, *supra* note 5, at 293-94 (arguing that contract law provides individuals with a “sphere of influence” in which they are not required to justify their activity to the state).

cause, according to Kronman, “the use of contract law as a mechanism for redistribution derives from [the libertarian’s] general belief that the compulsory transfer of wealth is theft, regardless of how it is accomplished.”³³ So far, there is little new here. Anyone even mildly acquainted with libertarian theory would be unsurprised by these remarks, and would understand them (though perhaps, not agree with them) as reflecting the libertarian’s basic opposition to the state meddling in the affairs of private individuals.

What is slightly more surprising, however, is that many liberals—the great champions of distributive justice—have also argued against taking into account distributive considerations in the context of contract law, albeit for different reasons than those expressed by libertarians. Unlike the libertarian, the liberal “who oppose[s] the use of contract law as a redistributive device do[es] so because [he or she] believe[s] that distributional objectives (whose basic legitimacy they accept) are always better achieved through the tax system than through the detailed regulation of individual transactions.”³⁴ According to this view, the distributive effects created by individual contracts should be ignored, and any inequalities that stem from such transactions can be (if necessary) remedied through the tax system, as a form of redistributive justice.

The fact that both libertarians and liberals, who otherwise share little in common, can adopt such similar views regarding the propriety of taking distributive justice into account in contract law does not seem to bode well for the argument that distributive considerations should be taken seriously. Kronman himself acknowledged this point when he wrote that such “widespread agreement, on both sides, that the legal rules regulating voluntary exchanges between individuals should not be selected or designed with an eye to their distributional consequences” might lead one to conclude that a “non-distributive conception” of contract law “must be correct.”³⁵

Nevertheless, Kronman’s article took an important normative step away from the prevailing view, if only in the limited sense of allowing these distributional considerations to be taken into account “whenever alternative ways of doing so are likely to be more costly or intrusive.”³⁶ In so doing, Kronman challenged the libertarians’ blanket prohibition of taking seriously distributive goals, and called to action those liberals who favored distribution only through the tax system by attempting to persuade them that, in at least some cases, distribution through the institution of contract law could be more effective than distribution through a tax and spend scheme. If for no other reason than this (and

33. Kronman, *supra* note 5, at 473-74.

34. *Id.*

35. *Id.* at 474.

36. *Id.*

there are other reasons), Professor Kronman's article was a major contribution to the literature in this area, for it marked off important intellectual space to take seriously the role of distributive justice in contract law in at least some situations. However, Kronman failed to recognize the larger distributive role that courts not only should, but must, play in the selection of each and every contract rule, for reasons that will be discussed in greater detail below.³⁷

Indeed, justifying the ostensibly distributive laws mentioned above (i.e., usury, warranty, and minimum wage laws) is, in some sense, too easy. Either one favors (at least in principle) the use of distributive justice in contract law, in which case these are exactly the types of laws one would expect courts and legislatures to use to achieve distributive goals, or one does not favor the use of distributive justice in contract law, in which case the mere existence of such laws is a smack in the face of what one expects the institution of contract law to do. The much more interesting question, it seems to me, is whether distributive considerations govern even the most seemingly mundane rules of contract law, rules that are, on their face, merely designed to provide guidance to parties and courts trying to answer some of the basic questions of contract law like which promises ought to be enforced, or how courts ought to determine the mutual intent of the parties, or whether this or that excuse to performance ought to be allowed. If these seemingly innocuous rules, rules that, on their surface, merely appear to tell courts when party conduct falls on this or that side of a previously established juridical line in the sand, can be shown to be, in fact, distributive, then the critiques leveled against distributive justice by both libertarians (i.e., using contract law to redistribute resources is theft) and liberals (i.e., the tax system is better), along with the defense of distributive justice offered by Kronman (distributive considerations are appropriate where they are less costly or intrusive than their alternatives)³⁸ fall to the wayside.

More specifically, if every rule of contract law is necessarily distributive in nature, as argued in Part III of this Article, then it no longer makes sense for the liberal to look exclusively to the tax system—or to any other distributive system—to bring about distributive justice. This is because if distributive consequences result from the mere use of default rules in contract law, regardless of which default rules are chosen, then one must at least consider these distributive consequences whenever such rules are formulated, applied, or interpreted.

As for the libertarian, if every rule of contract law can be shown to entail distributive consequences, as argued in Part III, then the libertar-

37. See discussion *infra* Part III (explaining in greater detail that every rule of contract law is necessarily distributive, making it not only undesirable, but impossible, to fail to take into account a rule's distributive effects).

38. Kronman, *supra* note 5, at 474.

ian's argument against using contract law to distribute wealth as a form of theft is beside the point: if every rule necessarily distributes wealth anyway,³⁹ then the libertarian, too, must struggle over how wealth should be distributed in the formation, application, and interpretation of these rules. Unless the libertarian is prepared to abandon contract law altogether,⁴⁰ he or she must either (1) engage with matters of distributive justice directly, or (2) with a touch of dishonesty, ignore the distributive consequences of the default rules they previously touted as "value neutral." This being so, the libertarian's energy would be much better spent not by fighting against default rules nebulously believed to impinge on personal liberty on the ground that they redistribute wealth between parties, but by selecting default rules that best comport with other values they deem important. And finally, if distribution in contract law is inevitable, then even the most well-reasoned defenses of distributive justice in contract law are unnecessary once we decide to have a law of contracts at all.⁴¹

All of what has just been stated, of course, assumes that the rules of contract law, and the rights conferred by those rules, are, in fact, distributive in nature. I will turn to this question in Part IV, where I argue that the selection of default rules⁴² in contract law, which determine the rights and duties of the parties where such rights and duties are not stipulated by the parties themselves, entails a choice between two or more competing regulatory regimes, each encapsulating within it a distinct and competing vision of distributive justice. Because that argument relies on a careful understanding of exactly what contract "rights" do and do not entail, it will first be necessary to understand precisely what is meant by a "right." It is to that question that I now turn.

39. Or, in the language of the libertarian, each default rule must necessarily result in a slightly different form of "theft." *Id.*

40. It is unlikely that this is truly an option for the libertarian, for the abandonment of contract law would itself seem to infringe on one's freedom to engage in exchange and otherwise dispose of and acquire resources as one sees fit.

41. However, such defenses are nevertheless important in upholding the normative legitimacy of an inevitable enterprise.

42. Though this principle is generally applicable to all default rules, I will confine my discussion to default rules in contract law.

III. DOWN THE RABBIT HOLE: HOHFELD AND THE ROLE OF POLICY IN LEGAL ANALYSIS

A. *The Hohfeldian Framework*

1. *The Building Blocks of the Law: The Eight Fundamental Legal Concepts*

In a groundbreaking work that has sharpened our thinking about law ever since, Professor Hohfeld sought to clarify law's most basic legal concepts; concepts upon which our entire legal edifice has been built, but which nevertheless have been used with unforgiveable ambiguity for centuries.⁴³ For instance, Hohfeld demonstrated that one of the most fundamental and important terms in the corpus of legal thought, a "right," was confusingly used in at least four analytically distinct ways: to describe what we would now call, in the language of Hohfeld (1) a true (or Hohfeldian) "right," (2) a "privilege," (3) a "power," and (4) an "immunity."⁴⁴ Each of these concepts, in turn, is distinguishable from each other in fundamental and important ways. As Professor Singer explains:

"Rights" are claims, enforceable by state power, that others act [or refrain from acting] in a certain manner in relation to the rightholder. "Privileges" are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. "Powers" are state-enforced abilities to change legal entitlements held by oneself or others, and "immunities" are security from having one's own entitlements changed by others.⁴⁵

A few examples will help illustrate the difference between these legal concepts. Suppose that you and I have signed a contract with each other whereby you agree to sell, and I agree to buy, 100 widgets for \$100. Here, it would be proper to say that I have a "right" to receive 100 widgets from you, and you have a correlative "right" to receive payment from me in the amount of \$100. We would call these "rights" because once the contract is formed, each of us can call upon the power of the state to force the other party to perform their contractual obligations or pay an appropriate remedy⁴⁶ as determined by the courts.⁴⁷

43. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20 (1913).

44. *See id.* at 30 ("[T]he term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense.").

45. Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986 (1982).

46. This does not mean, of course, that the promisee's only "right" is to *either* the promisor's performance *or* payment of money damages, at the promisor's election, a position that some commentators have accused Holmes of maintaining. *See, e.g.*, Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 647 (1999) ("The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform

Suppose, however, that the contract failed to specify how the widgets were to be delivered, or how the payment was to be made. Here, it would be appropriate to say that you held a “privilege” to ship the widgets in any commercially reasonable manner (e.g., by air, land, or sea), and that I would have a “privilege” to pay you in any commercially reasonable manner as well (e.g., via check, cash, or wire transfer). We would refer to these legal concepts as “privileges,” rather than “rights,” because each of us would be free to choose the manner in which we performed our contractual obligations, and neither of us would have the authority to compel the state to force the other party to perform (or not perform) in a certain manner.

Suppose further, however, that one of us was unhappy with the other party’s ability to exercise their privilege in a particular manner (e.g., suppose I wanted the widgets right away and was unhappy about your ability to send them by sea). In that case, I could make an offer to give you an additional amount of money to send the widgets via air, which you would now have the “power” to accept, thereby modifying our con-

or pay damages. Holmes saw the matter this way more than one hundred years ago.”). *See Norcia v. Equitable Life Assurance of U.S.*, 80 F. Supp. 2d 1047, 1047-48 (D. Ariz. 2000) (maintaining that Holmes’ “bad man” theory of contracts permeates American common law. That is, a contracting party usually cannot demand performance of a valid contract; rather, the defaulting party must either perform or pay damages equivalent to the value of the promised performance. Under this approach to contract theory, it follows that when performance becomes uneconomic, a contracting party will not infrequently break a contract, preferring instead to pay damages. The *Norcia* Court went on to find that when a bad man breaches a contract, the only punishment is to pay damages, and nothing else.); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”). Holmes was himself partially to blame for these misconceptions, given his colorful way of making a point. *See, e.g., id.* (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”); *see also* OLIVER WENDELL HOLMES, *THE COMMON LAW* 236 (Mark D. Howe, ed. 1963) (1881) (“The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.”); *id.* at 247-48 (“If we look at the law as it would be regarded by one who had no scruples against doing anything which he could do without incurring legal consequences, it is obvious that the main consequence attached by the law to a contract is a greater or less possibility of having to pay money. The only question from the purely legal point of view is whether the promisor will be compelled to pay.”). However, for reasons I have expressed elsewhere, Holmes’ view was much more nuanced than these brief descriptions of his theory suggest, and his rhetorical flourishes were designed, at least in part, to help courts prevent this type of behavior. *See generally* Marco Jimenez, *Finding the Good in Holmes’s Bad Man*, 79 *FORDHAM L. REV.* 2069 (2011).

47. Generally speaking, this remedy will attempt to give the non-breaching party the benefit of his bargain by putting him in the position he would have occupied had the other party performed. *See, e.g.,* FARNSWORTH, *supra* note 9, § 12.1, at 730 (“[Courts] attempt[] to put [the injured] party in as good a position as it would have been in had the contract been performed, that is, had there been no breach.”).

tract in the process.⁴⁸ We would refer to this legal concept as a “power” because, through the mechanism of “acceptance,” you could modify our previously-existing legal relationship, giving me the right to receive the widgets via air from you, and giving you the right to receive an additional sum of money from me.

Finally, in this example, each of us would be “immune” from having the other party impose any additional obligations on us without our consent. For instance, I could not impose on you, without your consent, an additional obligation to send me both widgets and gidgets, and you could not impose on me, without my consent, an additional obligation to pay you an additional sum of money.⁴⁹ We refer to this legal concept as an “immunity” because it reflects our ability to not have the original distribution of rights and privileges between us, as reflected in our original contract, changed without our consent.

Professor Hohfeld’s great insight, however, was not only in distinguishing these various legal concepts from each other, which was a remarkable feat in and of itself, but in recognizing that each one of these legal concepts connects with a related legal concept to form a complete legal relationship, with one party at one end of that relationship, and the other party at the other end. Each of the four legal concepts discussed above, therefore, is incomplete in and of itself, because an individual cannot have a legal relationship with himself, and must therefore be linked up with its juridical correlative—the legal concept reflecting the legal relationship from the other party’s perspective—to properly capture the full import of the legal relationship reflected by that legal concept. Professor Corbin helpfully summarized Professor Hohfeld’s analytical paradigm in the following way:

[Each of these “fundamental legal conceptions” must] always be used with reference to two persons, neither more nor less. One does not have a legal relation to himself. Nor does one have a legal relation

48. In common law, the additional consideration would be necessary to modify the contract per the preexisting duty rule. *See, e.g.*, *Alaska Packers’ Ass’n. v. Domenico*, 117 F. 99 (9th Cir. 1902) (contract modifications not enforceable without additional consideration). Under the Uniform Commercial Code, however, such modifications may be valid when done in good faith. *See* U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM’N 2014) (“An agreement modifying a contract within this Article needs no consideration to be binding.”); § 2-209 cmt. 2 (“[A] ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.”).

49. The law of contracts recognizes such immunities in the form of doctrines to protect parties against fraud, duress, undue influence, and the like. For an example of fraud protections, see FARNSWORTH, *supra* note 9, § 4.10, at 236 (“In the typical case, as when a seller misrepresents the quality of goods, the misrepresentation is said to go to the ‘inducement.’ The effect of such a misrepresentation is to make the contract voidable at the instance of the recipient.”). For an example of duress protections, see *id.* § 4.16, at 255 (“[D]uress by physical compulsion results in no contract at all or in what is sometimes anomalously described as a ‘void contract.’”). For an example of undue influence protections, see *id.* § 4.20, at 264 (“[U]ndue influence makes a contract voidable and may serve as a defense . . .”).

with two others; he has separate legal relations with each. A so-called legal relation to the State or to a corporation may always be reduced to many legal relations with the individuals composing the State or the corporation, even though for convenient discussion they may be grouped.⁵⁰

Accordingly, where one party claims to possess a particular fundamental legal conception (e.g., a privilege), another party must necessarily hold the other end of that same legal conception, joining the parties together in a single legal relationship.⁵¹ This means, of course, that all legal concepts are relational (i.e., there is no such thing as an individual party occupying a legal position in the abstract), and that there must be a total of eight, rather than four, “fundamental legal conceptions.” These eight fundamental legal conceptions, in turn, constitute the building blocks of our law, the jural “atoms,” if you will. So, what are these other four fundamental legal conceptions?

According to Hohfeld, rights, privileges, powers, and immunities are linked up correlatively with duties, no-rights, liabilities, and disabilities, respectively.⁵² In fact, Hohfeld maintained that these “eight fundamental legal concepts,” and no others, constituted the “lowest common denominators of the law” by which “every legal problem could be stated.”⁵³ This means that the entire legal corpus—whether one is referring to contract and tort laws chiseled into stone thousands of years ago in the ancient Near East, or whether one is dealing with a statute regulating property in our own time—consists, at its most basic level, of nothing more than different combinations of these eight fundamental legal concepts.

The stunning power of Hohfeld’s insight meant that, for the first time, even the most difficult legal problems could be broken down and understood in terms of their simpler components. More ominously, however, it also meant that the historical and ongoing failure to understand these concepts, or how they combined in various ways to form the body of our

50. Arthur L. Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163, 165 (1919).

51. In Hohfeld’s terms, every fundamental legal conception that was held by any given party was necessarily “correlative” to another fundamental legal conception held by another party; together, these “jural correlatives” constituted one complete legal relationship. *See, e.g.*, WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 10 (Walter Wheeler Cook ed., 1964) (“Any given single relation necessarily involves two persons. Correlatives in Hohfeld’s scheme merely describe the situation viewed first from the point of view of one person and then from that of the other.”).

52. Thus, a “duty,” for instance, has been defined as “simply a right viewed from the vantage point of the individual who must do or refrain from doing the act in question.” Kevin W. Saunders, *A Formal Analysis of Hohfeldian Relations*, 23 *AKRON L. REV.* 465, 468 (1990). Saunders goes on to write “X has a right against Y with regard to act A, if and only if Y has a duty to X with regard to act A.” *Id.*

53. James B. Brady, *Law, Language and Logic: The Legal Philosophy of Wesley Newcomb Hohfeld*, 8 *TRANSACTIONS OF THE CHARLES S. PEIRCE SOC’Y* 246, 247 (1972).

law, presented “a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems.”⁵⁴

So, how, exactly, did this Hohfeldian system work? Let us return to a concept we explored earlier, that of a Hohfeldian power. Earlier, we defined a “power” as a “state-enforced abilit[y] to change legal entitlements held by oneself or others,”⁵⁵ and illustrated this concept by referring to a party using the mechanisms of offer and acceptance to attempt to modify the legal entitlements (i.e., the privilege to ship goods by any commercially-reasonable means) stipulated in the original contract.⁵⁶ Fleshing out the definition of “power” provided above, we might go on to define a power in the following, more complete, way:

A person has a power over another person, if he or she can do some act that changes the legal relations of that second person Thus, a power held by X over Y may be looked at as X's capacity to perform an act that will have the effect of [changing] a legal relation to which Y is a party.⁵⁷

Returning to our example from earlier, where each party wanted the other party to perform obligations not stipulated in the original contract, we can now see more precisely why a party who is able to draw upon the rules of contract law to make an offer to another party can be said to possess a “power”: the offeror is given the ability to perform an act—the making of offer—that changes the legal relation to which the offeree is a party. But how, precisely, has that legal relationship been changed? In the following manner: whereas formerly the offeror was immune to having the legal relationship between her and the offeree changed, the offeror is now subject to having their legal relationship changed by the offeree's accepting of her offer. The power, in short, does not exist in isolation, but describes one aspect of the legal relationship from one party's (here, the offeror's) point of view.

What Professor Hohfeld discovered, however, is that this legal relationship can also be described from the other party's (i.e., the offeree's) point of view as well, by invoking the legal concept that is correlative to a power. And that legal correlative, a “liability,” can be understood as follows:

Since a liability is the correlative of a power, it too concerns a volitional act that changes a legal relation. However, with a liability the situation is viewed from the point of view of the person whose legal relations are changed, rather than from the point of view of the person with the capacity to effect the change through the performance of the act. Thus, a person Y is under a liability with regard to X, if there is an act X can perform that will affect the legal relations of Y.⁵⁸

54. HOHFELD, *supra* note 51, at 26.

55. Singer, *supra* note 45, at 986.

56. See *supra* notes 43-47 and accompanying text.

57. Saunders, *supra* note 52, at 480.

58. *Id.* at 479 (citation omitted).

Returning to our example, we can say that the offeree is under a “liability” with respect to the offeror because there is some act that the offeror can perform—the making of an offer—that will affect the legal relationship between the parties. In other words, whereas before the offeree could not change the legal relationship existing between the parties regarding their original obligations under the contract, once the offeror has made her offer, the offeree now can change that relationship, altering each parties’ obligations under the contract, through the mechanism of acceptance. Each of the fundamental legal conceptions set forth by Professor Hohfeld can be understood in a similar fashion, and it is to fleshing out each of these juridical relationships that we now turn.

In summary, then, Hohfeld’s fundamental legal conceptions can be said to possess the following four features:

- (1) Each legal relation is concerned with one activity, or omission, of one person.
- (2) Each legal relation regards an activity, or omission, with respect to two, and only two, persons.
- (3) The analysis of a legal relation ignores the question of sanctions.
- (4) The analysis is concerned with the effect of all laws on a particular activity or omission. It is not concerned with presenting the material of a particular law.⁵⁹

It is worth pausing here to briefly consider the third point outlined above, for it implies that “[w]hen an analysis is made in terms of legal relations, any sanction is ignored”⁶⁰ This does not mean, of course, that Hohfeld is denying the existence of legal sanctions,⁶¹ or even that he is discounting their importance, a fact that will be explored in greater depth below. Rather, it simply means that Hohfeld “does not find it necessary to bring them into the analysis of a legal relation” for the simple reason that “the application of a sanction may itself be separately [analyzed] in terms of legal relations.”⁶² Stated differently, where the conduct of two parties is governed, for example, by a right/duty relationship, and where the first party breaches its duty to the second (e.g., by failing to deliver 100 widgets as promised), we can analyze the remedy by means of a second independent Hohfeldian relationship (e.g., the breaching party’s duty to pay damages to the injured party, and the injured party’s right to receive those damages).

59. A.K.W. Halpin, *Hohfeld’s Conceptions: From Eight to Two*, 44 *CAMBRIDGE L.J.* 435, 439 (1985).

60. *Id.*

61. *Id.*

62. *Id.* at 439-40.

2. Arranging the Building Blocks I: The Four Jural Correlatives

The same logic used above to work out the relationship existing between a “power” and its jural correlative, a “liability,” can also be used to work out the relationships among each of the other fundamental legal concepts identified by Hohfeld. More specifically, we can link each of the fundamental legal concepts with their jural correlatives, as discussed above,⁶³ to make the following Hohfeldian claims: where the first party (P1) has a “right” to some entitlement, X, the second party (P2) must necessarily hold a correlative “duty” with respect to that right;⁶⁴ where P1 has a “privilege” to some X, P2 must necessarily have a correlative “no-right” with respect to that privilege; where P1 has a “power” to some X, P2 must necessarily have a correlative “liability” with respect to that power; and where P1 has an “immunity” to some X, P2 must necessarily have a “disability” with respect to that immunity.⁶⁵

In this way, each of the eight fundamental legal conceptions identified by Hohfeld can be combined to form the four distinct legal relationships discussed above (i.e., the right/duty relationship, the privilege/no-right relationship, the power/liability relationship, and the immunity/disability relationship). These relationships, in turn, can be mapped out as follows⁶⁶:

Table 1: Jural Correlatives

right	privilege	power	immunity
duty	no-right	liability	disability

It is important to note that each fundamental legal concept making up a given correlative pair (e.g., the “right” and the “duty” in the “right/duty” relationship) are equivalent to each other; the only difference between them is that one term (e.g., the top term) represents the

63. See *supra* Section III.A.1.

64. See, e.g., Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 502 (1924) (defining a “jural right” as “a relation existing between two persons when society commands that the second of these two shall conduct himself in a certain way (to act or to forbear) for the benefit of the first. A ‘right’ exists when its possessor has the aid of some organized governmental society in controlling the conduct of another person. The first is said to have a ‘right’ against the second and the latter a ‘duty’ to the first.”).

65. See, e.g., Saunders, *supra* note 52, at 479 (“Disabilities and immunities are the opposites of powers and liabilities, so statements asserting the existence of disabilities and immunities also regard the possibility of creating or extinguishing legal relations. The statements, however, assert incapacity. If X is under a disability with regard to Y, X does not have a power with regard to individual Y, that is, there is no act X can perform that will affect Y’s legal relations. Similarly, if Y has an immunity with regard to X, Y is not under a liability with regard to X. Once again, there is no act X can perform that will affect Y’s legal relations. The difference is that, while disability stresses the incapacity of X, immunity stresses the protection of Y’s legal relations against change, at least against change resulting from X’s acts.” (citation omitted)).

66. Hohfeld, *supra* note 43, at 30.

legal concept as viewed from the perspective of one party, whereas the second term (e.g., the bottom term) represents the legal concept as viewed from the second party's perspective.⁶⁷

To illustrate, consider a contract in which one party ("Buyer") agrees to purchase—and another party ("Seller") agrees to sell—100 widgets. There is only one contractual relationship that exists between the parties, but it can be viewed in two different ways. If we focus on the contract from the Seller's perspective, we would note that the contract imposes on her a duty to sell 100 widgets to the Buyer. Her duty is correlative to the Buyer's right. Similarly, if we focus on this relationship from the Buyer's perspective, we would note that the contract gives him the right to buy 100 widgets from the Seller.⁶⁸ His right is correlative to the Seller's duty. Note that both the Seller's "duty" and the Buyer's "right" are describing the same legal obligation, but the different terms indicate the different perspectives through which the jural relationship is viewed.

Although the insights contained in the previous paragraph seem elementary, the implications are profound: according to the Hohfeldian system, "rights" and "duties" (or any of the fundamental legal concepts identified by Hohfeld) do not—indeed, logically cannot—exist in the abstract. A party can only hold a "right" to some X if it can point to another party who holds the correlative "duty" to that same X, and vice versa. This means that, according to Hohfeld, abstract rights (or powers, or privileges, or immunities, etc.) are nonsensical concepts. One cannot possess, for instance, an abstract right to not be fraudulently induced to enter into a contract, or even, to take an extreme example, an abstract right not to be punched in the nose. Rather, to speak intelligibly about "rights," we must say that we have a "right" to X (e.g., to not be defrauded) with respect to a particular party's "duty" with respect to that same X (e.g., to not defraud). This pattern, in turn, holds with respect to all four of the jural relationships identified by Hohfeld.

There is yet a further analytical distinction we can make once these fundamental legal concepts are mapped out (as per Table 1), and that is to distinguish between the temporal state occupied by each of these correlative pairs. As described by Professor Nyquist, "[t]he two legal relations on the left side of Hohfeld's table of correlatives (right/duty and privilege/no-right) . . . focus[] on a *current state of affairs*," while "[t]he relations on the table's right side (power/liability and immunity/disability) . . . focus[] both on a current state of affairs and on a *po-*

67. See, e.g., Saunders, *supra* note 52, at 468 ("X has a right against Y with regard to act A, if and only if Y has a duty to X with regard to act A.").

68. In this sense, what Hohfeld called jural "correlatives" were not "correlative" terms at all, but identical terms; the only difference between the two parts of the "correlative" pair was the point of view from which one viewed the relationship. See, e.g., Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1163 (1938) ("Rights and duties are not correlative, but identical.").

*tential future state.*⁶⁹ This, in turn, provides important insights into the nature of the relationship that exists (or may come into existence) between parties.

For instance, suppose we want to know whether Seller is currently under an obligation to deliver 100 widgets to Buyer. With respect to the current state of affairs, there are only two possibilities: either (1) Buyer has no right to demand Seller's performance (which would be the case, for instance, if Buyer has no enforceable contract with Seller), in which case we would say that Seller has the privilege of not performing, or (2) Buyer has a right to Seller's performance (which would be the case, for instance, where Buyer has an enforceable contract with Seller), and we would here say that Seller has a duty to perform.⁷⁰

Suppose that we determine that Seller is not obliged (i.e., has no "duty") to deliver 100 widgets to Buyer. We would now know something about the present state of affairs existing between the parties, but this would by no means exhaust our inquiry, for that state of affairs may be changed. Therefore, we will also want to know whether Seller will ever, at some future state, be obliged to deliver 100 widgets to Buyer.⁷¹ In this case, there are again only two possibilities: the answer will be "yes" where (1) Buyer has a power to change the privilege/no-right relationship between Buyer and Seller, in which case Seller would be under a liability to have its legal relationships changed by Buyer; and "no" where (2) Seller has an immunity with respect to having its privilege/no-right legal relationships changed by Buyer, in which case Buyer is under a disability with respect to changing this legal relationship. The first scenario could arise, for instance, where Seller sends a letter offering to sell Buyer 100 widgets, creating a power of acceptance in Buyer, and a liability in Seller (of having its privilege of not delivering the widgets converted to a duty to deliver the widgets). The second scenario, of course, could arise where Seller sent no such offer to Buyer.

69. Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 240-41 (2002) (emphasis added).

70. Incidentally, if Seller breached his duty to Buyer, our common law courts would find that Seller has violated Buyer's right and would give Buyer a state-enforced claim for breach of contract against Seller.

71. See, e.g., Saunders, *supra* note 52, at 470 ("Hohfeld recognized that for any two individuals and an act, there either is or is not an obligation that the act be done, and the obligation or lack thereof may be looked at from the point of view of the person who would perform the act or the of person for whom the act is to be performed. Similarly, for any two individuals one can do an act that will affect the other's legal relations or he or she cannot so affect the other's legal relations. This too may be looked at from the point of view of the person who would perform the act or of the person whose legal relations would or would not be affected. The importance is the recognition that eight situations exist. How those situations are labelled is of lesser importance . . .").

3. *Arranging the Building Blocks II: The Four Jural Opposites*

In addition to recognizing that each of the eight fundamental legal concepts can be organized into four pairs of jural correlatives, Professor Hohfeld also demonstrated that they can be organized into pairs of “jural opposites” as well.⁷² Specifically, Hohfeld understood that the presence of any given fundamental legal concept necessarily precluded the existence of its jural opposite. An example is helpful here. Suppose, for instance, that Buyer and Seller have signed a contract giving Buyer a right (and imposing on Seller a corresponding duty) to receive 100 widgets from Seller. This being so, it must follow as a matter of logic that the opposite cannot also be true—i.e., it cannot be the case that the Buyer has no right to receive 100 widgets from Seller, nor can the Seller be privileged to not deliver 100 widgets to Buyer. This is because the jural concepts “right” and “no right” constitute jural opposites, as do the concepts “duty” and “privilege.” Where a party possesses a right to some X, that party cannot simultaneously possess a no-right to that same X. Similarly, where a party is under a duty with regard to X, that party cannot simultaneously be privileged with regard to that same X.

Similar relationships hold for each of the other fundamental legal concepts as well. For instance, suppose Offeror offers to sell 100 widgets to Offeree for \$100. Before acceptance, we can describe the present state of affairs by saying that Offeree has no right to receive 100 widgets from Offeror, and (looking at the same legal relationship from Offeror’s point of view) Offeror is privileged to not deliver 100 widgets to Offeree.⁷³

With regard to the future state of affairs, however, it is the case that Offeree has the power (and Offeror is under a corresponding liability) to change (or, from Offeror’s point of view, have changed) the currently existing privilege/no-right relationship between the parties into a right/duty relationship by accepting the offer. This being so, however, it logically follows that the opposite cannot also be true: Offeree cannot be under a disability respecting its ability to change the presently-existing legal relationship between Offeror and Offeree (through acceptance), and, looking at the same legal relationship from the Offeror’s point of view, Offeror cannot be immune from having the legal relationship between Offeror and Offeree changed through Offeree’s acceptance.

72. In this manner, Hohfeld had anticipated the branch of symbolic logic known as deontic logic (dealing with the logic of permissions and obligations) several decades before it was first formalized by G. H. von Wright in 1951. See, e.g., G. H. von Wright, *Deontic Logic*, 60 *MIND* 1 (1951).

73. Although the above illustration focuses on Offeree’s no-right to the widgets, we could have just as easily focused on Offeror’s no-right to the \$100. Doing so, we would describe the relationships between the parties as follows: with regard to the present state of affairs, Offeror has *no right* to receive \$100 from Offeree, and Offeree is privileged to *not* pay \$100 to Offeror.

As before, each of the jural concepts can be mapped onto a chart, this time describing pairs of fundamental legal concepts that constitute jural opposites⁷⁴:

Table 2: Jural Opposites

right	privilege	power	immunity
no-right	duty	disability	liability

4. *The Power of Hohfeldian Logic: Deducing Legal Relationships*

Combining the information from the two charts above, the real power of the Hohfeldian framework can now be demonstrated. From a single data point, Professor Hohfeld's system allows us to obtain both apparent and hidden information about the analytical structure of the legal relationship existing between any two parties at any point in time. Indeed, not only does this system allow us to work out an entire array of legal relationships from a single data point, but, just as importantly, it allows us to determine what "conclusions" cannot be drawn as a matter of logic,⁷⁵ and must therefore be made as a matter of policy⁷⁶ whenever it is required to resolve a dispute between two parties.

For instance, drawing on both charts above, suppose we know that, as a starting point, Party 1 ("P1") has a right towards Party 2 ("P2") with respect to some X (e.g., P1 has a right to receive 100 widgets from P2). From this single fact, we can conclude, as a matter of logic, that P1 cannot also have a no-right towards P2 with respect to that same X⁷⁷ (because they are jural opposites). And, because a duty is correlative to a right, we can further conclude that P1's right must entail P2's duty towards P1 with respect to X (i.e., P2 must have a duty towards P1 to deliver 100 widgets). Further, because duties and privileges are jural opposites, we can also conclude that P2 cannot be privileged towards P1 to not X⁷⁸ (i.e., P2 cannot be privileged towards P1 to not deliver the 100 widgets). Each of these conclusions, it must be remembered, follow from the single observation that P1 had a right towards P2 with respect to some X.

To take another example, suppose we are told that A is privileged towards B with respect to some X. With this as our starting point, we can

74. Hohfeld, *supra* note 43, at 30.

75. See discussion *infra* Section III.A.5.

76. This is discussed in greater detail in Section III.B *infra*.

77. See, e.g., Saunders, *supra* note 52, at 468 ("[A]n individual has a no-right against another individual with regard to a particular act if and only if that individual does not have a right against the second individual with regard to that act.")

78. See *id.* ("[A]n individual has a privilege against a second individual with regard to a particular act if and only if the individual does not have a duty toward the second individual with regard to that act.")

once again draw upon Hohfeld's framework to conclude that B must have no right towards A with respect to X. Why? Because privileges and no-rights are jural correlatives, so where A is privileged towards B with respect to some X, B must necessarily have a corresponding no-right with respect to A's privilege. Similarly, we can also deduce that A, being privileged, cannot be under a duty towards B with respect to X.⁷⁹ Why? Because privileges and duties are jural opposites. And so on.

Similar deductions, of course, can be worked out by the reader. The important point is that by beginning with any one of the eight fundamental legal conceptions, the Hohfeldian system allows us to obtain deep insights into other aspects of the legal relationship that may not be readily apparent at first glance. It also reveals, just as importantly, what part of the legal relationship must be filled in (if it is to be filled in at all) not by logic, but by policy.⁸⁰ It is to this point that we now turn.

79. As an aside, the reader may have noticed that these eight fundamental legal conceptions can be reduced even further. The four legal conceptions on the left side of the above tables can be reduced to two pairs (e.g., the right/duty pair and the privilege/no-right pair), and any given term in any one pair (e.g., "right") can be understood in relation to any given term in the other pair (e.g., "right" is the opposite of a "no-right"). The same is also true of the four terms on the right side of the chart. This means, as Corbin realized, that all eight fundamental legal conceptions can be derived from just one term on the left-hand side of the above charts, and just one term on the right-hand side of the above charts. See generally Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921) (arguing that all legal relationships can be derived from "duties" (or, viewed from another perspective, "rights") and "powers" (or, viewed from another perspective, "liabilities."); see also Saunders, *supra* note 52, at 471 ("[O]ne may select, as it were, one [legal term from the left-hand side of the above charts]—right, duty, no-right, privilege—and one [legal term] from [the right-hand side of the above charts]—power, liability, disability, immunity—and express the remaining relations in terms of the two selected. Each of those remaining from the first choice may be expressed as the negation, correlative or negation of the correlative of the term chosen. The same is true of the second choice. Each term in each group of four will be equivalent to its correlative, with a change in point of view that is not of great logical relevance, and will hold whenever its negation does not. Since they are logically related, they may be expressed in terms of each other.").

80. As usual, the extraordinary prescience of Oliver Wendell Holmes on this point, writing before Professor Hohfeld published his seminal work, is uncanny. See HOLMES, *supra* note 46, at 465-66 ("The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.").

5. *The Limits (and Promise) of Hohfeldian Logic: The Rise of Policy*

In Section III.A.4., above, we have seen the extraordinary power of the Hohfeldian system, but it is worth pausing to note the limits of this framework, and to understand exactly what Hohfeldian analysis can and cannot do. As a descriptive system, the Hohfeldian framework is of tremendous value in helping us understand, by teasing out the logical implications of a few small initial presumptions, the nature of the legal relationship that exists between two parties with respect to some entitlement. In doing so, a judge, lawyer, or policy maker can determine, at a glance, what consequences follow, as a matter of logic, from a few basic assumptions made regarding the parties' relationship with each other with respect to some entitlement, and this, in turn, can promote analytical clarity by making transparent what may previously have been opaque. Just as importantly, however, by seeing the legal relationship between the parties clearly, the Hohfeldian system allows us to determine where analytical gaps exist in the relationship, where logic alone cannot tell a judge, lawyer, or policy maker what implications flow from the parties' relationship as a matter of logic. This, in turn, requires the judge, lawyer, or policy maker to fall back on his or her judgment in determining, normatively, by recourse to policy, how a relationship between two parties ought to be governed. Obviously, since most of contract law consists of default rules, this latter insight is of tremendous importance. It is one thing to tease out the logical consequences of a right/duty or privilege/no-right relationship that may exist between the parties; it is quite another to determine whether a right/duty or privilege/no-right complex ought to govern the parties' relationship in the first place.

It may therefore strike some as ironic that while Professor Hohfeld's descriptive system increased analytical clarity by allowing one to logically tease out the nature of the legal relationship existing between two parties, his system actually decreased the role of logic (and thereby increased the role of policy) in legal decisionmaking. Specifically, by clearly revealing what legal conclusions could not be made as a matter of logic, Professor Hohfeld demonstrated which legal decisions must be made as a matter of policy. And that world, as it turns out, was much vaster than previously supposed. Of course, once these policy determinations were made (e.g., once a court declared that a particular relationship was to be governed by, say, a right/duty relationship because it declared an offer to have been accepted), Hohfeld would kick in again and provide a framework for more precisely formulating the issues before a court.

An illustration may prove helpful here. Consider the following example, taken from section 237 of the Restatement (Second) of Contracts:

A contracts to build a house for B, for which B promises to pay \$50,000 in monthly progress payments equal to 85% of the value of the

work with the balance to be paid on completion. When A completes the construction, B refuses to pay the \$7,500 balance claiming that there are defects that amount to an uncured material breach. If the breach is material, A's performance is not substantial and he has no claim under the contract against B, although he may have a claim in restitution (§ 374). If the breach is not material, A's performance is said to be substantial, he has a claim under the contract against B for \$7,500, and B has a claim against A for damages because of the defects.⁸¹

At first glance, the number of legal issues involved in such a seemingly straightforward hypothetical may seem overwhelming. However, by drawing upon Hohfeld, such a problem becomes manageable. For instance, we can see that "A," the "Contractor," originally had a duty to build a non-defective home for "B," the "Homeowner." Further, knowing this, we can also conclude that Homeowner must have had a right to receive a non-defective home from Contractor (because rights and duties are jural correlatives). Further, because Contractor had a duty, it must also be true that Contractor was privileged to carry out her duty (her privilege being derived from her duty,⁸² for the simple reason that a duty implies the privilege of carrying it out).⁸³ Finally, we can also conclude that Homeowner had no right to interfere with Contractor's exercise of its privilege of building a non-defective home,⁸⁴ because privileges and no-rights are jural correlatives.

Once Contractor finishes building the home for Homeowner, there are a number of additional conclusions we can draw, as explained by Professor Nyquist:

If [Contractor] builds the house without defects, she will have a right to recover the \$7,500 balance without deduction, and [Homeowner] will have a duty to pay. If the construction is defective, the next issue is whether [Contractor's] performance is substantial. If it is, then [Contractor] has a right to recover the \$7,500 balance but also has a duty to pay damages for the defects. If [Contractor's] performance is not substantial, then [Contractor] does not have a right to recover on the contract, and [Homeowner] is privileged not to pay. In that case, however, to avoid unjust enrichment [Contractor] has a right to recover off the contract in restitution for the value of the benefit received by [Homeowner].⁸⁵

81. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d, illus. 11 (AM. LAW INST. 1981).

82. Hohfeld, *supra* note 43, at 32 ("[W]hen it is said that a given privilege is the mere negation of a *duty*, what is meant, of course, is a duty having a content or tenor precisely *opposite* to that of the privilege in question.")

83. Brady, *supra* note 53, at 248 ("Hohfeld realized, however, in an important sense, privilege is implied by duty. If X has a duty to do S for Y, then he has a privilege to do S for Y. Whatever is obligatory, is permitted.")

84. Homeowner might do this, for example, because he no longer desired the home and was looking for a way to get out of the contract by inducing the *other party* to breach.

85. Nyquist, *supra* note 69, at 249-50 (emphasis added).

This analysis, of course, cannot tell us anything about whether the house was built without defects (this is a question of fact for the jury), or whether the performance was substantial (this is an issue of law to be determined by the judge).⁸⁶ It also cannot tell us how the terms chosen by the parties ought to be interpreted where the meaning is not clear, or what default rules ought to be chosen by the judge to help resolve the dispute.⁸⁷ What it does do, however, is provide great assistance in clarifying the issues before the court by stating, precisely, the nature of the legal relationship between the parties. And, once the legal relationship has been precisely stated, and the additional jural relationships developed in Sections III.A.2-3 have been fleshed out, the stage can be set for the important work of determining what to do about the rest of the contract, the part about which Hohfeldian logic has nothing to say.

6. Summary

As has been shown, Hohfeld offered a powerful set of analytical tools to help us think clearly about a number of legal problems, which is a precursor to thinking clearly about the types of solutions that are needed to solve these problems. Further, his system demonstrated that, by knowing just a single data point in the parties' relationship (e.g., a seller's duty to deliver widgets), we can logically tease out which legal relationships necessarily follow (i.e., the jural correlatives), which legal relationships do not follow (i.e., the jural opposites), and which legal relationships can be implied (e.g., the privileges implied by the seller's duties). And, more importantly, by demonstrating which logical deductions cannot be made, Hohfeld revealed the vast gap in legal analysis that must be filled in as a matter of policy. Indeed, we have seen that one of the main conclusions to be drawn from the immensely logical Hohfeldian system is that most legal problems cannot be solved by logic but must instead be solved by making use of the more normative tools of policy and principle. However, as argued in greater detail below, whether solving these problems through Hohfeldian logic or by reference to policy, these decisions will have important distributive consequences. In fact, to put the argument in its strongest terms, I will be arguing below that all acts of lawmaking (by whatever branch of government), and all acts of judicial interpretation, necessarily engage, at the most basic level, with matters of distributive justice.

86. In determining *this* issue, however, the judge will be applying a combination of legal and policy-based judgments described throughout the rest of this Article.

87. See discussion *infra* Section III.B.

B. *The Hohfeldian Challenge to Classical Jurisprudence*

1. *Disambiguating Legal Concepts*

The Hohfeldian system just described had important implications for classical jurisprudence. Specifically, in addition to helping us recognize many of the legal relationships that previously lay hidden beneath the surface,⁸⁸ Hohfeld's analytical system helped society reimagine the nature of law in important ways, in particular by demonstrating the limits of logic and the importance of policy in resolving legal disputes.

A couple of examples will help to illustrate this point. As discussed above,⁸⁹ in the Hohfeldian system, "rights" and "privileges" are carefully distinguished from one another, because each constitutes a unique legal concept that corresponded with its own particular jural correlative and jural opposite. In practice, however, these concepts were frequently lumped together in the judge's mind, which might cause him or her to go astray when attempting to work out the logical consequences of one party's relationship with another. For instance, it is often the case that a party with a true Hohfeldian right to the exclusive possession of a good will also possess a privilege to dispose of this property as he or she sees fit. Therefore, it is but a small misstep for a party or judge to think about both of these concepts as together constituting one's "right" to the property, as though rights and privileges (if one bothered to distinguish these concepts in the first place) belonged together as a matter of logic. But, as we have seen in Section II.A.2., because true Hohfeldian rights are correlative with duties rather than privileges, such a determination can only be made as a matter of policy.⁹⁰ Professor Brady illustrates this point well:

X may, for consideration paid, agree not to go on his own land, Blackacre. His privilege of entering Blackacre, as against Y, is extinguished. But he still has the right, as against Y, that Y not enter. Or he may give Y a privilege to go on Blackacre. X's right that Y stay off is extinguished (X has no-right against Y in regard to entry which is the same thing as saying that Y has a privilege of entry). Yet X himself still has the privilege of entering his own land.⁹¹

In the example above, the "privilege" constitutes just one component of X's entitlements to Blackacre, and can be analytically separated from the other components of X's entitlements (such as X's "right" against Y)

88. Nyquist, *supra* note 69, at 247 ("Generally, legal relations go unnoticed until a dispute arises, but the relations exist nonetheless.")

89. See discussion *supra* Section III.A.1.

90. It is possible, of course, for an individual to possess both a privilege and a right to some X in the Hohfeldian system, for although the existence of a right does not imply a privilege as was commonly supposed (because the jural correlative of a right is a duty, rather than a privilege), the possession of a right also does not foreclose the possibility of a privilege (because the jural opposite of a right is not a privilege, but a no-right).

91. Brady, *supra* note 53, at 250.

and exchanged in the open market (by exercising a “power” to change the presently-existing legal relationship through the vehicle of offer and acceptance, as implied by Professor Brady’s reference to “consideration paid”). By carefully distinguishing these two legal concepts, we can see not only that one’s privilege (e.g., to do with one’s property as one pleases) does not inhere in—and can be disentangled from—the right itself (e.g., to exclusively possess the property), but that the latter cannot be logically derived from the former.⁹² Thus, a “right” and a “privilege” can only coexist (if they coexist at all) as a matter of policy rather than logic, which is to say that policy considerations might sometimes keep them separate when it finds it prudent to do so.⁹³

2. *Increasing the Role of Policy in Legal Analysis*

So why is it the case then that rights and privileges were (and still are) so often conflated? It seems to be a classic example of mistaking correlation for causation. In the day-to-day world of our experience, it is often the case, as a matter of policy, that courts find it desirable to superimpose a privilege/no-right relationship on top of a right/duty relationship (and vice versa).⁹⁴ However, as we have already seen, because the existence of one pair of jural correlatives does not logically imply the other (i.e., there is no causation), it is not true that a privilege/no-right relationship must (or even ought) to be accompanied by a right/duty relationship, or vice versa. Whether such concepts are found together or not, therefore, must be determined by recourse to policy rather than logic. And this, in turn, means that many (and perhaps most) legal decisions could no longer be made according to the theory of adjudication advanced by the legal formalists (i.e., that judges can decide cases by simply “applying” the law as written, as though they were working out the logical relationships between the parties as a sort of legal geometer).⁹⁵ Instead, each decision would have to be resolved by taking into account sound policy considerations.

92. See *infra* notes 101-03 and accompanying text.

93. In broad outline, this point was made by Oliver Wendell Holmes a full generation before Professor Hohfeld wrote. See, e.g., HOLMES, *supra* note 46, at 5 (“The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”). Professor Hohfeld’s great contribution was that in revealing the logical limits of the law, he showed us exactly why Holmes’ insights were true.

94. Brady, *supra* note 53, at 250 (“A possible source of confusion here is the fact that the right-duty relation is often used to protect the privilege-no right relation.”).

95. This view, led by the Dean of Harvard Law School, Christopher Columbus Langdell, dominated much of legal thinking prior to Hohfeld. See, e.g., Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986) (defining legal formalism as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way

This policy-based jurisprudence, as Brady points out, constitutes the real unfulfilled promise of the Hohfeldian enterprise:

Hohfeld did not make the mistake . . . of thinking that legal cases could be solved by the logic of legal relations. He did not claim that judicial decisions could be derived from the pattern of legal relations alone. A clash of principles or policy is not to be resolved by the privilege-right distinction. One of the ironies of the common criticism that analytical jurisprudence ignores questions of social policy in judicial decision is that the work of such analytic writers as Hohfeld actually makes it clear when a policy decision is necessary.⁹⁶

This point cannot be overemphasized, for it means that the logical deductions that may be drawn from within the Hohfeldian framework should not be thought of as ends in themselves, but as means—not only as means of teasing out legal relationships between parties that might otherwise remain hidden, but of revealing the logical gaps that must be filled in by policy. As Brady states elsewhere:

Thus Hohfeld's "analytical jurisprudence," instead of resulting in a "mechanical" or "automatic" decision, actually shows that there are possibilities for different decisions depending on policy considerations. The use of Hohfeld's distinctions thus shows the complexity of legal problems, the implications of judicial decision, and the need for making policy decisions.⁹⁷

3. *Eliminating Logical Fallacies*

By bringing to the fore the importance of policy in resolving legal disputes, Professor Hohfeld not only revealed that the role of policy in the law was much greater than previously thought, but helped identify certain logical fallacies that were frequently made by courts who ignored this insight and attempted to resolve legal disputes through "logic" instead. In particular, Hohfeld found that courts were especially susceptible to committing the following three logical fallacies: (1) "[d]educing duties from privileges," (2) "[d]educing privileges from rights," and (3) "[a]ssuming legal relations among three or more persons must be identical."⁹⁸ These insights, in turn, have had important implications for contract law, as we shall soon see, for they not only posed a serious challenge to the libertarian ideal of freedom of contract that reigned supreme

that the solution to a mathematical problem can be pronounced correct or incorrect."); *see also* HOLMES, *supra* note 46, at 465 ("The danger of which I speak [in accounting for the development of the law] is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.").

96. Brady, *supra* note 53, at 254 (citations omitted).

97. *Id.* at 255.

98. Nyquist, *supra* note 69, at 251-52 (emphasis omitted).

during much of the nineteenth century,⁹⁹ but suggested that the seemingly straightforward notion of preventing one party from “interfering” with another party’s “freedom of contract”¹⁰⁰ was a much more complex manner than simply allowing parties to exercise their contractual “liberty.”

To see why this is so, recall from the discussion above that rights are correlative with duties, while privileges are correlative with no-rights. This means that duties can only be deduced from rights, and not from privileges. So, if A has a privilege to behave in a certain way towards B, this does not imply that B has a duty to not interfere with A’s privilege. Rather, A’s “privilege” only means that B has “no right” to demand that A not exercise his privilege. It is true that a court may, as a matter of policy, impose such a duty of non-interference on B, but this duty would be independent of, and certainly not derivable from, A’s privilege. In Hohfeld’s words, “[w]hether there should be such concomitant rights (or claims) [where there is a privilege] is *ultimately a question of justice and policy*; and it should be considered, as such, on its merits.”¹⁰¹

Because a court is not bound, as a matter of logic, to impose any duty on B to refrain from some activity, X, where A has a privilege to X, this means that a court has judicial discretion to decide, as a matter of policy, whether B should be granted a privilege with respect to X, which should happen only where it makes good policy sense to do so. Where this is the case, then, just as B would have no right to interfere with A’s privilege with respect to X, so, too, would it be the case that A would have no right to interfere with B’s exercise of his privilege with respect to that same X. Hohfeld, in short, made it clear that it may sometimes be the case that both parties may have conflicting privileges with respect to some X, which, if it came to a head, the court might be called upon to work out as a matter of policy.

To see how this might be so, consider the case of a commons, in which all individuals are granted equal access to a common resource. In such cases, the law privileges each party (e.g., A) against every other party (e.g., B, C, D . . . Z) to use the commons for a particular purpose (e.g., grazing cattle, throwing refuse into a stream, spewing clouds of noxious gases into the atmosphere). From a Hohfeldian perspective, this means

99. See, e.g., Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 917 (1974) (“Modern contract law is fundamentally a creature of the nineteenth century Only in the nineteenth century did judges and jurists . . . assert[] for the first time that the source of the obligation of contract is the convergence of the wills of the contracting parties.”).

100. See, e.g., *Printing & Numerical Registering Co. v. Sampson*, [1875] 19 LR Eq. 462, 465 (Lord Jessel M.R.) (U.K.) (“[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.”).

101. Hohfeld, *supra* note 43, at 36 (emphasis added).

that B, C, D . . . Z correspondingly have no right to interfere with A's privilege of using the commons for the designated purpose (because the opposite of a privilege is a no-right). But this also means—and this is also clear from the nature of a commons—that the law is not giving A the right to use the commons to graze his cattle (although we sometimes speak this way), because doing so would impose a corresponding duty (the jural correlative of a right) on other parties (e.g., B, C, D . . . Z) to not interfere with A's right to graze his cattle. Therefore, in a commons, each of the other parties also has a privilege to graze their cattle as well, and it is the very nature of these conflicting privileges that is responsible for the phenomenon we recognize as the tragedy of the commons.¹⁰²

To take another example, classical analytical jurisprudence unduly focused its attention on “privileges” and “duties” to the exclusion of other legal relationships.¹⁰³ Professor Hohfeld was able to demonstrate not only that privileges and duties did not belong together (privileges are correlative to no-rights, whereas duties are correlative to rights), but that these two ideas existed, in fact, as “opposite ends of two different legal relations.”¹⁰⁴ This meant that, contrary to classical analytical jurisprudence, granting one party a privilege did not logically entail imposing a duty of non-interference on the party occupying the other end of that legal relationship. Rather, the only thing that could be logically derived from granting a party a privilege was to impose on the party at the other end of the legal relationship a no-right to interfere with the first party's exercise of its privilege. If the law wanted to go beyond this, again, it would have to do so as a matter of policy, rather than logic. And because these policy choices, as I shall argue below,¹⁰⁵ consist entirely of distributive decisions, they should not be decided upon without considering their distributive consequences.

Unfortunately, the three logical fallacies discussed above have influenced, and continue to influence, a great deal of contract law. For instance, the first and third logical errors have been combined to support the libertarian ideal that a party's “freedom to contract” allows that party to exercise his “liberty” (his privilege) to contract with whomever he chooses on terms of his own choosing, and that others are duty-bound (error #1) to not interfere with this privilege.¹⁰⁶ Further, because other

102. See, e.g., Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243-48 (1968) (defining the tragedy as a situation in which “[e]ach man is locked into a system that compels him to increase his [personal production through the use of a common resource] without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own interest in a society that believes in the freedom of the commons.”).

103. Nyquist, *supra* note 69, at 255.

104. *Id.* at 255.

105. See discussion *infra* Part IV.

106. See, e.g., Nyquist, *supra* note 69, at 253-54 (“The nineteenth-century classical analytical jurisprudence of Jeremy Bentham, John Stuart Mill, and John Austin assumed that a privilege (the used the term *liberty*) also imposed a duty of noninterference. In other words,

individuals are duty-bound to not interfere with A's privilege, it was thought that the government, too, would be infringing on A's liberty (error #3) if it attempted to restrain the exercise of A's liberty in any way.¹⁰⁷

4. Hohfeld's Challenge to Libertarianism

Although not employing Hohfeld's vocabulary, Professor Kronman captured the above idea beautifully when he pointed out that the libertarian position, which holds that "advantage-taking by one party to an agreement should be allowed unless it infringes the rights or liberty of the other party,"¹⁰⁸ fails to "provide a satisfactory test for discriminating between acceptable and unacceptable forms of advantage-taking in the exchange process, but rather begs the question it is meant to answer."¹⁰⁹ Why? According to Kronman, because "[f]or the liberty principle to be of any help at all, we must already know when an individual is entitled to complain that his liberty has been violated and to know this, we must know what rights he has."¹¹⁰ To recast Kronman's argument in Hohfeldian terms, we might say that a libertarian cannot even speak of having a "right" capable of protection until a court or legislature first determines that a party's conduct should be regulated by a right/duty relationship rather than by the privilege/no-right relationship, and that this determination, in turn, cannot be derived logically, but rests on policy considerations.¹¹¹ It is not the libertarian's assertion of his advantage that dictates the policy, according to Professor Hohfeld, but rather the policy that allows or forbids the libertarian's assertion of his advantage.¹¹²

they assumed that once society had determined an act was privileged, it meant *both* that others had no effective claim against the person exercising the privilege *and* that others had a duty of noninterference.").

107. See *infra* notes 113-16 and accompanying text.

108. Kronman, *supra* note 5, at 483.

109. *Id.*

110. *Id.* ("For example, we cannot say whether the liberty principle is violated if one person takes advantage of another by concealing valuable information in the course of an exchange, unless we have already decided that it is part of the first person's liberty that he be allowed to exploit the information he possesses in this way and not a part of the other person's liberty that he be free from such exploitation.").

111. See, e.g., *id.* at 483-84 ("Every claim concerning rights is necessarily embedded in a controversial theory: the only way to justify the claim that a person has a certain right is to argue that he does, and this means deploying a contestable theory that cannot itself be verified or disproven by simply looking to see what is the case. In order to apply the liberty principle, we must already have a theory of rights. Because it does not itself supply such a theory, the liberty principle, standing alone, provides no guidance in deciding which forms of advantage-taking ought to be allowed.").

112. See also *id.* at 493-94 ("Libertarians claim that mere possession of an advantage gives the possessor a right to exploit his advantage in any way he wishes, so long as the rights of others are not violated in the process. On this view, the fact that an individual possesses a particular advantage is held to give him a *prima facie* right to exploit it for his own benefit; his right to do so, however, may be defeated or overridden by the legitimate claims of others."). Kronman goes on to note that "the fact that X possesses the advantage he wants to exploit can never be an argument for defining the scope of Y's right in a certain way; that proposition will always be

Nevertheless, the idea of “freedom of contract” is often invoked by libertarians to speak as though their rights are being violated whenever and wherever limits are put on their ability to contract with others on terms of their own choosing. For instance, those favoring this approach have historically relied on such arguments to support their unlimited right to form contracts that allow unlimited workweeks (*Lochner v. New York*),¹¹³ permit racially-based restrictive covenants (*Shelley v. Kraemer*),¹¹⁴ and engage in baby selling (*In re Baby M*).¹¹⁵ And, countering these libertarian arguments, especially in the post-*Lochner* era,¹¹⁶ we have seen courts and legislatures engage in redistributive policies restricting the ability of individuals to contract with whomever they want (consider, for instance, laws prohibiting contracting with those who lack capacity,¹¹⁷ such as minors,¹¹⁸ incompetents,¹¹⁹ etc.) on whatever terms they want (consider, for instance, minimum wage¹²⁰ and usury laws¹²¹) through

true and therefore cannot make the position of either party stronger (or weaker) than it would otherwise be. Likewise, it can never be an argument either for limiting or expanding the scope of Y's right to non-interference that Y himself possesses an interest that will be affected if others are allowed to take advantage of him, since this, too, is true in every case. The mere fact of possession—whether X's or Y's—provides no help whatsoever in deciding how Y's right to non-interference should be defined, or whether X should be assigned an exclusive right to the advantages he possesses.” *Id.* at 494.

113. 198 U.S. 45, 56 (1905) (prohibiting legislation, such as legislation limiting the workweek to 60 hours, that constituted “an unreasonable, unnecessary and arbitrary interference with the right of the individual . . . to enter into those contracts in relation to labor which may seem to him appropriate”).

114. 334 U.S. 1, 18-23 (1948) (refusing to enforce racially-based restrictive covenants as violating the Equal Protection Clause of the Fourteenth Amendment).

115. 537 A.2d 1227, 1249 (N.J. 1988) (“Putting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy.”).

116. See, e.g., Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism,”* 123 HARV. L. REV. FORUM 55, 55-56 (2010) (During the *Lochner* era, “[a]ccording to progressive scholars, American judges steeped in laissez-faire economic theory, who identified with the nation’s capitalist class and harbored contempt for any effort to redistribute wealth or otherwise meddle with the private marketplace, acted on their own economic and political biases to strike down legislation that threatened to burden corporations or disturb the existing economic hierarchy. In order to mask this fit of legally unjustified, intellectually dishonest judicial activism, the progressive interpretation runs, judges invented novel economic ‘rights’—most notably ‘substantive due process’ and ‘liberty of contract’—that they engrafted upon the Due Process Clause of the Fourteenth Amendment.”).

117. RESTATEMENT (SECOND) OF CONTRACTS § 12(1) (AM. LAW INST. 1981) (“No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties.”).

118. *Id.* § 14 (“Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

119. *Id.* § 15(1) (“A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.”).

120. See *supra* Abstract.

121. See sources cited *supra* note 15.

whatever means are available (consider, for instance, laws prohibiting certain sharp practices such as fraud,¹²² duress,¹²³ undue influence,¹²⁴ unconscionability,¹²⁵ etc.).¹²⁶ In other words, especially since Hohfeld's work, we have come to recognize that the extent of a party's ability to contract with others is a matter of policy that cannot be settled in the abstract or as a matter of logic, but must be weighed against the other party's interest as well.

5. *Law's Expansive Regulatory Role*

Professor Hohfeld also helped reveal that the scope of "law" and "legal rules" was much broader than previously thought. Prior to Hohfeld's work, classical analytical jurisprudence understood law largely as a series of commands issued by a sovereign.¹²⁷ But long before H.L.A. Hart would famously attack the narrowness of these views,¹²⁸ Hohfeld already had a much more expansive role in mind for law, which, he argued, not only commands, but also "permits and enables and disables."¹²⁹

122. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW INST. 1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").

123. *Id.* § 175(1) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

124. *Id.* § 177(2) ("If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.").

125. *Id.* § 208 ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

126. *See, e.g.,* Kronman, *supra* note 5, at 507 ("Usury laws, minimum wage laws, rent control laws, and laws prohibiting racial discrimination in employment and the sale of real property all have, as one of their objectives, a redistribution of wealth in favor of traditionally disadvantaged groups. Each of these laws attempts to achieve its goal by imposing restrictions on the process of voluntary exchange.").

127. In its simplest form, the "command theory of law," associated most intimately with John Austin and Jeremy Bentham holds that "law," to be so called, must consist of the commands of a sovereign, backed up with the threat of a sanction. *See, e.g.,* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 36 (Robert Campbell ed., 4th ed. London, John Murray 1873). *See also* JEREMY BENTHAM, OF LAWS IN GENERAL 1 (H.L.A. Hart ed., 1970) (defining law as an "assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question").

128. *See, e.g.,* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593-629 (1958) (agreeing with Austin that "[s]ome laws require men to act in certain ways or to abstain from acting whether they wish to or not" by threat of a sanction, but also describing other types of legal rules that, unlike commands, "provide facilities . . . for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law," such as "the rules enabling individuals to make contracts, wills, and trusts, and generally to mould their legal relations with others").

129. Corbin, *supra* note 79, at 237.

According to Hohfeld,

“[a] rule of law that permits is just as real as a rule of law that forbids; and, similarly, saying that the law permits a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law forbids a certain act to X as between himself and Y.”¹³⁰

This is a profound insight, and one that will be developed at great length in Part IV, below. For now, suffice it to say that because the “privilege/no-right” relationship is every bit as much of a legal relationship as is the “right/duty” relationship,¹³¹ there is no such thing (contrary to the libertarian position) as not regulating a legal relationship. Indeed, because every legal relationship is necessarily regulated by the state, every legal relationship imposes a policy choice on the state as to how that particular legal relationship will be regulated, both with respect to the present state of affairs (i.e., through a right/duty relationship, or through a privilege/no-right relationship) and with respect to the future state of affairs (i.e., through a power/liability relationship, or through an immunity/disability relationship). These choices, in turn, are fundamentally distributive in nature: the way a court or legislature decides to protect a party’s entitlement will make that party better or worse off vis-à-vis another party before they ever enter into a contract with one another, and, once there is a contract, before a dispute between those parties ever arises. For instance, a party given a privilege to some X is better off than a party upon whom is imposed a no-right to some X; a party given a right to some X is better off than a party upon whom is imposed a duty to not X; and a party given both a privilege and a right to some X is better off than any of the parties previously mentioned.

6. *Summary*

To summarize, the implications of the analysis above has important implications for the law, in general, and for contract law, in particular. For instance, once it is realized that the decision that must be made by lawmakers is how to regulate—rather than whether to regulate—a given legal relationship between two parties, one of the largest obstacles to regulation has been removed. A legal relationship that might have been previously viewed as “unregulated” can now be seen, through a Hohfeldian lens, for what it truly is: as a relationship regulated through the imposition of a privilege/no-right relationship rather than a right/duty relationship. Again, in the language of Professor Hohfeld:

It is difficult to see . . . why, as between X and Y, the “privilege + no-right” situation is not just as real a jural relation as the precisely oppo-

130. Hohfeld, *supra* note 43, at 42 n.59.

131. Nyquist, *supra* note 69, at 256 (arguing that Hohfeld demonstrated that the “privilege/no-right and right/duty [pairs] are both legal relations”).

site “duty + right” relation between any two parties. Perhaps the habit of recognizing exclusively the latter as a jural relation springs more or less from the traditional tendency to think of the law as consisting of “commands,” or imperative rules. This, however, seem fallacious. A rule of law that permits is just as real as a rule of law that forbids; and, similarly, saying that the law permits a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law forbids a certain act to X as between himself and Y.¹³²

And because, as we discussed earlier, duties cannot be derived from privileges, and because privileges frequently conflict with one another, there is plenty of room for the law to mold legal relationships on sound policy grounds. Further, as developed in Part IV, below, each of these policy grounds entail making distributive choices that, intentional or otherwise, operate to shift the distribution of resources from one segment of society to another.

IV. OUT OF THE RABBIT HOLE: HOHFELD AND DISTRIBUTIVE JUSTICE IN CONTRACT LAW

Building on the framework outlined above, this Part of the Article will argue that there is no such thing as a neutral law, that all lawmaking, whether done by a legislative body or by a court, and every act of interpretation upon which the rights and duties of parties depend, is a matter of distributive justice. This thesis will be advanced by drawing upon a unique feature of the Hohfeldian framework that has previously gone without notice but is perhaps one of the most important insights that can be drawn from Hohfeld’s system. Specifically, like the principle of mass conservation accepted within physics, which holds that within a closed system, matter can neither be created nor destroyed, but can only change from one form to another, so too is it the case that within a closed Hohfeldian system, legal relationships can neither be created nor destroyed, but can only change form with respect to the way they are regulated—which is to say, from one jural relationship to another.

Furthermore, just as different arrangements of matter make up different atoms, which themselves can (and do) combine with other atoms to create molecules with distinct chemical properties, so too is it the case that the eight distinctive Hohfeldian “atoms” (i.e., the fundamental legal conceptions known as rights, duties, privileges, no-rights, powers, liabilities, immunities, and disabilities) can (and do) combine in different ways to create distinct legal relationships between individuals and, indeed, distinct bodies of law (e.g., contract law, tort law, property law), each having its own unique distributive properties. And these distributive properties, like the different chemical properties of a particular molecular arrangement, are of the utmost importance: because a Hohfeldian

132. Hohfeld, *supra* note 43, at 42 n.59.

relationship must of necessity always exist between members of a society with respect to some object or good, distributive justice is countenanced every time these legal relationships are maintained or rearranged to replace one form of distribution with another.

A. Distributing Justice Within the Hohfeldian Realm

To understand why legal relationships can neither be created nor destroyed, but can only change shape from one form to another, imagine a simple society in which there is a king, Rex (R), two citizens (A and B), and some item of value (X), which can encompass anything ranging from a piece of land to a moveable object. With respect to each party's ability to take possession of X, the possibilities are, as previously discussed, twofold: either (1) one or both of the parties will have a privilege to possess X, in which case the other party will have no right to interfere with the first party's privilege to possess X (because privileges and no-rights are jural correlatives), or (2) one of the parties will have a right to possess X, in which case the other party will have a duty to not interfere with that party's right to possess X (because rights and duties are jural correlatives). In Hohfeldian terms, the legal relationship between parties A and B with respect to X must be regulated either by a privilege/no-right or a right/duty relationship. Therefore, the sum total of possible legal relationships between these two parties with respect to X must remain constant (i.e., there can only be one possible arrangement between these two parties with respect to a single X),¹³³ although the distributive entitlements of each party would be very different under the two regimes.

Where a privilege/no-right relationship is found to exist, the law would recognize and enforce an *ex ante* distributive arrangement that conferred an advantage on the party best able to secure the privilege (perhaps because that party was stronger, faster, or more cunning than the other party). In other words, by recognizing a privilege/no-right relationship, the law would give its blessing to a distributive scheme that favored strength, speed, or cunning as a state-protected form of wealth, and this state-protected form of wealth could be used to secure further advantages for the party that just so happened to be born with a disproportionately large endowment of these skills vis-à-vis other parties

Similarly, where a right/duty relationship is found to exist, the law would recognize and enforce an *ex ante* distributive arrangement that conferred an advantage on the party to whom the right was allocated,

133. The idea is similar to that first espoused by the Greek philosopher Empedocles, who maintained that everything that exists is but a recombination of that which has come before; nothing is created *ex nihilo*, for out of nothing comes nothing. *See, e.g.*, FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 62 (1946) (arguing that, according to Empedocles, "objects come into being through the mingling of the elements, and they cease to be through the separation of the elements; but the elements themselves neither come into being nor pass away, but remain ever unchanged").

and a disadvantage on the party to whom the duty was allocated. One party, in other words, would have a distributive advantage conferred on it by the state, while the other party would have a distributive disadvantage imposed on it by the state. And this distributive arrangement would exist as a template against which the parties would be forced to bargain with one another in an attempt to rearrange these previously assigned entitlements according to their personal preferences! These distributive advantages, in effect, would therefore constitute a real form of wealth¹³⁴ for the first party (and a concomitant form of poverty for the second party), one that would exist as an a priori fact long before the parties ever attempted to strike up a bargain with each other.

To illustrate, suppose that there are two possible societies in which A and B could live: in one society, R does not allow the transfer of rights through contract, and in the other, R allows such transfers. In the society in which such transfers are not allowed, R in effect imposes ex ante disabilities on both parties from changing the distributive arrangement between them, but the disability will favor the richer party (who starts with a particular entitlement, such as land or wealth) by protecting it with a corresponding immunity from having its legal relationship changed by the poorer party. This might be the case, for instance, where X represents land, and land is forced to stay within the family.

Where contract is allowed, on the other hand, the disability/immunity relationship discussed above would be replaced with a power/liability relationship. R, in other words, could allow one party to use the tools of contract law to make an offer to another party, conferring on that second party a power of acceptance which, when exercised, would convert one type of legal relationship between the parties (e.g., privilege/no-right) into another (e.g., right/duty).¹³⁵

Within the world of contract law, however, this is by no means the end of the matter. Before X ever acted upon Y's offer—indeed, before parties X and Y ever met—the law would have to make some further a priori decisions: it would have to decide upon a rule either (1) allowing a party in Y's position to revoke its offer (in which case the law would give Y an

134. See, e.g., Kronman, *supra* note 5, at 496. ("If we prohibit someone from exploiting potentially valuable information or skills (for example, the skill of deception) we thereby decrease his wealth just as surely as if we were to take some money from his bank account and burn it or transfer it into a common fund.")

135. Although some authors have spoken of the act of acceptance as creating new rights and duties in the other party, we know from what has been said that a party's exercise of his or her power does not technically result in the creation (or extinction) of new (or old) legal relationships, for one of two possible relationships (i.e., the right/duty or privilege/no-right relationship) must have necessarily already existed. In reality, a power enables the party possessing it to convert one type of relationship (e.g., privilege/no-right) into another (e.g., right/duty), and makes the party at the other end of the legal relationship liable to have his or her legal relationship changed. See, e.g., Saunders, *supra* note 52, at 485 ("If Y has made an offer of contract to X, X has a power of acceptance. There is an act X may do, that is, accept the offer, that will create rights and duties in Y.")

additional power to change the current power/liability relationship between Y and X)¹³⁶ or (2) preventing a party in Y's position from revoking its offer (in which case it would further impose upon Y a disability to change the current power/liability relationship between Y and X with respect to Y's offer). The first option tends to be the rule throughout much of our common law, which allows an offeror to revoke his or her offer at any time prior to acceptance,¹³⁷ whereas the second option tends to be the case where there is an option contract (where an offeree has given valuable consideration to an offeror to leave the offer open),¹³⁸ and also in a few other cases in which an offeror has promised to leave the offer open, even without any valuable consideration having been paid to the offeree in return.¹³⁹ But no matter which option is chosen, each choice will entail putting in place an *ex ante* distributive arrangement that confers wealth on one party to the disadvantage of the other.

As evinced by the examples above, it can be seen that in a closed Hohfeldian system, in which the number of people and objects of value is fixed (e.g., two parties and one good), the sum total of legal relationships between the parties must always remain constant. To analogize once again to the laws governing the physical world, just as Newton, and the ancient Greeks before him,¹⁴⁰ claimed that the total quantity of matter in the universe remains constant, itself not capable of being created or destroyed, so too is it the case that the total number of legal relationships in a society must remain the same among the inhabitants of that society.¹⁴¹ And further, just as some of the ancient Greeks thought that it was the combination of different atoms that produce observable changes in mat-

136. Whereby X can accept Y's offer and convert their privilege/no-right relationship to a duty/right relationship.

137. *See, e.g.*, FARNSWORTH, *supra* note 9, § 3.17, at 152 ("It is a fundamental tenet of the common law that an offer is generally freely revocable and can be countermanded by the offeror at any time before it has been accepted by the offeree.")

138. RESTATEMENT (SECOND) OF CONTRACTS § 25 (AM. LAW INST. 1981) ("An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.")

139. *E.g., id.* § 45(1) ("Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it."); CISG 16(2)(a) ("[A]n offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable."); UNIDROIT Principles 2.1.4(2)(a) (INT'L INST. FOR UNIFICATION PRIV. LAW 2010) ("[A]n offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable.")

140. *See, e.g.*, COPLESTON, *supra* note 133, at 51 ("Parmenides asserted the unchangeability of Being, and, in so far as he conceived of Being as material, he asserted the indestructibility of matter. Empedocles and Democritus adopted this position and used it in their atomistic doctrine.... Democritus, therefore, while adopting Parmenides' thesis that being can neither arise nor pass away—the indestructibility of matter—interpreted change as due to the aggregation and separation of indestructible particles of matter.")

141. Of course, as new people are born, or old people die, the legal relationships that existed between them are created or destroyed, respectively, but as for existing individuals, legal relationships cannot be created nor destroyed, but merely changed from one form to another.

ter,¹⁴² so too is it the case that observable legal change is effected by different combinations of the eight jural elements identified by Hohfeld. And finally, to push the analogy a bit further, just as atoms may be combined in unique ways to form planets, stars, clouds, bacteria, and humans, so too, can these fundamental legal conceptions be combined to create not only distinctive legal relationships with unique distributive consequences, but entire bodies of law, ranging from laws that govern the disposition of a decedent's estate, to laws that govern the complex of rights and duties bestowed on two married individuals, and to the contract rights created between two parties entering into an agreement with one another. On the surface, these bodies of law may look very different from one another, as trees look different from clouds, but all are composed of the same basic building blocks, only in different combinations.

This insight, however, too often goes unappreciated, even by those familiar with Hohfeld's work. For instance, it is not uncommon to hear discussions of Hohfeldian powers, immunities, liabilities, and disabilities as being "concern[ed with] the creation and extinction of legal relations rather than the simple existence of such relations as expressed in 'right,' 'duty,' 'no-right,' and 'privilege.'"¹⁴³ Or, to take another example, it is sometimes thought that "a person with a power is capable of performing some act which has the effect of creating or terminating a legal relation."¹⁴⁴ But this way of talking about Hohfeldian entitlements is misleading, for it suggests that legal relations can be created, *ex nihilo*, by a party or judge or legislature, which masks the deeper truth that the legal relationships are already there, constituting *a priori* forms of distributive wealth, and it is only in certain cases, perhaps through the following of certain rules (e.g., offer and acceptance), that the already-existing legal relationship may be changed by a party.

Indeed, to think about legal relationships as being created and destroyed is to believe that the laws that regulate human behavior can be created and destroyed. If this were true, then the libertarian argument against excessive government regulation might well be correct,¹⁴⁵ for there would then indeed be a difference between states with more regulation and less regulation. But an understanding of the Hohfeldian framework presented above shows that this is not true: new legal relationships (and therefore, new forms of regulation) cannot be created or destroyed, but can only be changed from one type of legal relationship (or one form of regulation) to another. One can, for instance, only exercise a power that converts a right/duty relationship into a privilege/no-right

142. See COPLESTON, *supra* note 133.

143. Saunders, *supra* note 52, at 466-67 (emphasis added).

144. *Id.* at 479 (emphasis added).

145. If legal entitlements could be created or destroyed, of course, any argument for or against libertarianism would have to take place in the normative—rather than analytical—realm, and, as such, is beyond the scope of this Article.

relationship (or vice versa), but there is nothing that will allow a party, court, or legislature to create a legal relationship *ex nihilo*. Therefore, because legal relationships (or new forms of regulation) cannot be created whole cloth, they must (and do), contrary to libertarian assertions, exist as *a priori* distributive facts; facts created by “Rex” prior to the parties having ever had any contact with one another.

This is not merely a semantic point, as viewing the matter in the traditional manner (that legal rights, duties, etc., can be “created” and “destroyed”) would be to obscure an exciting and important truth about Hohfeld’s system, and about the law as a whole. And that truth is this: the entire Hohfeldian system has a fixed number of possible legal relationships between all individuals and all things in a society, and every one of these legal relationships entails a distinct distributive arrangement that exists as an *a priori* jural truth.¹⁴⁶ Whether we are speaking of regulating the relationship between A and B with a right/duty or privilege/no-right relationship, or whether we are superimposing on it a power/liability or immunity/disability relationship, society (or Rex) has no choice but to fix the distributional entitlements between the parties in advance, who must thereafter navigate their way within this distributive framework.¹⁴⁷

The consequences of the closed jural system just described, in which legal relationships cannot be created nor destroyed but only changed from one form to another, is important for another reason: it means that every act of lawmaking and legislation either reaffirms an existing legal arrangement, or makes changes to an already-existing legal arrangement. Despite the way we frequently think and talk about courts and legislatures, neither of these bodies, in fact, ever “make” new law. Rather, at most, they “change” the law by engaging in acts (e.g., deciding cases or passing legislation) that operate to replace one regulatory regime with another, shifting the distributive arrangement in the pro-

146. Although, like the Copenhagen interpretation of quantum mechanics, which holds that physical properties at the quantum level only exist as probability distributions and do not come into being until they are measured, so too is it the case that the “jural truths” referred to do not come into existence until “measured” by a court in a judicial opinion. On the Copenhagen interpretation of quantum mechanics, see Ravi Gomatam, *Niels Bohr’s Interpretation and the Copenhagen Interpretation—Are the Two Incompatible?*, 74 *PHIL. SCI.* 736, 741 (2007).

147. Hohfeld himself seems to have come close to recognizing this important idea, but at other times he slips back into speaking of rights being created and destroyed. For instance, at one moment Hohfeld speaks of a party’s “volitional control” to exercise their “(legal) power” to “change [] legal relations,” recognizing that powers can be invoked to change the right/duty relationship to a privilege/no-right relationship, or vice versa. Hohfeld, *supra* note 43, at 44 (emphasis added). However, at other times, Hohfeld speaks of the legal interests themselves as being “*extinguish[ed]*” and “*creat[ed]*.” *Id.* at 45 (emphasis added). “Thus, X, the owner of ordinary personal property . . . has the power to extinguish his own legal interest (rights, powers, immunities, etc.) . . . and . . . to create in other persons privileges and powers.” *Id.* “X has the power to transfer his interest to Y,—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest.” *Id.* “[T]his enactment imposed . . . a liability to have duty created.” *Id.* at 53.

cess. In short, because some legal arrangement must, of necessity, always exist between any two parties with respect to some X, all the law does—indeed, all the law can do—is establish which legal relationship should exist. And once we realize this, we can see that what we think of as “creating” new law is simply the process of choosing which default or immutable rule should exist, a process that is, at its core, a matter of distributive justice.

This means, of course, that the question raised by Kronman (i.e., whether it is ever appropriate to take distributive justice into account in contract law) and the claims made by the libertarians against whom he was arguing (i.e., that taking distributive justice into account in contract law is never appropriate) are, according to the framework developed in this Article, off the mark. Because every act of legislation or interpretation entails distributive consequences, the consideration of distributive justice is not only appropriate, but necessary, in every act of lawmaking or legal interpretation, in contract law and elsewhere.¹⁴⁸ Every choice governing every rule in contract rule is a distributive choice setting the regime of background rules against which the parties bargain with one another. The manner in which these initial entitlements are set, in turn, constitutes a real form of wealth establishing each party’s starting point in their negotiations with each other, strongly influencing what each party will be able to get from its bargain.¹⁴⁹

Let us turn to some specific examples in contract law to see how this works in practice, although the points made below can be applied more broadly to all areas of law.

148. To say that making distributive choices is necessary, of course, is not to say that making such choices is easy, especially given that a policy-based commitment to a particular distributive regime will result in the parties changing their own behaviors, requiring further policy-based adjustments on behalf of the courts or legislatures. As explained by Kronman: So long as the parties to a contract remain free to modify their arrangement in ways not already subject to governmental control, the distributive consequences of regulating one aspect of the contract can be partially frustrated or undone by altering its other features. To illustrate the point, suppose that poor people are frequently victimized by exorbitant interest rates (rates in excess of those justified by the special risks of transacting with the poor). To prevent exploitation of this sort, a law is passed forbidding merchants to charge interest greater than some fixed amount. The first effect of such a law may well be to diminish the supply of credit to the poor, or to particular groups among the poor, thus making them worse rather than better off. Even if the supply of credit is unchanged, merchants may respond to the law by changing the terms on which they sell goods to the poor—for example, by increasing price, eliminating warranties or requiring additional security—and thereby prevent any change in the *status quo*. If the regulation of interest rates is to have its intended effect, these other aspects of the contractual relationship may also have to be controlled by the state. In this way, partial regulation of the contractual relationship creates its own pressure to expand the scope of regulation, bringing the entire transaction more fully under the control of the state. Kronman, *supra* note 5, at 506.

149. WILLIAM IAN MILLER, *EYE FOR AN EYE* 218 n.5 (Cambridge Univ. Press 2006) (“The rule embodied in most laws is a default rule only. In other words, the outcome declared by the rule may in fact be the outcome least selected by the people involved, who bargained to a different outcome; people bargained in the shadow of the rules, with the rules less defining a specific outcome than providing ammunition for various bargaining positions.”).

B. Distributing Justice Throughout Contract Law

As applied to contract law, the previous discussion makes clear that courts make a distributive decision no less frequently than every time they hear a contract dispute. To see why this is so, let us begin by considering one of the most basic issues in all of contract law: whether a particular promise ought or ought not to be enforced.¹⁵⁰

1. Consideration

When two parties argue over the enforceability of a particular promise in court, their dispute typically takes the following shape: the promisee argues that the promisor's promise should be enforced because some doctrine is present¹⁵¹ compelling the enforcement of the agreement, whereas the promisor argues that no such doctrine is present¹⁵² to compel enforcement of the promise. If we recast the parties' dispute in Hohfeldian terms, however, we see immediately that the parties are really fighting over whether their conduct towards one another is regulated by a right/duty relationship (as the promisee argues), or by a privilege/no-right relationship (as the promisor argues).¹⁵³ In either case, the legal relationship over which the parties are fighting consists of which relationship (right/duty or privilege/no-right) actually governed the parties' relationship *ex ante*, i.e., before their dispute ever took place. And, where the nature of the parties' legal relationship is unclear, as is often the case in litigation, what the parties' dispute is really about is whether the court should find that a right/duty or a privilege/no-right relationship exists between the parties with respect to some X (e.g., a promise to deliver 100 widgets).

Viewed in these terms, it is important to note that the dispute over which the parties are fighting in the above example is only ostensibly about consideration; in reality, the dispute is over the way the background rules regulating the parties' relationship has been—or ought to be—set. It is, in short, a dispute about the distributive arrangement that

150. See, e.g., Melvin Aron Eisenberg, *The Principles of Consideration*, 67 *CORNELL L. REV.* 640, 640 (1982) ("The first great question of contract law, therefore, is what kinds of promises should be enforced.")

151. For instance, the promisee may argue that there was consideration, making the promise enforceable, because the exchange was "bargained for," i.e., "sought by the promisor in exchange for his promise and . . . given by the promisee in exchange for that promise." See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* § 71(2) (AM. LAW INST. 1981).

152. For instance, the promisor may argue that the promise is not enforceable because it was gratuitously made, or made on account of something the promisee had done for the promisor in the past, or because the promisor simply felt morally obliged. In each of these cases, the promise would be without legal effect because it was not "bargained for." See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* § 71(2) (AM. LAW INST. 1981).

153. See, e.g., Radin, *supra* note 68, at 1163 (In deciding such a case, the court will "call[] it a *demand-right* if it is lawful," (i.e., if there is consideration), or will "call[] its absence a *privilege-right* on the part of the defendant," (i.e., where there is no consideration).)

does (or ought to) exist between the parties. And as the legal relationships established by these background rules constitute a real form of wealth, making one or the other of these parties better off than they would have been had another set of background rules been selected, the manner in which these background rules are set is also, in a very real sense, a matter of distributive justice.

These distributive decisions, however, are present not only where the parties are arguing over the enforceability of a promise, but throughout the entire corpus of contract law. For indeed, in every case that the court finds the parties' conduct to be governed by the right/duty relationship (i.e., in every case that the court finds there to be a contract), a whole host of other distributive decisions must be decided upon, all of which can be said to govern the parties' conduct towards one another, before anything like a workable system of contract law can function. And because every rule of contract law, and every decision deciding a contract dispute, has distributional consequences, it stands to reason that legislatures and judges ought to at least be aware of what these distributive consequences are when they make laws or decide the disputes before them. We will examine some of these distributive decisions below, beginning with the establishment of default rules.

2. *Default Rules*

Because most of the rules of contract law are default rules,¹⁵⁴ one of the most important services provided by any system of contract law is the establishment of a set of default rules to regulate the parties' conduct in those instances in which the parties have failed to do so themselves.¹⁵⁵ Consider, for instance, the relatively straightforward example of a merchant contracting to sell a defective good to a buyer. If the parties do not agree upon a rule governing their relationship in the event a defect is later discovered, and if the buyer later sues the seller for a refund because of this defect, what is the law to do?

One school of thought, which might be roughly equated with the libertarian view, holds that the law should not interfere with transactions that are freely entered into between two private parties.¹⁵⁶ More specifically, by

154. See, e.g., FARNSWORTH, *supra* note 9, § 1.10, at 37 (“[T]he great bulk of the general rules of contract law, including those of the Uniform Commercial Code and the Vienna Convention,” are default rules, rules that “are subject to contrary provision by the parties.”).

155. See, e.g., Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 396 (2009) (“How to fill gaps in incomplete agreements is perhaps the most important question in contract law. It is important both because courts often interpret and supplement contracts and because the default rules set by law determine how contracts will be written.”).

156. See, e.g., *Printing & Numerical Registering Co. v. Sampson* [1875] 19 LR Eq. 462, 465 (Lord Jessel M.R.) (U.K.) (“[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”).

encouraging courts and legislatures to adopt a policy of caveat emptor (or “buyer beware”)¹⁵⁷ and letting the loss lie where it falls (i.e., on the buyer),¹⁵⁸ this view is often couched in terms of protecting the parties’ “freedom of contract”¹⁵⁹ by refusing to regulate the relationship between the parties where they could have done so themselves.¹⁶⁰ However, another school of thought, which might be roughly equated with the liberal view, would propose that the law should instead regulate the affairs between parties by imposing a default rule protecting buyers with a warranty, forcing sellers (unless contracted around) to stand behind their goods.¹⁶¹

It may seem logical to associate the first view with laissez-faire capitalism and the government’s refusal to regulate markets,¹⁶² and the second view with paternalistic governmental regulation (with good or ill effect). This, however, would be a mistake. Drawing on our earlier discussion, it is not the case that a choice must—or even can—be made between non-regulation and regulation; rather, both solutions constitute two different forms of regulation. Caveat emptor, in short, is a form of

157. For an excellent general discussion of the principle of caveat emptor, including its historical development, see generally Walton H. Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 *YALE L.J.* 1133 (1931).

158. The justification for this principle being the idea that “[t]he buyer who at the time of the sale has failed to exact positive assurances against future contingencies deserves to take the consequences of his slothfulness.” *Id.* at 1178.

159. See, e.g., *id.* at 1183 (“A freedom of contract, which comprehended the seller’s right to determine the vendible qualities of goods, was to be abridged only when an insistent need could summon the police power to its support. Save in so exceptional an instance, an open market invited whosoever would to come and sell. In behalf of the right freely to bargain the judiciary might be invoked to declare a legislative act a nullity.”).

160. This view probably saw its peak during the nineteenth century, and into the early parts of the twentieth century. See generally *id.* at 1176-82 (providing a number of illustrations, both in England and America, of courts applying this principle to find for seller where buyer has received defective goods). Here is one illustrative case: “A cargo of cotton had been purchased by sample, and nearly one-third of the bales turned out to be falsely packed; the outside layers, from which alone the sample could be drawn, were good, but the interiors were bad. The court noted that the seller was a dealer, discovered that the representation was not false to the party making it, refused to take notice of the customs of the trade, and held that the rule of *caveat emptor* applied.” *Id.* at 1177 (citing *Ormrod v. Huth*, 14 *W. & W.* 651 (1845)).

161. This is, in fact, the position taken by the Uniform Commercial Code in regulating the sale of goods. See, e.g., U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM’N 2014) (“Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”); *id.* § 2-315 (“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”).

162. See, e.g., Hamilton, *supra* note 157, at 1173 n.255 (“In the hurly-burly which marks the passage of an agrarian into an industrial society a legislative *laissez-faire* is likely to be accompanied by a judicial *caveat emptor*. The intellectual association of the maintenance of free contract with the reduction of contractual protection to a minimum belongs rather to judges than to men of business.”).

regulation.¹⁶³ Specifically, the free-market approach advocated by libertarian proponents of caveat emptor and laissez-faire capitalism is, when understood in Hohfeldian terms, little more than a call for courts to regulate the parties' conduct via a privilege/no-right relationship.¹⁶⁴ In the same vein, the so-called paternalistic approach advocated by liberal proponents of regulation is no more or less intrusive, from a Hohfeldian perspective, than the alternative approach, and constitutes little more than a call for courts to regulate the conduct between buyers and sellers with a right/duty relationship.¹⁶⁵ Both approaches, in short, constitute two different forms of regulation.¹⁶⁶

Furthermore, each form of regulation has important distributive consequences. In the first instance, protecting merchants with a privilege/no-right relationship by adopting a policy of caveat emptor constitutes an important form of wealth for the merchants, giving them an ex ante advantage vis-à-vis buyers even before the parties ever strike a bargain with one another. And even where a particular buyer is savvy enough to contract out of this default rule by requiring a merchant to provide a warranty, it is the buyer who must pay for this in the bargaining process,¹⁶⁷ resulting in a contract slightly more in the merchant's favor than would have been the case otherwise.

The opposite is equally true where the buyer is protected with a right/duty relationship: here, it is the buyers who will receive an important form of wealth vis-à-vis sellers before the parties ever meet one another face to face. Once again, even where a seller contracts around this rule by disclaiming such a warranty, they will have to give something to the buyer in return (e.g., a lower price), resulting in a slightly more favorable contract for the buyer than would have been the case otherwise. Either way, the choice of a default rule constitutes a choice between two different ways of distributing wealth ex ante, and it cannot be said that one rule or the other allows for more or less freedom of con-

163. See, e.g., Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, in *SEXY DRESSING, ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83, 91 (1993) (noting that even the "inaction" ostensibly associated with the laissez-faire approach "is a policy").

164. Specifically, it is a call granting to the merchant a *privilege* of selling defective goods, and imposing on the buyer *no-right* to interfere with the merchant's privilege.

165. Specifically, it imposes on the merchant (where the merchant decides to sell its goods at all) a *duty* to sell non-defective goods, and grants to the buyer the right to purchase non-defective goods.

166. See, e.g., Nyquist, *supra* note 69, at 256 ("In a sale of goods by a merchant . . . the late-nineteenth-century rule of caveat emptor (no implied warranty of quality) has now been replaced by an implied warranty of merchantability. But in these transactions we have not moved from an unregulated to a regulated market; we have merely changed how we regulate. The choice between imposing liability on a merchant seller for defective goods or allowing the loss to fall on the buyer is not a choice between having a policy and not having a policy. It is a choice of which policy to have.")

167. Not only in the form of the transaction costs that are associated with any bargain, but in terms of attempting to purchase from the seller a legally recognized entitlement.

tract. Each rule regulates the relationship between the parties differently, and therefore distributes freedom differently. Therefore, where parties argue over whether a privilege/no-right or right/duty relationship ought to govern their conduct, they are really arguing over which distributive arrangement is or ought to be in effect, and this decision requires a policy choice that must be worked out in advance, either wholesale, or on a case-by-case basis.

3. *Parol Evidence*

The analysis provided above is applicable to much more than determining whether a promise should or should not be enforced, or whether this or that default rule ought to govern. Indeed, because contract law requires that courts and legislatures consistently make decisions over whether to regulate the behavior of contracting parties with a right/duty or privilege/no-right relationship, the sorts of distributive decisions discussed above are ubiquitous in contract law. A few more examples will serve to illustrate the point.

Consider, for instance, the choice over whether a court or legislature ought to (1) permit a party to introduce an unwritten term into a written contract via parol evidence, as is common under the Convention on Contracts for the International Sale of Goods,¹⁶⁸ or (2) refuse to allow a party to prove additional terms where such terms are not mentioned in a prior written agreement, as is the traditional rule under common law.¹⁶⁹ At its core, such a choice consists of choosing whether to regulate the parties' conduct in the shadow of a written document with a privilege/no-right relationship or a right/duty relationship. If a court or legislature selects the first method of regulation, then it will hold, in effect, that A is privileged to introduce non-written terms into a prior written agreement, and B has no right to interfere with A's privilege of introducing such terms. A court or legislature selecting the second method of regulation, however, will hold that A has a duty to not introduce non-written terms into a prior written agreement, and B has a right to require that any terms subsequently introduced by A shall be written. Whether the first or second method of regulation is ultimately decided upon cannot be determined by recourse to anything within the law itself, but must be made after careful consideration of the policy choices involved,¹⁷⁰ and these choices will

168. *See, e.g.*, CISG Adv. Co. Op. No. 3 ("The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.").

169. *See, e.g.*, *Samar, Inc. v. Hofferth*, 726 N.E.2d 1286, 1290 (Ind. Ct. App. 2000) ("When the language of a contract is clear and unambiguous, the intent of the parties is determined from the four corners of the instrument, giving the words contained therein their plain, usual, and ordinary meaning."); *see also* *Gianni v. R. Russel & Co.*, 126 A. 791, 792 (Pa. 1924) ("As the written lease is the complete contract of the parties, and since it embraces the field of the alleged oral contract, evidence of the latter is inadmissible under the parol evidence rule.").

170. Regarding the parol evidence rule, these policy considerations might take into account, for instance, one's views concerning the ability of the written word to adequately capture and re-

ultimately affect the distribution of entitlements constituting the contractual relationship between the parties.

4. *Modification*

Let us next consider the ability of the parties to modify a provision in their contract. Contract law can either (1) allow such modifications to be made by one or both parties by imposing a power/liability relationship or (2) prohibit the parties from making such changes by imposing an immunity/disability relationship. The former might be the case, for instance, where the parties are allowed to modify their existing relationship by mere agreement, as is typical under the Uniform Commercial Code¹⁷¹ and the Convention on Contracts for the International Sale of Goods,¹⁷² whereas the latter relationship might hold, for example, where the parties are not allowed to modify their relationship absent a subsequent consideration-based bargain, as is the case under the common law.¹⁷³

It is important to note that the first way of regulating the agreement (the power/liability relationship) gives more bargaining power, and thus a relative distributive advantage, to the party seeking to change the agreement, whereas the latter form of regulation (the immunity/disability relationship) gives more bargaining power, and thus a relative distributive advantage, to the party seeking to preserve the original agreement. The form of regulation imposed, therefore, gives one or the other of the parties a real form of wealth that exists *ex ante*, as a matter of distributive justice, before the issue of modification ever arises between them.

5. *Unilateral Offers*

Pressing the above analysis further, the power/liability and immunity/disability relationship may (or may not) itself be subject to change, depending on the distributive arrangement decided upon by courts and legislatures in advance (or upon consideration) of any dispute arising between the parties. To see how this is so, consider the various rules of

flect the true nature of the parties' intent, the extent to which we are worried about the written word possibly trumping the will of the parties, or even the extent to which we view "the uncertain testimony of slippery memory" as a problem more serious than the concerns previously raised. *Countess of Rutland's Case*, 77 Eng. Rep. 89, 90 (K.B. 1604). For a good discussion of some of the policy arguments involved, see generally Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1997).

171. See, e.g., U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014) ("An agreement modifying a contract within this Article needs no consideration to be binding.")

172. See, e.g., CISG Art. 29(1) ("A contract may be modified or terminated by the mere agreement of the parties.")

173. See, e.g., *Alaska Packers' Ass'n. v. Domenico*, 117 F. 99 (9th Cir. 1902) (refusing to enforce a subsequent modification where such modification was not supported by sufficient consideration).

offer and acceptance that might apply where A offers B \$100 to walk across the Brooklyn Bridge. Under the older common law, as exemplified in a famous law review article written by Professor Wormser, because the offeror (A) is bargaining for the offeree's (B's) performance, A must only pay the \$100 if B completes the bargained-for-act, leaving A free to revoke the offer any time prior to complete acceptance (i.e., prior to walking across the entire length of the Brooklyn Bridge). According to Professor Wormser:

It is elementary that an offeror may withdraw his offer until it has been accepted. It follows logically that A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge—the act contemplated by the offeror and the offeree as the acceptance of the offer.¹⁷⁴

In Hohfeldian terms, we would summarize Professor Wormser's view by saying that B, by walking over the Brooklyn Bridge, has a power to change the legal relationship between A and B by completing the bargained-for-act (i.e., crossing the Brooklyn Bridge), and that A is under a liability to have the legal relationships changed. Prior to B completing this act, A is privileged to not pay B \$100, and B has no right to receive \$100 from A. If B can complete the act before A can revoke, however, B will have properly exercised its power, thereby forming a contract imposing on A a duty to pay B \$100 (and a corresponding right in B to receive payment from A). But prior to B's complete acceptance, it is A that has the power to change the legal relationship between A and B by revoking his offer prior to B crossing the bridge. By doing so, A will convert the power/liability relationship existing between the parties into a disability/immunity relationship: whereas previously B had the power to change the legal relationship by crossing the bridge, B would now be disabled to change the legal relationship between A and B, and A would be correspondingly immune from having the legal relationship changed by B.

The old common law rule discussed above—and therefore, the old regulatory regime—has since been changed, however. Under the new rule, as exemplified in section 45 of the Restatement (Second) of Contracts: "Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it."¹⁷⁵

Under this new rule, B will still have the power to change the legal relationship between A and B by completing the bargained-for-act prior to A's revocation of the offer. However, once B begins performance, A is no longer able to revoke the offer, as per the old rule. In other words, B's

174. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 *YALE L.J.* 136, 137 (1917).

175. *RESTATEMENT (SECOND) OF CONTRACTS* § 45(1) (AM. LAW INST. 1981).

act of beginning to walk across the Brooklyn Bridge converts the previous power/liability relationship between A and B into a disability/immunity relationship: where A could have previously exercised his power of revocation, he is now disabled from doing so; whereas B was previously under a liability to have its relationship changed by A, B is now immune from A's attempt to change the relationship between them.

For our purposes, what is important to note is not which specific rule governed at a particular time, but that both the old and new rules constituted two distinct forms of regulation, neither of which was necessitated by logic, and both of which had important distributive consequences for all of the parties involved. Indeed, both of the rules described above were a product of policy choices made by courts and/or legislatures, policy choices that resulted in distinct distributive arrangements and governed the parties' relationship before the particular parties ever came into contact with one another. Under the old common law rule, as espoused by Professor Wormser, the relative advantages were distributed to the offeror, whereas under the more modern view, the relative advantages are distributed to the offeree.¹⁷⁶

6. Remedies

Let us consider one final example: remedies. Because a party can only be in violation of another party's rights if their conduct is regulated by a right/duty relationship,¹⁷⁷ Professor Hohfeld showed that, contrary to what some courts thought was a matter of logical necessity, duties cannot be deduced from injury: there are many instances in which harm can and does go uncompensated.¹⁷⁸ The decision to compensate at all¹⁷⁹—and how much to compensate¹⁸⁰—is therefore also a distributive choice.

176. Wormser, *supra* note 174, at 137.

177. Indeed, by applying Hohfeld, we can say that a legal wrong consists of nothing more than acting inconsistently with a pre-existing legal relationship. In other words, if A acts towards B *as though* their conduct is regulated by a privilege/no-right relationship when, in fact, it is *actually* regulated by a right/duty relationship, then A has committed a legal wrong (or violated a legal right, which amounts to the same thing). A has done this by attempting to illegitimately change (by acting inconsistent with) the distributive arrangement previously established between A and B. Where this is so, this "wrong" should be remedied by recourse to corrective justice, which seeks to reestablish the previously-existing distributive arrangement.

178. Singer, *supra* note 45, at 1051 ("The very process of recognizing more and more instances of *damnum absque injuria* in the legal system demonstrated that a series of classical conceptualist deductions were logical errors.")

179. Of course, courts may and sometimes do disallow recovery altogether, although a duty has been breached, because it deems some other policy consideration to be more important, such as where the party in breach successfully asserts a defense or excuse to performance (e.g., impossibility, impracticability, and frustration of purpose).

180. In Part IV, *supra*, we saw how the choice of regulating the relationship between A and B with a right/duty or privilege/no-right relationship is a distributive choice. But once this first distributive choice is made, and the right/duty relationship has been chosen, a second distributive choice must be made regarding the extent to which this right/duty relationship shall be protected. Perhaps not surprisingly, this, too, is a policy choice that entails distributive consequences.

Consider, for instance, contract law's preference for expectation damages,¹⁸¹ or even the three limitations traditionally imposed on expectation damages, those of foreseeability,¹⁸² certainty,¹⁸³ and avoidability.¹⁸⁴ These preferences privilege a particular distributive arrangement over countless alternatives, yet none of these principles are derivable a priori from a given set of legal relationships, as is shown by the fact that we may (and sometimes do) alternatively award restitution or reliance damages instead of expectation damages.

Indeed, the very award of expectation damages is not, in itself, a jurisprudential fact that judges "find" and "award," but is itself the product of juristic creation.¹⁸⁵ Courts and litigants who speak about "rights" to expectation damages often lose sight of this, treating the "right" to compensation as though it were a fact of nature. But this way of thinking clouds one's ability to appreciate not only the policy that creates the right,¹⁸⁶ but the policy choices that determine the extent to which the right is protected.¹⁸⁷

181. *See, e.g.*, FARNSWORTH, *supra* note 9, § 12.1, at 730 (Courts "protect[] the expectation that the injured party had when making the contract by attempting to put that party in as good a position as it would have been in had the contract been performed, that is, had there been no breach. The interest measured in this way is called the *expectation interest* and is said to give the injured party the 'benefit of the bargain.'").

182. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (AM. LAW INST. 1981) ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.").

183. *See, e.g., id.* § 352 ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

184. *See, e.g., id.* § 350(1) ("[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.").

185. *See, e.g.*, Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52 (1937).

186. *See, e.g., id.* at 52-53 (arguing that expectation damages, which purport to "compensate" the plaintiff by giving him something he never had," itself constitutes "a queer kind of compensation" that can only be justified on policy grounds).

187. Not only may courts protect rights to various extents by choosing between expectation, reliance, and restitution damages, but even more broadly, courts exercise their discretion when determining whether to protect entitlements with liability or property rules. *See, e.g.*, MILLER, *supra* note 149 at 48-49 ("First a culture decides to create and then assign to a person an entitlement in a thing Next, the polity decides how to protect the entitlement it has conferred on V. In this model, it has a choice between two types of protection. The entitlement can be backed by . . . a property rule or by a liability rule. Property-rule protection means the entitlement is transferable only at a price the entitlement-holder (in this case V) is willing to accept. No one can take it unless he agrees to V's terms. V has the sole power to determine whether and for how much he will give up his entitlement. Liability-rule protection, however, will, under certain circumstances, compel V to transfer his entitlement for a price—not a price he gets to set, but one that will be determined by a third party, such as a court or an arbitrator or an official compensation schedule."); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller Whenever someone may

The preferred distributive arrangements, then, are imposed not as a matter of logic, but as a matter of policy, to regulate the legal relationships between the “injuring” and “injured” party (terms that themselves rely upon the “rights” and “duties” established by the distributive arrangements), all of which have distributive consequences.

V. CONCLUSION

The list of contract examples that could be provided to illustrate the distributive nature of contract rules is countless, and spills over into the areas of mutual assent, interpretation, breach, defenses, etc.—in short, it impacts every rule constituting the structure of contract law itself. This is because every rule of contract law reflects a policy choice regarding how the legal relationship between the parties should be regulated, or, more specifically, how the relative advantages and disadvantages of contract law’s superstructure should be distributed between the parties. And, perhaps most importantly, as the discussion above demonstrates, these distributive choices are made for the parties by courts and legislatures, rather than by the parties during the bargaining process. Indeed, even where certain default rules are contracted around by the parties, it is the distributive starting points established by courts and legislatures that will, in part, determine how much the parties will be able to bargain, and how much they will be required to pay to deviate from the prevailing default terms. The rules of contract law, in other words, reflect real sources of wealth for the parties to a contract, wealth that is created, and that exists, within the superstructure of contract law itself.

By not only clarifying the legal issues, but by revealing the discretion available to lawmakers in deciding these issues, Hohfeldian analysis reserves a central place for the role of policy in both creating and interpreting these legal rules. It is important to note, however, that Hohfeld merely provided the framework for understanding the scope of policy, but “offered no analysis of how policy was to be understood.”¹⁸⁸ This Article has argued, however, that because all of the legal arrangements decided upon entail distributive consequences, they should be grounded, in no small measure, upon notions of distributive justice. In this sense, the Hohfeldian revolution is far from complete: in a field like contract law, for instance, it is still not uncommon to hear individuals discussing rules as preordaining answers to legal questions, and it is still all too common to hear “liberal” judges being accused of exceeding their judicial authority by refusing to simply “follow the law” as written. By failing to see the discretion built into contract law at its most fundamental level and its concomitant dependence on sound policy choices, the distributive ar-

destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.”)

188. Nyquist, *supra* note 69, at 256.

rangements organized by the superstructure of contract law too often go unnoticed, and the important task of determining how this discretion should be used too often gets ignored. By recognizing this superstructure, we can move towards the more useful task of helping courts and legislatures decide upon the best way of using its discretion to solve thorny legal problems with distributive consequences, problems that depend, in no small part, on distributive justice.

