Gregory & Kalven, Cases & Materials on Torts (2nd ed. 1969)

POSTSCRIPT ON TORTS THROUGH COMBINATION: A NOTE ON THE COMMON-LAW BACKGROUND: THE HOUSE OF LORDS TRILOGY.

The basic principles of the common law governing the privilege to impose economic harm on others when competing for trade advantages are conveniently set forth in three famous cases — generally known as the House of Lords trilogy. In each of these cases the pressure causing the harm was generated by a combination of capital or of labor and the cases are particularly interesting on whether or not the court was using a "double standard."

1. Perhaps the best known is Mogul Steamship Co. Ltd. v. McGregor, Gow & Co., 23 Q.B.D. 598 (C.A. 1889), [1892] A.C. 25. There defendants, a combination of shipping companies, were engaged in carrying cargo from China to England. Fearing that if competitors entered the field they could not maintain the prevailing freight rates, the defendants combined to exclude new enterprise. When plaintiff shipping company tried to enter the field, defendants deliberately set out to keep it from securing any business by drastically lowering freight rates and by paying rebates to those who shipped exclusively with them. The plaintiff also charged that defendants refused to carry, from ports at which only combination vessels called, the cargo of any merchant who shipped with the plaintiff company from ports served by both defendants' and plaintiff's ships. If proved, this would have been a type of secondary boycott. Altogether, defendants' pressures harmed plaintiff company to the point of ruin; and plaintiff sought damages and an injunction.

The Court of Appeal and the House of Lords, however, concluded that defendants had done nothing unlawful. The judges apparently conceded that the intentional infliction of harm on another is a prima facie tort, even though the means employed by the defendants fell within no common law category of illegality and were not unlawful under a statute. But they recognized that the justification afforded by the pursuit of self-interest and gain in business competition prevented this deliberate infliction of harm from being tortious. The defendants "have done nothing more against the plaintiffs," said the Court of Appeal, "than pursue to the bitter end a war of competition waged in the interest of their own trade."

Nor could the judges and Law Lords perceive any element of illegality in the fact of combination among the defendants, as long as it was for the purposes of trade and competition. However plainly this case establishes the principle that the deliberate infliction of harm through economic pressures is not tortious as long as it is "justified" by the pursuit of self-interest and gain — in this case business competition — it equally underscores the paradox that unlimited competition of this sort results in monopolistic controls which are essentially anticompetitive.

2. The second of the famous trilogy (Allen v. Flood, [1898] A.C. 1) is quite different from the Mogul case on its facts, yet it seems to be quite similar in principle. The plaintiffs, Flood and Taylor, two shipwrights, had been employed by the Glengall Iron Company to repair some woodwork on the same ship on which about 40 ironworkers were employed. This was apparently contrary to the rules of the ironworkers' union, and the ironworkers threatened to walk out. Allen, the union's business agent, persuaded them to remain at work until he consulted with the company. Thereupon the company discharged Flood and Taylor, who then sued Allen for damages, alleging malicious and wrongful intentional injury through his having induced the company to "break their contract" with them. In sending the case to the jury, the trial court asked it if Allen had "maliciously" induced the company to discharge the plaintiffs; and the jury answered in the affirmative, whereupon judgment was entered on the jury's verdict of £20 for each plaintiff. This was affirmed by the Court of Appeals; and after a lengthy argument with numerous advisory opinions of lesser judges invited in to hear the arguments, the Law Lords voted 6-to-3 to reverse.

Allen v. Flood became the outstanding case for the proposition that motive or malice did not serve to render unlawful conduct which was otherwise lawful. For nothing that defendant Allen or his ironworkers' union did fell within any existing category of illegality, Lumley v. Gye not being applicable because the plaintiffs' employment had been at will.

Lord Herschell, writing one of the majority opinions, was most caustic about the trial court's introduction of the element of malice, observing: "I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. . . . The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own."

Lord Herschell then went on to recognize that this case fell well within the pattern already set in the Mogul case and was governed by the principles there enunciated. Here Allen's ironworkers were determined not to work with shipwrights and to do all of Glengall's work, or none. "Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the rights of the ironworkers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being entrusted to other hands." As to the Mogul case, Lord Herschell obviously disapproved of the so-called prima facie tort rendered lawful through justification, preferring the view that if conduct is not unlawful in itself, the fact that it causes harm does not render it tortious. And he was "aware of no ground for saying that competition is regarded with special favor by the law," seeing "no reason why it should be so regarded." But taking the Mogul case for what it professed to be, he asked: "What was the object of the defendant, and the workmen he represented, but to assist themselves in their competition with the shipwrights?" Thus, with what at the time was unusual clarity, Lord Herschell was able to perceive the exact similarity between the two cases, although the former involved businessmen and the latter organized workers.

3. The third case was Quinn v. Leathem, [1901] A.C. 495. Here it appears that the plaintiff, Leathem, ran a slaughter yard and regularly sold all of his product to a retail butcher named Munce in Belfast. There was no contract between Leathem and Munce. Quinn and other officials of a meatworkers' union, having already unionized Munce, were determined to organize slaughter yards like Leathem's. They asked Leathem to let his old men go and hire new men from the union, while Leathem insisted on keeping his old employees after they were duly admitted to the union. But the union officials, apparently anxious to place members who had long been out of work and were feeling resentment at the plaintiff's employees because they had so long been nonunion, turned Leathem's proposal down. On his refusal to comply, the union officials notified Munce that unless he ceased purchasing Leathem's meat they would call out his workers. Wishing to avoid trouble, Munce thereupon bought his meat elsewhere, to Leathem's damage. Also defendants had induced one of Leathem's employees to quit.

In Leathem's action for damages the trial court asked the jury if defendants acted and conspired wrongfully and maliciously, defining malice as going beyond securing or advancing their own interests and intending to injure plaintiff in his business. After a verdict and judgment for the plaintiff a majority of the Court of Appeal approved the trial court's action and rejoiced in a judgment "that may have the effect of arresting the mischief of Allen v. Flood at the point of combination," indicating that the decision in that case had depended upon there having been "a single person" involved as defendant and that the Quinn case was decided on the issue of conspiracy. Actually it seems difficult to imagine the defendant in Allen v. Flood as a single person when he had the entire ironworkers' union behind him. Only Palles, C.B., on the Irish Court of Appeal thought what his fellow judges said was nonsense, insisting that the theory of the Mogul case governed and that if the act involved would not have been tortious had it been done by an individual, then it did not become tortious when done by several defendants acting in combination.

The House of Lords unanimously affirmed the judgment in Quinn v. Leathem. Although the case was clearly one where the defendants were exercising harmful secondary economic pressures in pursuit of their trade interests as labor unionists — and in that respect no different in principle from the Mogul case — the Law Lords made it plain that Allen v. Flood was an aberration, and made it appear that the pursuit of self-interest and gain through the exercise of harmful economic pressures by a combination might be a privilege denied the labor unionists and reserved for businessmen only.

For a fuller treatment of the House of Lords trilogy, see Gregory, Labor and the Law, c. 2 (2d rev. ed. 1958).

SHERMAN AND CLAYTON ACTS

SHERMAN ANTITRUST ACT §1, 26 Stat. 209 (1890), as amended, 15 U.S.C. §1 (1958): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

SHERMAN ANTITRUST ACT §2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §2 (1958): "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Note

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619; Chicago Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683." Black, J., in Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4-5, 78 S. Ct. 514, 517-518 (1958).

CLAYTON ANTITRUST ACT §3, 38 Stat. 731 (1914), 15 U.S.C. §14 (1958): "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

CLAYTON ANTITRUST ACT §4, 38 Stat. 731 (1914), 15 U.S.C. §15 (1958): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

W.N. Hohfeld, Some Fundamental Legal Concepts as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913)

FUNDAMENTAL JURAL RELATIONS CONTRASTED WITH ONE ANOTHER

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties," and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression.[25] As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions. That this is so may appear in some measure from the discussion to follow.

The strictly fundamental legal relations are, after all, *sui generis;* and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

Jural Opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

Rights and Duties. As already intimated, the 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; and this looseness of usage is occasionally recognized by the authorities....

Recognizing, as we must, the very broad and indiscriminate use of the term "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative....

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best. . . .

Privileges and "No-Rights." As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no-right." In the example last put, whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point; for, always, when 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. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the *duty of entering.* The privilege is perfectly consistent with this sort of duty,—for the latter is of the *same* content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty *to stay off.* Similarly, if A has not contracted with B to perform certain work for the latter, A's privilege of *not* doing so is the very negation of a duty of *doing* so. Here again the duty contrasted is of a content or tenor exactly opposite to that of the privilege.

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter.

In view of the considerations thus far emphasized, the importance of keeping the conception of a right (or claim) and the conception of a privilege quite distinct from each other seems evident; and, more than that, it is equally clear that there should be a separate term to represent the latter relation. No doubt, as already indicated, it is very common to use the term "right" indiscriminately, even when the relation designated is really that of privilege;[34] and only too often this identity of terms has involved for the particular speaker or writer a confusion or blurring of ideas. . . .

Similar difficulties seem to exist in Professor Gray's able and entertaining work on *The Nature and Sources of Law.* In his chapter on "Legal Rights and Duties" the distinguished author takes the position that a right always has a duty as its correlative;[37] and he seems to define the former relation substantially according to the more limited meaning of "claim." Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions "right" and "duty." But, with the greatest hesitation and deference, the suggestion may be ventured that a number of his examples seem to show the inadequacy of such mode of treatment. Thus, e.g., he says:

"The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic."[38]

This passage seems to suggest primarily two classes of relations: *first,* the party's respective privileges, as against A, B, C, D and others in relation to eating the salad, or, correlatively, the respective "no-rights" of A, B, C, D and others that the party should not eat the salad; *second,* the party's respective rights (or claims) as against A, B, C, D and others that they should not interfere with the physical act of eating the salad, or, correlatively, the respective duties of A, B, C, D and others that they should not interfere.

These two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not. A, B, C and D, being the owners of the salad, might say to X: "Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you." In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated.[39]

Perhaps the essential character and importance of the distinction can be shown by a slight variation of the facts. Suppose that X, being already the legal owner of the salad, contracts with Y that he (X) will never eat this particular food. With A, B, C, D and others no such contract has been made. One of the relations now existing between X and Y is, as a consequence, fundamentally different from the relation between X and A. As regards Y, X has no privilege of eating the salad; but as regards either A or any of the others, X has such a privilege. It is to be observed incidentally that X's right that Y should not eat the food persists even though X's own privilege of doing so has been extinguished.[40]

On grounds already emphasized, it would seem that the line of reasoning pursued by Lord Lindley in the great case of *Quinn v. Leathem*[41] is deserving of comment:

"The plaintiff had the ordinary *rights* of the British subject. He was *at liberty* to earn his living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This *liberty* involved *the liberty* to deal with other persons who were willing to deal with him. *This liberty is a right* recognized by law; its *correlative* is the general *duty* of every one not to prevent the free exercise of this *liberty* except so far as his own liberty of action may justify him in so doing. But a person's *liberty* or *right* to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."

A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as *privilege*;[42] and certainly that is the fair connotation of the term as used the first three times in the passage quoted. It is equally clear, as already indicated, that such a privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against "third parties" as regards certain kinds of interference.[43] Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits. The only correlative logically implied by the privileges or liberties in question are the "no-rights" of "third parties." It would therefore be a *non sequitur* to conclude from the mere existence of such liberties that "third parties" are under a *duty* not to interfere, etc. Yet in the middle of the above passage from Lord Lindley's opinion there is a sudden and question-begging shift in the use of terms. First, the "liberty" in question is transmuted into a "right"; and then, possibly under the seductive influence of the latter word, it is assumed that the "correlative" must be "the general duty of every one not to prevent," etc.[43a]

Another interesting and instructive example may be taken from Lord Bowen's oft-quoted opinion in *Mogul Steamship Co. v. McGregor*.[44]

"We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others."[44a]

As the learned judge states, the conflict or antinomy is only apparent; but this fact seems to be obscured by the very indefinite and rapidly shifting meanings with which the term "right" is used in the above quoted language. Construing the passage as a whole, it seems plain enough that by "the right of the plaintiffs" in relation to the defendants a legal right or claim in the strict sense must be meant; whereas by "the right of the defendants" in relation to the plaintiffs a legal privilege must be intended. That being so, the "two rights" mentioned in the beginning of the passage, being respectively claim and privilege, could not be in conflict with each other. To the extent that the defendants have privileges the plaintiffs have no rights; and, conversely, to the extent that the plaintiffs have rights

the defendants have no privileges ("no-privilege" equals duty of opposite tenor).[48]

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Sir Frederick Pollock, in his volume on *Jurisprudence* (2d ed., 1904), 62, seems in effect to deny that legal liberty represents any true legal relation as such. Thus, he says, *inter alia:* "The act may be right in the popular and rudimentary sense of not being forbidden, but freedom has not the character of legal right until we consider the risk of unauthorized interference. It is the duty of all of us not to interfere with our neighbors' lawful freedom. This brings the so-called primitive rights into the sphere of legal rule and protection. *Sometimes it is thought that lawful power or liberty is different from the right not to be interfered with; but for the reason just given this opinion, though plausible, does not seem correct.*" Compare also Pollock, *Essays in Jurisprudence and Ethics* (1882), ch. I.

It is difficult to see, however, why, as between X and Y, the "privilege + no-right" situation is not just as real a jural relation as the precisely opposite "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, seems 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. That this is so seems, in some measure, to be confirmed by the fact that the first sort of act would ordinarily be pronounced "lawful," and the second "unlawful." Compare *Thomas v. Sorrel* (1673), Vaughan, 331, 351

In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation. Before concluding this branch of the discussion a general suggestion may be ventured as to the great practical importance of a clear appreciation of the distinctions and discriminations set forth. If a homely metaphor be permitted, these eight conceptions,—rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities,—seem to be what may be called "the lowest common denominators of the law." Ten fractions (1-3, 2-5, etc.) may, *superficially*, seem so different from one another as to defy comparison. If, however, they are expressed in terms of their lowest common denominators (5-15, 6-15, etc.), comparison becomes easy, and fundamental similarity may be discovered. The same thing is of course true as regards the lowest generic conceptions to which any and all "legal quantities" may be reduced.

Reverting, for example, to the subject of powers, it might be difficult at first glance to discover any essential and fundamental similarity between conditional sales of personalty, escrow transactions, option agreements, agency relations, powers of appointment, etc. But if all these relations are reduced to their lowest generic terms, the conceptions of legal power and legal liability are seen to be dominantly, though not exclusively, applicable throughout the series. By such a process it becomes possible not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various jural problems involved. An indirect, yet very practical, consequence is that it frequently becomes feasible, by virtue of such analysis, to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant. If this point be valid with respect to powers, it would seem to be equally so as regards all of the other basic conceptions of the law. In short, the deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law.[90]

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Joseph Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wisc. L. Rev. 975

II. Hohfeld's System

A. Fundamental Legal Conceptions

Hohfeld identifies eight basic legal rights: four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities). "Rights" are claims, enforceable by state power, that others act in a certain manner in relation to the rightholder. "Privileges" are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. "Powers" are state-enforced abilities to change legal entitlements held by oneself or others, and "immunities" are security from having one's own entitlements changed by others.

The four negations or opposites of the primary legal entitlements refer to the absence of such entitlements. One has "no-right" if one does not have the power to summon the aid of the state to alter or control the behavior of others. "Duties" refer to the absence of permission to act in a certain manner. "Disabilities" are the absence of power to alter legal entitlements and "liabilities" refer to the absence of immunity from having one's own entitlements changed by others.

The eight terms are arranged in two tables of "correlatives" and "opposites" that structure the internal relationships among the different fundamental legal rights.[11]

Jural Opposites

right	privilege	power	immunity
no-right	duty	disability	liability

Jural Correlatives

right	privilege	power	immunity
duty	no-right	liability	disability

Hohfeld's concept of "opposites" conveys the message that one must have one or the other but not both of the two opposites. For example, with regard to any class of acts one must either have a right that others act in a certain manner or no right. Similarly, one must have either a privilege to do certain acts or a duty not to do them.

11. *See* Hohfeld, *Legal Conceptions*, *supra* note 4, at 30.

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The concept of "correlatives" is harder to grasp. Legal rights, according to Hohfeld, are not merely advantages conferred by the state on individuals. Any time the state confers an advantage on some citizen, it necessarily simultaneously creates a vulnerability on the part of others. Legal rights are not simply entitlements, but jural relations. Correlatives express a single legal relation from the point of view of the two parties. "[I]f X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place."[12] If A has a duty toward B, then B has a right against A. The expressions are equivalent. Rights are nothing but duties placed on others to act in a certain manner. Similarly, privileges are the correlatives of no-rights. "[W]hereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or in equivalent words, X does not have a duty to stay off."[13] If A has no duty toward B, A has a privilege to act and B has no right against A. Thus, if A has the privilege to do certain acts or to refrain from doing those acts, B is vulnerable to the effects of A's actions. B cannot summon the aid of the state to prevent A from acting in such a manner no matter how A's actions affect B's interests.

Hohfeld's central goal was to clarify the fundamental difference between legal liberties and legal rights.[14] He criticized his predecessors for not understanding the "fundamental and important difference between a right (or claim) and a privilege [or liberty]."[15]

12. *Id.* at 32.

13. *Id.*

14. I will use the terms "privileges" and "liberties" interchangeably since in the Hohfeldian analysis, they occupy the same structural position. The usual distinction is that liberties are acts that are completely unregulated and privileges are exceptions to generally imposed duties. *See* 2 J. Austin, Lectures on Jurisprudence 16 (1863).

Hohfeld also found it important to distinguish between privileges and powers. Powers are not mere legal liberties, as the old phrase "freedom of contract" implied. What is important about the power to make a contract or to eject a trespasser is not just that one has no duty not to do so, or that others have duties not to interfere, but that the state will enforce the contract or the ejection. Hart, *Bentham on Legal Powers*, 81 Yale L.J. 799, 817 (1972) [hereinafter cited as Hart, *Legal Powers*]. Enforcement of contracts does not merely ratify the results of individual will; it chooses whose will to enforce by overriding the will of the one who breached the contract. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 562 (1933). One can imagine a legal system in which there were privileges to make contracts, but no powers. Contracts—agreements for consideration—could be made, but they could also be breached with impunity. Current contract law permits some agreements and promises, such as promises to make gifts or contracts without consideration, but will not enforce them. It is simply not true that all private arrangements altering legal entitlements that are permitted by the state will also be enforced by courts.

15. Hohfeld, *Legal Conceptions*, *supra* note 4, at 33.

The classical analytical jurists, like Thomas Holland, John Chipman Gray and John Austin, were correct to deduce duties from rights since they express the same legal relation. Rights are nothing but duties on others. However, they were wrong to deduce duties from mere privileges or liberties. It is not true that merely because one has the legal liberty to do an act that others have legal duties not to interfere with the permitted act.

Hohfeld commented on an example given by John Chipman Gray. Gray wrote:

> The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to each shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic.[16]

Hohfeld commented that this description of the property right fails to distinguish between rights and liberties and that it is a logical error not to do so.

> These two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not. A, B, C, and D, being the owners of the salad, might say to X: "Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you." In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would would have been violated.[17]

X's legal liberty to eat the salad may be accompanied by a duty on others not to interfere. However, one does not necessarily always have both a liberty and a right. Others may have liberties as well. Notice also that the example Hohfeld gave is one of conflicting liberties. A gives X permission to take the salad if she can. A then proceeds to try to prevent X from eating it. A's privilege to keep the salad conflicts with X's privilege to take it.

Just as privileges do not imply rights, rights do not imply privileges. A's right to keep trespassers off her land does not necessarily imply a privilege in A to use the land. Thus one might conceive of a remainderperson who has no liberty to enter the land but retains a right to keep trespassers off. Rights do not necessarily imply privileges any more than privileges imply rights. Everyone may have a duty to stay off the land or to refrain from eating the salad.

16. *Id.* at 34 (quoting J. GRAY, THE NATURE AND SOURCES OF THE LAW § 48 (1909)).
17. *Id.* at 35.

The importance of the distinction between privileges and rights can be illustrated by Walter Wheeler Cook's discussion of the 1917 United States Supreme Court case *Hitchman Coal & Coke Co. v. Mitchell.*[18] In that case, an employer sought an injunction to prevent a union's attempt to organize certain mines. The Court assumed that the employer's legal liberty to employ nonunion labor implied a duty on the union not to try to unionize the employees.[19] Cook argued that this reasoning confused rights and liberties. The employer had a *privilege* to hire nonunion labor; it was not unlawful to do so. However, this did not necessarily imply a *right* to hire nonunion labor with accompanying duties on others not to interfere with the privilege. Cook argued that the Supreme Court relied on precedents that gave employers mere liberties to hire nonunion labor to conclude they also had a right against interference by the union.[20] Legal liberties are not necessarily accompanied by duties against interference. Moreover, Cook argued that "it does not follow that, because some acts of interference with the enjoyment of the benefits of a lawful agreement are unlawful, all acts of interference are necessarily prohibited."[21] The employer has privileges but so may unions. The employer's liberty to employ nonunion labor may coexist with the union's liberty to organize the employees.

B. Hohfeldian Debate

Hohfeld's discussion created quite a stir among legal scholars. In the decade that followed publication of his famous article, dozens of commentaries were written on it. Defenders of Hohfeld battled with his critics. There seemed to be no agreement on whether, or why, Hohfeld's analysis was important. The Hohfeldian debate was exceedingly complex and picayune.[22] It would be exhausting and

18. 245 U.S. 229 (1917).

19. Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779, 787-90 (1918) [hereinafter cited as Cook, *Labor Unions*]; Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in READINGS IN JURISPRUDENCE 484, 485 (J. Hall ed. 1938) [hereinafter cited as Cook, READINGS].

20. Cook, *Labor Unions*, *supra* note 19, at 779, 790-93.

21. *Id.* at 788.

22. Carleton Allen has written of the debate about Hohfeld that "the subject is, in my opinion, one of the most complex in legal analysis." Allen, *Legal Duties*, 40 YALE L.J. 331, 351 (1931). A more or less complete list of articles pertaining to the legal rights debate follows: Allen, *Legal Duties*, 40 YALE L.J. 331 (1931); Bingham, *The Nature of Legal Rights and Duties*, 12 MICH. L. REV. 1 (1913); Clark, *Relations, Legal and Otherwise*, 5 ILL. L.Q. 26 (1922); Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919); Cook, *Labor Unions*, *supra* note 19; Cook, READINGS, *supra* note 19; Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); Corbin, *Legal Analysis and Terminology*, in

fruitless to recount it in detail. I have therefore abstracted two basic controversies, around which much of the technical disputes

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READINGS IN JURISPRUDENCE 471 (J. Hall ed. 1938); Corbin, *Offer, Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917); Corbin, *Rights and Duties*, 33 YALE L.J. 501 (1924); Corbin, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 607 (1921); Corbin, *What is a Legal Relation?* 5 ILL. L.Q. 50 (1922); Dainow, *The Science of Law: Hohfeld and Kocourek*, 12 CAN. B. REV. 265 (1934); De Slooveere, *Analytical Jurisprudence as Related to Modern Legal Methods*, 9 N.Y.U. L.Q. REV. 407 (1929); Dickey, *Hohfeld's Debt to Salmond*, 10 U.W. AUSTL. L. REV. 59 (1971); Dowdall, *The Present State of Analytical Jurisprudence*, 42 LAW Q. REV. 451 (1926); Gobel, *Affirmative and Negative Legal Relations*, 4 ILL. L.Q. 94 (1921); Gobel, *Negative Legal Relations Reexamined*, 5 ILL. L.Q. 36 (1922); Gobel, *A Redefinition of Basic Legal Terms*, in READINGS IN JURISPRUDENCE 516 (J. Hall ed. 1938); Gobel, *The Sanction of a Duty*, 37 YALE L.J. 426 (1928); Gobel, *Terms for Restating the Law*, 10 A.B.A. J. 58 (1924); Green, *The Relativity of Legal Relations*, 5 ILL. L.Q. 187 (1923); Harno, *Tort-Relations*, 30 YALE L.J. 145 (1920); Hart, *Bentham*, in JEREMY BENTHAM: TEN CRITICAL ESSAYS 73 (B. Parekh ed. 1974); Hart, *Bentham and the De-Mystification of the Law*, 36 MOD. L. REV. 2 (1973); Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799 (1972); Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 171 (A. Simpson ed. 1973); Hart, *Bentham and the United States of America*, 19 J. L. ECON. 547 (1976); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Hohfeld, *Legal Conceptions*, *supra* note 4; Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Husik, *Hohfeld's Jurisprudence*, 72 U. PA. L. REV. 263 (1924); James, *Bentham on the Individuation of Laws*, 24 N. IR. L.Q. 357 (1973); James, *Bentham and Legal Theory*, 24 N. IR. L.Q. 267 (1973); Kocourek, *Acts*, 73 U. PA. L. REV. 335 (1925); Kocourek, *The Alphabet of Legal Relations*, in READINGS IN JURISPRUDENCE 509 (J. Hall ed. 1938); Kocourek, *Attribution of Physical Qualities to Legal Relations* (pts. 1-2), 19 ILL. L. REV. 435, 542 (1925); Kocourek, *Basic Jural Relations*, 17 ILL. L. REV. 515 (1923); Kocourek, *The Century of Analytic Jurisprudence since John Austin*, in 2 LAW: A CENTURY OF PROGRESS: 1835-1935 195 (1937); Kocourek, *Classification of Jural Interrelations*, 1 B.U.L. REV. 208 (1921); Kocourek, *The Hohfeld System of Fundamental Legal Conceptions*, 15 ILL. L. REV. 24 (1920); Kocourek, *Juristic Knots and Nots*, 19 ILL. L. REV. 80 (1924); Kocourek, *Nomic and Anomic Relations*, 7 CORNELL L.Q. 11 (1921); Kocourek, *Non-Legal Content Relations*, 4 ILL. L. Q. 233 (1922); Kocourek, *Non-Legal Content Relations Revisited*, 5 ILL. L. Q. 150 (1923); Kocourek, *Plurality of Advantage and Disadvantage in Jural Relations*, 19 MICH. L. REV. 47 (1920); Kocourek, *Polarized and Unpolarized Legal Relations*, 9 KY. L.J. 131 (1921); Kocourek, *Reply to Paper of Professor Corbin*, 4 AM. L. SCH. REV. 614 (1921); Kocourek, *Rights in Rem*, 68 U. PA. L. REV. 322 (1920); Kocourek, *Tabulae Minores Jurisprudentiae*, 30 YALE L. J. 215 (1921); Kocourek, *Various Definitions of Jural Relation*, 20 COLUM. L. REV. 394 (1920); Kocourek, *Wanted: A Lawyer's Phrase for Legal Capabilities and Constraints*, 9 A.B.A. J. 25 (1923); Kocourek, *What is Liberty?* 15 ILL. L. REV. 347 (1920); Langdell, *Classification of Rights and Wrongs* (pts. 1-2), 13 HARV. L. REV. 537, 659 (1900); Lysaght, *Bentham on the Aspects of a Law*, 24 N. IR. L.Q. 383 (1973); Lyons, *Logic and Coercion in Bentham's Theory of Law*, 57 CORNELL L. REV. 335 (1972); Page, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 616 (1921); Patterson, *Bentham on the Nature and Method of Law*, 33 CAL. L. REV. 612 (1945); Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557 (1937); Pound, *Legal Rights*, 26 INT'L J. ETHICS 92 (1915); Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909); Pound, *The Progress of the Law: Analytical Jurisprudence, 1914-27*, 41 HARV. L. REV. 174 (1927); Radin, *A Restatement of Hohfeld*, in READINGS IN JURISPRUDENCE 501 (J. Hall ed. 1938), originally in 51 HARV. L. REV. 1141 (1938); Randall, *Hohfeld on Jurisprudence*, 41 LAW Q. REV. 86 (1925); Terry, *The Arrangement of the Law* (pts. 1-2), 17 COLUM. L. REV. 291, 365 (1917); Terry, *Arrangement of the Law*, 15 ILL. L. REV. 61 (1920); Terry, *Duties, Rights, and Wrongs*, 10 A.B.A. J. 123 (1924); Terry, *Legal Duties and Rights*, 12 YALE L.J. 185 (1903); Terry, *Proximate Consequences in the Law of Torts*, 28 revolved.

The first issue was whether legal liberties that were not accompanied by duties on others represented a *legal* category at all. Albert Kocourek argued in 1920 that a rule of law implies constraining liberty by imposing duties on people. Kocourek claimed that "[a] jural relation is a situation of legal and material fact upon which one by his own will may restrict or claim to restrict, presently or contingently, with the aid of the law, freedom of action of another."[23] He argued that privilege/no-right relations are not legal relations at all since no governmental constraint is involved.[24] Kocourek explained his position with an example:

> If A, the owner of a cigar, smokes it in his study, he exercises a liberty, or, in the language of the Hohfeld System, a "privilege." No one has a claim against A that he shall not smoke the cigar. What is the possible juristic significance of the act? Does the law in any way undertake for the advantage of others to say that A shall, or shall not, smoke the cigar? Not at all. Then where is the juristic significance?[25]

The juristic significance is, of course, that B has no right to prevent A from smoking the cigar, and thus if B sues A for damages for smoking a cigar in A's study, B will lose. Moreover, no court in the land will issue an injunction to force A to stop smoking. A has a legal liberty to do so and no matter how much it upsets B, B has no right that A not do so. Hohfeld himself had explained this point:

> 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. That this is so seems, in some measure, to be confirmed by the fact that the first sort of act would ordinarily be pronounced "lawful," and the second "unlawful."[26]

Privilege and no-right are not mere negations. "They are also affirmations," wrote Arthur Corbin, "that society will not penalize the

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HARV. L. REV. 10 (1914); Williams, *The Concept of Legal Liberty*, in ESSAYS IN LEGAL PHILOSOPHY 121 (R. Summers ed. 1968), originally in 56 COLUM. L. REV. 1129 (1956).

23. Kocourek, *Various Definitions of Jural Relation*, 20 COLUM. L. REV. 394, 412 (1920).

24. Kocourek, *What is Liberty?—Is it an Act?—Is it a Relation?* 15 ILL. L. REV. 347, 349 (1920); Kocourek, *Basic Jural Relations*, 17 ILL. L. REV. 515, 518 (1923). This position had been argued much earlier by both John Austin (1863) and Frederick Pollock (1896). J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED *290 (1832) [hereinafter cited as J. AUSTIN, PROVINCE OF JURISPRUDENCE]; Hohfeld, *Legal Conceptions*, *supra* note 4, at 42 n.59.

25. Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 ILL. L. REV. 24, 36 (1920) [hereinafter cited as Kocourek, *The Hohfeld System*].

26. Hohfeld, *Legal Conceptions*, *supra* note 4, at 42 n.59.

holder of the privilege when he acts in the privileged way."[27] Frederick Green put it more poetically: "When the lion and the lamb lie down together, they are as much in relation as when one eats the other up."[28]

Hohfeld's defenders argued that in a lawsuit the judge must decide whether to adopt the plaintiff's proposed rule that the defendant had a duty not to harm her or to adopt the defendant's proposed rule that she had a privilege to do the harmful act. If the plaintiff wins, the legal relation is declared to be one of right and duty. If the defendant wins, it is one of privilege and no-right. Surely a ruling that the defendant wins is a ruling of law.[29]

The second basic issue in the Hohfeldian debate raged over the status of Hohfeld's eight terms: Roscoe Pound claimed that eight terms were too many;[30] Albert Kocourek claimed that eight terms were too few;[31] and William Page claimed that it was impossible to know.[32]

Roscoe Pound, for example, accepted the idea of a liberty unaccompanied by duties on others as a legitimate legal term, but he rejected the utility of identifying a correlative to liberty. Hohfeld's no-right, he claimed, "is not a significant legal institution."[33]

Albert Kocourek, on the other hand, exclaimed, "Can we be sure that there are only four fundamental juristic terms? Could there not be more than four?"[34] He argued that there were not eight, but twenty-four basic conceptions. His new distinctions were based on various criteria such as whether the legal entitlements were founded on once valid claims (claims barred by the statute of limitations), or possibly valid claims (contingent property rights), or possibly invalid claims (revocable contract rights), and whether the claims were based on a previous tortious or illegal act.[35] He also claimed that Hohfeld's terms were themselves ambiguous. "Privi-

27. Corbin, *Jural Relations and their Classifications*, 30 YALE L.J. 226, 233-34 n.6 (1921) [hereinafter cited as Corbin, *Jural Relations*].

28. Green, *The Relativity of Legal Relations*, 5 ILL. L. Q. 187 (1923).

29. Cook, *The Associated Press Case*, 28 YALE L.J. 387, 391 (1919).

30. *See, e.g.*, Pound, *Legal Rights*, 26 INT'L J. ETHICS 92, 96, 97, 100 (1915).

31. *See, e.g.*, Kocourek, *Tabulae Minores Jurisprudentiae*, 30 YALE L.J. 215, 222 (1921) [hereinafter cited as Kocourek, *Tabulae*]; Kocourek, *Nomic and Anomic Relations*, 7 CORNELL L.Q. 11, 26 (1921) [hereinafter cited as Kocourek, *Relations*].

32. *See, e.g.*, Page, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 616, 618 (1921).

33. Pound, *supra* note 30, at 100.

34. Kocourek, *The Hohfeld System*, *supra* note 25, at 38.

35. Kocourek, *Tabulae*, *supra* note 31, at 222-25; Kocourek, *Reply to Paper of Professor Corbin*, 4 AM. L. SCH. REV. 614 (1921); Kocourek, *Relations*, *supra* note 31, at 24-33; Corbin, *supra* note 214, at 234-35.

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lege" could refer either to unregulated activities, or exceptions from generally imposed duties, or liberty to affect the interests of another.[36]

Hohfeld's defender, Arthur Corbin, argued that there must be a compromise between having too many terms and too few. "Hohfeld effected this compromise at a convenient and serviceable point. . . . Hohfeld's eight terms are adequate for the analysis of jural situations of fact, the several fundamental varieties of factual situations [described] in ordinary human words."[37] While Corbin claimed that Hohfeld's terms were sufficient to describe all factual and legal situations, he was not able to justify this assertion.

The Hohfeldian debate consumed a great deal of paper and energy. Yet I believe that those engaged in it went about it the wrong way. The eight terms presented by Hohfeld were a human invention. Their validity and importance must relate to their utility in solving some problem. The proper way to judge them is to look back to Hohfeld's predecessors to discover the problem that the eight terms were supposed to resolve. It is only when we look back to see what Hohfeld was arguing against that we can make a judgment about whether Hohfeld's terms were either necessary or sufficient to achieve some as yet unidentified purpose.

C. Restatement of the Contradiction

Viewed in historical context, it is clear that Hohfeld's analytical system had a dual purpose. First, it corrected a particular conceptualist error. The writers he criticized claimed that rights flowed from privileges as a matter of deductive logic. To confer a legal liberty on someone necessarily meant imposing duties on others not to interfere with the permitted acts. Not to do so, they felt, would be a logical contradiction. Hohfeld demonstrated that it was a logical error to deduce rights from liberties. He argued that liberties that are not accompanied by duties on others not to interfere with the permitted acts exist in the legal system, and that there were often good policy reasons to allow these liberties. He sought to free us from feeling bound to impose duties on others every time we confer a legal liberty on someone. The rational lawmaker must use policy considerations to decide whether to confer such duties in the particular case. "Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should

36. Kocourek, *The Hohfeld System*, *supra* note 25, at 32, 35-36 n.28.

37. Corbin, *Jural Relations*, *supra* note 27, at 235-36.

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be considered, as such, on its merits."[38]

Second, Hohfeld's analytical system represented a full scale rejection of the meta-theory of self-regarding acts that had been adopted by the classical jurists. With this rejection, Hohfeld re-exposed the fundamental contradiction between freedom of action and security. Hohfeld rejected the classical assertion that liberties were permitted only to the extent that they did not affect the interests of others. The self-regarding theory was a misdescription of the rules in force. The rules often allowed damage without legal redress. Further, there was no reason to retain the theory in the hope that the legal rules would eventually conform to the theory since there were often good reasons to allow individuals to act in ways that harmed others. Thus, Hohfeld rejected the assumption that liberties can be justified by the fiction that they are self-regarding. On the contrary, Hohfeld defined legal liberty as freedom to harm others. By conceptualizing legal liberty in this manner, Hohfeld restated the fundamental contradiction between freedom of action and security: "To the extent that the defendants have privileges the plaintiffs have no rights; and conversely, to the extent that the plaintiffs have rights the defendants have no privileges. . . ."[39]

Hohfeld also argued that liberties might legitimately conflict. Since liberties are not necessarily accompanied by rights, A's liberty might, in some cases, be exercised in ways that interfered with B's exercise of her liberty. Such interference represents a special case of damage for which the victim has no legal recourse. X and Y might both have a legal liberty to eat the salad on the table. Employers might have the liberty to hire nonunion labor at the same time that employees have the legal liberty to form a union. In cases such as this, the contradiction between freedom of action and security is particularly stark. The result is determined not by orderly rules of law but by a power struggle in which the state will not come to the aid of either party.

The next step in the story is to go back to elaborate the development of both the self-regarding theory and its conceptualist aspects to demonstrate the historical genesis of Hohfeld's scheme.

38. Hohfeld, *Legal Conceptions*, *supra* note 4, at 36.
39. *Id.* at 37.

87 Wis.2d 441

Patrick PRZYBYLA, Plaintiff-Respondent,

v.

Michelle PRZYBYLA, Defendant-Appellant.

No. 77-584.

Court of Appeals of Wisconsin, District I.

Argued Nov. 15, 1978.

Opinion Released Dec. 27, 1978.

Opinion Filed Dec. 27, 1978.

Husband brought action against his now divorced wife seeking compensatory and punitive damages for alleged mental distress arising from wife's determination to seek an abortion without consent of the husband and after allegedly falsely misrepresenting and deceiving him about her intention to seek an abortion. The Circuit Court, Milwaukee County, William R. Moser, J., denied wife's motion for summary judgment, and husband appealed. The Court of Appeals, Decker, C. J., held that intentional exercise by a woman and her physician of her right to terminate her pregnancy, as protected by the United States Constitution, cannot constitute conduct that is so extreme and outrageous that it will support recovery for intentional infliction of emotional distress.

Reversed and remanded with directions.

1. Appeal and Error ⇐671(1)

In reviewing trial court's denial of summary judgment the only facts which Court of Appeals could consider were those in the record.

2. Damages ⇐49
Husband and Wife ⇐53

Intentional exercise by a woman and her physician of her right to terminate her pregnancy, as protected by the United States Constitution, cannot constitute conduct that is so extreme and outrageous that it may form basis of an action for intentional infliction of emotional distress; hence, husband had no right of action against wife for alleged severe emotional distress suffered because of wife's determination to seek an abortion during her first trimester of pregnancy without the advice, consent or permission of the husband and after she allegedly falsely misrepresented and deceived husband about her intention to seek an abortion.

Plaintiff Patrick Przybyla brings this action for $1,000,000 in compensatory and punitive damages against Michelle Przybyla, who at the relevant times here involved was his wife.[1] The pertinent allegations are:

3. That the defendant was pregnant with the child of the plaintiff; and that on April 22, 1977 she deceitfully terminated this pregnancy via an abortion.

4. That the plaintiff beseeched the defendant not to destroy his child because he desired to be a father and enjoy the companionship, care, custody, and management of his child and family.

5. That the defendant maliciously and deceitfully abused the confidence and trust implicit in a marriage relationship and aborted her pregnancy, thereby denying plaintiff fatherhood, and with deceit, malice, and intent to injure the plaintiff, led the plaintiff to believe she would delay the abortion and consider his pleadings for the life of his child and an opportunity for fatherhood.

6. That through the malicious acts of the defendant, the plaintiff was denied the enjoyment of fatherhood and the companionship and care of his child and family; and that the plaintiff suffered great emotional anguish and mental distress caused by the malicious deceit of the defendant, all to his injury.

Defendant concedes that she was pregnant as alleged and that she procured an abortion on April 22, 1977, in a medically-accepted manner nine weeks after conception without the permission or consent of her husband. Her concession is not disputed by the plaintiff husband. Although the defendant has denied the allegations of paragraphs 4, 5 and 6 quoted above, the parties concede that the issues presented are legal, not factual, and thus may be reached upon summary judgment.[2] Thus, we construe the defendant's position as a concession of the facts as alleged and as supplemented by the moving papers, but a

1. The present marital status of the parties is unascertainable from the record; however, at the time of conception the parties were husband and wife and at the time of the abortion the parties were separated and a divorce action was pending in the circuit court for Milwaukee county.

2. *Lawver v. Boling*, 71 Wis.2d 408, 413, 238 N.W.2d 514 (1976).

contention that the conceded facts, as a matter of law, do not constitute a claim upon which relief may be granted.[3]

The defendant, in furtherance of that position moved for summary judgment denying that an issue of material fact existed and claiming entitlement to judgment as a matter of law. The circuit court denied summary judgment and this appeal followed.

Harry F. Peck, Milwaukee (argued), for defendant-appellant; Roger L. Pettit of the Wisconsin Civil Liberties Union, Milwaukee, on brief.

Linda A. Leaf, Milwaukee, for plaintiff-respondent.

Before DECKER, C. J., CANNON, P. J., and ROBERT W. HANSEN, Reserve Judge.

DECKER, Chief Judge.

[1, 2] The only facts which we are permitted to consider are those in the record[4] and they postulate the simple question whether a claim for damages resulting from severe emotional distress can arise from a wife's determination to seek an abortion during the first trimester of her pregnancy without the advice, consent or permission of the child's father, her husband, after she falsely misrepresented and deceived him about her intention to seek an abortion.[5]

Grounding his action upon the fraudulent and intentional misrepresentation of the defendant, the plaintiff contends: "All the factors in *Alsteen v. Gehl*, 21 Wis.2d 349 [124 N.W.2d 312] (1963)[6] are present in this case for the recovery of damages for the intentional infliction of emotional distress."[7]

Under the *Alsteen* rule the plaintiff must demonstrate four factors to recover. The one factor critical to this case is:

2. In addition to being intentional, the defendant's conduct must be extreme and outrageous. The average member of the community must regard the defendant's conduct . . . as being a complete denial of the plaintiff's dignity as a person.[8]

Defendant's right to obtain an abortion without the consent of her spouse is preserved to her by the United States Constitution as interpreted by the United States Supreme Court in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69–71, 96 S.Ct. 2831, 2841–2842, 49 L.Ed.2d 788 (1976). Because we view that case as directly controlling the issues in this case, our quotation therefrom is unusually lengthy:

> In *Roe* [*Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147] and *Doe* [*Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201] we specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed. We now hold that the State may not constitutionally require the consent of the spouse, as is specified under § 3(3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy. We thus agree with the dissenting judge in the present case, and with the courts whose decisions are cited above, that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

3. *See* secs. 802.06(2) and (3), and 802.08, Stats.

4. *Sedlet Plumbing & Htg. v. Village Court, Ltd.*, 61 Wis.2d 479, 483, 212 N.W.2d 681 (1973).

5. We note the absence of any allegation of special financial detriment to the plaintiff or gain to defendant.

6. 124 N.W.2d 312.

7. Plaintiff's brief, p. 6.

8. 21 Wis.2d 349, 360, 124 N.W.2d 312 (1963).

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. Moreover, we recognize that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.

. . . . .

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. [Footnotes and citations omitted.]

We hold that the intentional exercise by a woman and her physician of her right to terminate her pregnancy as protected by the United States Constitution, cannot constitute conduct that is so extreme and outrageous that it meets the *Alsteen* requirement quoted above.

The order of the circuit court is reversed and the action is remanded with directions to enter an order dismissing the complaint upon its merits.

Order reversed and remanded with directions.