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# RIGHTS AND PUNISHMENT: THE HOHFELDIAN THEORY'S APPLICABILITY AND MORALS IN UNDERSTANDING CRIMINAL LAW

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## Abstract

It is often suggested that criminal law is a limitation of the general applicability of the Hohfeldian theory of rights and duties and their correlativity. The first part of this paper shows how a formalization of normative positions and a clear understanding of how rights work refuses this thesis. This part leads us to the notion of sanction. The second part of the paper presents an analysis of sanction in terms of rights and duties in order to resolve the seemingly paradoxical situation of the legal systems in which one has the right to escape from the prison.

## 1 The Hohfeldian Theory and Its Alleged Limitations

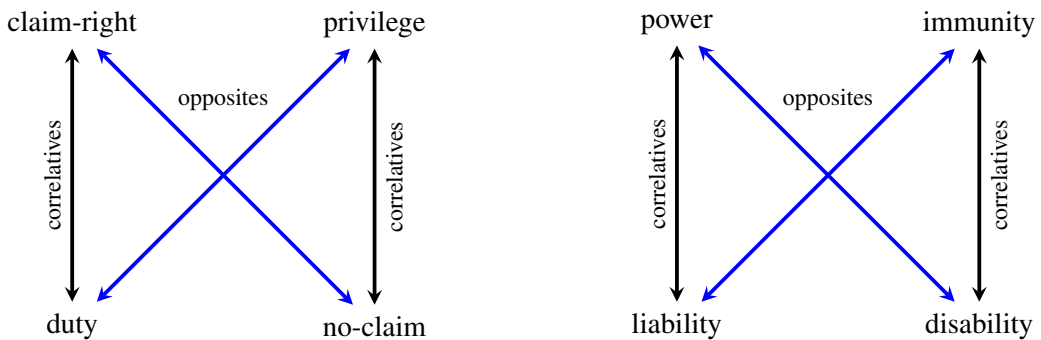
Wesley Newcomb Hohfeld's analysis on the different types of rights and duties (Fundamental Legal Conceptions as Applied in Judicial Reasoning, 1913, 1917) is highly influential and often discussed in analytical legal theory, and it is considered as a fundamental theory in AI&Law and normative multi-agent systems. Yet a century later, the formalization of this theory remains, in various ways, unresolved. The classical formalization developed by Stig Kanger and Lars Lindahl [8, 9, 10, 12] concentrating on computational features of duties has some well-known and documented limitations, for example in Makinson [14] and Sergot [18]. The theory of Hohfeld and its possible formal approaches have been commented on by many logicians and legal theorists since then. Some—famously Hart in [4], but also Lyons

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et al. [13], Sreenivasan [20], Kocourek [11]—argue against the general validity of the Hohfeldian model: they say it might be valid in (some areas of) private law where there are clearly (two) counterparties as the theory considers, but branches of law where we deal with undirected, general or absolute duties/prohibitions, or rights where there is no clear (one) other party obliged realize an obvious limitation of the theory’s applicability. In the following I’m going to argue that if we understand properly the Hohfeldian system, we might incline to admit that whatever relational his system is, areas of law like criminal law—where we consider general obligations (prohibitions)—*do not* serve as a counterargument of the theory’s general validity.

The well-known system of the correlative pairs of rights (upper line) and duties (lower line) Hohfeld built in [7] can be reconstructed in the following diagram:<sup>1</sup>



Hohfeld’s reason to distinguish these, as he calls them, fundamental legal conceptions is that the word ‘right’ was overused in judicial reasoning. This overuse, though, leads to conceptual problems, as he puts it: “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.”

Let’s see a complex—and complete—example from the reception to represent the difference between the types of right behind the word ‘right’ and the necessity of their conceptual clarification. We find it in Szabó [21]: the sentence "Peter has a right to be in this house" can refer any of these types above depending where we say it: if this house is a building rent by Peter then his right is a claim-right against the owner to ensure his occupancy (which means that the owner has the duty to do so); if this building is a public one then Peter’s right is a privilege to be within it as being a citizen (which means other people have no

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<sup>1</sup>It is worth to note already at this point that while Hohfeld was precise in using the word ‘correlatives’ to describe the relation between the pairs below, the word ‘opposites’ is covering different need to involve negation. See details in 2.1.

claim-right against him *not* to do so); if Peter is a detective dashing in a house with an official warrant for search in his hand then he has a power (which means that the house's owner has a liability to this action of Peter, that is, Peter can impose a duty on her to let him in); but if Peter chains himself to the radiator in his own house stressing that he is exempt from the execution of the eviction, then what he refers to is his immunity (which also means a referring to the person's disability to conduct the eviction).<sup>2</sup> These normative positions have different computational properties, different consequences,<sup>3</sup> handling them and their difference properly both in legal theory and in logic representing law is crucial. From the viewpoint of deontic logic (or other logics used to formalize law) the virtue of this system is handling agency—this is the point of correlativity: according to Hohfeld, someone's right always involves someone else's duty, and the other way around. It is often discussed in legal theory whether this correlativity is general, i.e. true everywhere in law, see for instance Hart [4] and Lyons et al. [13].

In what follows, I introduce a formalism in order to show how the Hohfeldian theory can be used to describe rights and duties in criminal law. Please note that elements of and arguments for this formalism have already been presented in Markovich [15] and recently and most detailedly in Markovich [16]; the contribution of this paper, in the first part, is justifying the validity of the Hohfeldian theory in areas like criminal law using this formalism, and, in the second, showing what morals this theory and its proper understanding has about a specific notion of criminal law: the sanction or punishment.

## 2 Formalization of a "Resolutely Relational" Theory

If we consider the theory of normative positions presented by Kanger [8, 9, 10] as an attempt to formally represent the Hohfeldian rights and duties, missing the representation of legal relations's counterparties is a well-known limitation of it,<sup>4</sup> meanwhile, as Makinson stresses in [14], Hohfeld's theory is "resolutely relational". Makinson, therefore, deems it necessary to introduce some explicit indexing of counterparties in the formal representation in order to properly capture the full relationality of rights relationships—even if it can be redundant sometimes in certain contexts. The notion of 'directed obligation' is explicitly introduced ten years later in Herrestad and Krogh [5] to the notion of duty (being the correlative pair of claim-right) in order to distinguish it from the general notion (standard) deontic logic uses.

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<sup>2</sup>Please note that it is not typical that the very same sentence can be interpreted in all the four different ways. It is the word 'right' which can be interpreted in the four different ways in different sentences, contexts.

<sup>3</sup>These different consequences is the central question of Markovich [16].

<sup>4</sup>It has been noted, for instance, in Hansson [3], in Makinson [14], in Sergot [18]. Some considerations has been made, though, on whether the intended reading of Kangerian formulae can count as the representation of relationality, see in Makinson [14].

The necessity of this introduction can be shown easily with a simple formal setup which is used in rephrasing the classical formalizations in Makinson [14] and Sergot [18], that is, standard deontic logic (SDL)<sup>5</sup> with agent-indexed modal operators and a simple action logic that Chellas [2] called ET (using the operator  $E$  in and agent-indexed way with the intended meaning of  $E_x$  as  $x$  sees to it that, containing only the axiom T in order have successful actions).

## 2.1 Language and Semantics

Let's start with the following language set-up:

**Definition 1.** *Our modal language is given by*

$$p \in \Phi \mid \phi \wedge \psi \mid \neg\phi \mid \perp \mid E_a\phi \mid \mathbf{O}_{a \rightarrow b}\phi$$

for  $a, b \in A$  set of agents, where  $\Phi$  is the set of propositional letters.

**Definition 2.** *Frames are given as the following: for a set  $W$  of possible worlds and set  $A$  of agents write*

$$\mathfrak{F} = \langle W, f_a, R_{a,b}^O \rangle_{a,b \in A}$$

where  $f_a : \wp(W) \rightarrow \wp(W)$  is a function and  $R_{a,b}^O \subseteq W^2$  is a binary relation. Models are structures

$$\mathfrak{M} = \langle W, f_a, R_{a,b}^O, V \rangle_{a,b \in A}$$

where  $V$  is a valuation function for atomic propositions:  $V : \Phi \rightarrow \wp(W)$

**Definition 3.** *For  $\mathfrak{M} = \langle W, f_a, R_{a,b}^O, V \rangle_{a,b \in A}$  and  $w \in W$  we let*

- $V(\perp) = \emptyset$
- $w \models p \Leftrightarrow w \in V(p)$  for propositional letters  $p \in \Phi$ .
- $w \models \phi \wedge \psi \Leftrightarrow w \models \phi$  AND  $w \models \psi$ .
- $w \models \neg\phi \Leftrightarrow w \not\models \phi$ .

*It is convenient to extend the valuation  $V$  to arbitrary formulas:*

$$V(\phi) := \{w : \mathfrak{M}, w \models \phi\}$$

*and we add the following:*

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<sup>5</sup>The originally used deontic logic in the theory of normative positions is slightly differ what we usually call SDL as does not contain the derivation rule of modal generalization, but this difference has no effect on the current formalization

- $w \models E_a \varphi \Leftrightarrow w \in f_a(V(\varphi))$
- $w \models \mathbf{O}_{a \rightarrow b} \varphi \Leftrightarrow \forall w' (wR_{a,b}^O w' \Rightarrow w' \models \varphi)$

### Constraints

- *constraint on  $f$* :  $f_a(X) \subseteq X$  for all  $X \subseteq W$ , in particular  $f_a(V(\varphi)) \subseteq V(\varphi)$
- *constraint on  $R_{a,b}^O$* :  $\forall w \exists w' wR_{a,b}^O w'$

In order to have the equivalence between the correlative pair of claim-right and duty (as the Hohfeldian correlativity's logical interpretation in the reception is unanimously equivalence<sup>6</sup>) we need to add the direction of the duty indicating the other agent who has the claim-right:

$$(1) \quad \mathbf{CR}_x E_y F \Leftrightarrow \mathbf{O}_{y \rightarrow x} E_y F$$

(where  $F$  is a propositional letter with the intended meaning of 'given state of affairs').<sup>7</sup> As *claim-right* is a so-called passive right as the right owner and the actor (the agent whose action is the subject of the normative position) are different, the formalization presents both agent, while its correlative pair, *duty* is an active positions having the same agent in the indices of the deontic and action operator needs to made up with the direction to formally exhibit the counterparties making the equivalence hold.

While the notion of *duty* as directed obligation is generally accepted in the literature, the relationality of the other Hohfeldian conceptions as positions is practically overlooked. But Hohfeld was very consequential in this directedness: all legal relations he considers are two agents'—counterparties'—relation: the Hohfeldian privilege does not mean being free from any claim-right, but only the freedom from the specific other party's claim-right. This difference is formally visible if we want to formalize the correlativity of *privilege* and *claim-right*: while  $\mathbf{PR}_x E_x F \Leftrightarrow \mathbf{NC}_y \neg E_x F$  does not hold, the following does:

$$(2) \quad \mathbf{PR}_{x \succ y} E_x F \Leftrightarrow \mathbf{NC}_y \neg E_x F^8$$

In this paper we won't work with the second square of Hohfeld (containing the so-called higher order modalities), but it needs to be told that the same is true for the Hohfeldian

<sup>6</sup>As it has been indicated above already, the Hohfeldian notion of 'opposition' is less precise in the logical sense: while it means one negation considering *claim-right* and *no-claim*, we need two negations for moving from *duty* to *privilege*: I have a privilege to see to it that A if and only if I *don't* have a duty *not* to see to it that A. It will be visible in the later formulae.

<sup>7</sup>Thanks to the equivalences, we don't need to add  $\mathbf{CR}_x$ , neither the later modalities, to the language.

<sup>8</sup>The choice of the symbol  $\succ$  is intended to reflect the "similarity" between its form and the notion being free *from* something; has no relation to the usual use of it.

*power-liability* and *immunity-disability* pairs, too.<sup>9</sup> *Power* and *disability* are active positions: the right owner (and who lacks it in case of *disability*) is the same as the acting agent, therefore the relationality needs to be indicated formally, too:

$$(3) \quad \mathbf{P}_{x \rightarrow y} E_x F \Leftrightarrow \mathbf{L}_y E_x F$$

$$(4) \quad \mathbf{I}_x E_y F \Leftrightarrow \mathbf{D}_{y \rightarrow x} E_x F$$

## 2.2 Undirected rights and duties?

Does this mean that the Hohfeldian theory is designed to directed rights and duties and, *therefore*, is indeed unable to grasp undirected rights and duties? Just the opposite: this resolutely relational structure enables us to clearly refer to those right positions which seems to be—and often simply considered as—*absolute*. What does it mean in terms of the formulae above? If we want to “generate” absolute or general rights and duties we only need to take the conjunction of the given relations with each other agent (given a finite set of agents). This formally looks like the following in the case of active rights:

$$(5) \quad \bigwedge_{y \in A} \mathbf{O}_{x \rightarrow y} E_x F \Leftrightarrow \mathbf{O}_x E_x F$$

$$(6) \quad \bigwedge_{y \in A} \mathbf{PR}_{x \succ y} E_x F \Leftrightarrow \mathbf{PR}_x E_x F$$

$$(7) \quad \bigwedge_{y \in A} \mathbf{P}_{x \rightarrow y} E_x F \Leftrightarrow \mathbf{P}_x E_x F$$

$$(8) \quad \bigwedge_{y \in A} \mathbf{D}_{x \rightarrow y} E_x F \Leftrightarrow \mathbf{D}_x E_x F$$

Also in the case of passive rights, here, though, we need to interpret the action operator slightly differently than we did above as we remove the agent-index, so  $EF$  needs to be interpreted as ‘*it is seen to it that F*’:

$$(9) \quad \mathbf{CR}_x \bigwedge_{y \in A} E_y F \Leftrightarrow \mathbf{CR}_x EF$$

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<sup>9</sup>It may seem strange at first glance that *power* is a relational thing. This feeling might come from that, in everyday life, we usually refer to *power* as something which is not relational: we usually say the someone has *the* power to do something, that is, the only thing we mention is the right-owner. But—as it has been emphasized above—the Hohfeldian system is consequently relational: with power we can change *someone’s* rights or duties. If I go to the registrar in order to get married, the question is not that whether she has the power to marry two people in general, the real question is whether she has the power to marry *us*—which is not obvious since it can be the question of jurisdiction restricted to a given district or state. Another source of considering *power* general is that the point in the *Searlian* power in [17] is exactly the generally accepted feature, but the Hohfeldian notion, while strongly connected, is different. But this discussion would lead us out from the scope of this paper, for further arguments and details see Markovich [16]).

$$(10) \quad \mathbf{NC}_x \bigwedge_{y \in A} E_y F \Leftrightarrow \mathbf{NC}_x EF$$

$$(11) \quad \mathbf{L}_x \bigwedge_{y \in A} E_y F \Leftrightarrow \mathbf{L}_x EF$$

$$(12) \quad \mathbf{I}_x \bigwedge_{y \in A} E_y F \Leftrightarrow \mathbf{I}_x EF$$

And this not just does not go against the Hohfeldian intentions, but perfectly fits. Why we can be so sure?

There is a second part of the often cited famous essay *Fundamental Legal Conception as Applied in Judicial Reasoning* Hohfeld wrote three years later (both parts can be found in Hohfeld [7]). This second part is not so well-known and much less often cited (or even mentioned), while it is crucial in understanding Hohfeld's intentions and theory. In this second part he differentiates between the so-called *paucital* and *multital* rights. This differentiation fits the classical one between 'relations in personam' and 'relations in rem': renaming it happens exactly to emphasize that the so-called 'in rem' legal relations are also between people so the classical name is misleading. Nigel Simmonds picks two picturing examples in [19] of each category: "Suppose that I have a contract with you whereby you are obliged to manufacture a quantity of widgets. I have a claim-right against you and you have a correlative duty to manufacture the widgets. I might have a similar contract with another widget manufacturer, with similar consequences in terms of our claim-rights and duties. However many such contracts I have, however, my claim-rights are essentially limited to a definite number of persons. These are what Hohfeld calls 'paucital' claim-rights. (...) Suppose on the other hand, that I am the owner of Blackacre. I have a claim-right that you should not enter the land without my consent. I have the identical claim-right against your mother, my employer, the Bishop of Ely, and anyone else that you care to mention. Each of these claim-rights is a consequence of my ownership of Blackacre. These are 'multital rights'."

Hohfeld gives a short summary description of each type's features: "A paucital right, or claim, is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is a one of a *few* fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim, is always *one* of a large *class* of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people." There is another good example of Simmonds in [19]: "my claim-right that you should not assault me is a multital right, since it is only one member of a large class of similar rights holding against

an indefinite number of people (i.e. I have a right that your mother should not assault me, a right that the Bishop of Ely should not assault me, and so on)”, for which Hohfeld would add the example of a patentee’s right that any other person shall not manufacture articles covered by the patent.

That is, using the series (the conjunction) of a—directed—right, gives us a (seemingly) undirected one. This is exactly what we did with the formulae above.

### 3 Meaning of Legal Rights

To understand what a right means in criminal law we first need to provide some general description of what a legal right in general means. As it is suggested in Markovich [15, 16], we can start from the intuitive sounding informal definition provided by Makinson in [14]:<sup>10</sup>

$x$  bears an obligation to  $y$  that  $F$  under the system  $N$  of norms

*iff*

in the case that  $F$  is not true then  $y$  has the power under the code  $N$  to initiate legal action against  $x$  for non-fulfillment of  $F$

Whatever intuitive it is, the right-to-left direction of the biconditional does not work: the fact that I have the power to initiate a legal action against someone does not imply that I had a claim-right against him (that is, he had a duty towards me). If this was the case, the court would not need to carry out the proceeding: the fact of initiating the legal action would mean winning it. But sometimes people lose their cases and the reason is exactly that they did not have the claim-right originally. Sergot in [18] suggests to add "with some expectation of success" to the definition. Even if this approaches reality well, this amended definition still would not tell us anything about what a claim-right is. The following biconditional, though, serves well in terms of providing the sufficient and necessary conditions of talking about a—legal—claim-right.<sup>11</sup>

$$(13) \quad \mathbf{O}_{x \rightarrow y} E_x F \leftrightarrow \Box(\neg E_x F \rightarrow \mathbf{CR}_y E_j E_x F)$$

that is, a directed duty to see to it that  $F$  (and because of the equivalence, its correlative

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<sup>10</sup>Makinson aimed at defining the notion of the counterparty, but as we can see, this definition is a definition of what a directed obligation (duty) is, that is—having the equivalence in (1)—also a definition of what a claim-right is.

<sup>11</sup>The formula in (13) is not a proper definition in terms of not having the definiendum at the side of the definiens, but this practically follows from the Hohfeldian intentions: he considered these conceptions *sui generis*, that is, he refused to reduce them to something else.



claim-right) means that if the duty bearer does not fulfill it then its counterparty has a claim-right against the judiciary (indicated with the agent constant  $j$ ) to see to it that the original duty bearer see to it that  $F$  is the case. We need to introduce and use a necessity operator to make the conditional strict instead of material, it comes with the modal logic S5<sup>12</sup> and with the taste of talking about legal metaphysics: this is how things are in law, this is what a right *is* in law. This description in (13) is still based on the state enforcement but does not use the notion of *power*. The reason is to keep two crucial notions distinct: these are the ability/position to have rights and the ability/position of changing them. These two notions have clear terminology in languages of countries having continental legal systems ('Rechtsfähigkeit' and 'Handlungsfähigkeit' in German, or 'zdolność prawna' and 'zdolność do czynności prawnych' in Polish, 'capacité juridique' and 'capacité d'agir' in French, 'capacità giuridica' and 'capacità di agire' in Italian, all respectively), while the English terminology seems to be a bit loose in distinguishing them (maybe 'legal capacity' is the best version to the first and 'legal competence' or 'capacity to act' to the second). Keeping them distinct is essential: every human has the first one, but not the second (infants and people lacking mental soundness partly or completely lack the capacity to act.) If we use the notion of *power* in defining what a claim-right is (as it happened in the Makinsonian definition), these notions collapse. It absolutely does not mean that the notion of *power* would be eliminable or less important. It has a crucial role in legal systems, and Hohfeld was right to take it as one of the fundamentals. The point here is only that we should not involve it into defining claim-rights. Neither can be reduced to the other (just like Hohfeld said: these are sui generis notions). *Power* is about the ability to change someone's rights (for instance, put a duty on him), and while we won't analyze its notion in this paper (neither conceptually, nor formally), we will refer to and rely on the role it plays in legal systems.

<sup>12</sup>This changes our language and models in the following way:

$$p \in \Phi \mid \varphi \wedge \psi \mid \neg\varphi \mid \perp \mid E_a\varphi \mid O_{a \rightarrow b}\varphi \mid \Box\varphi$$

for  $a, b \in A$ , where  $\Phi$  is the set of propositional letters.

Frames are now defined as it follows: for a set  $W$  of possible worlds and the set  $A$  of agents we write

$$\mathfrak{F} = \langle W, f_a, R_{a,b}^O, R^{\Box} \rangle_{a,b \in A}$$

where  $f_a : \wp(W) \rightarrow \wp(W)$  is a function and  $R_{a,b}^O, R^{\Box} \subseteq W^2$  are binary relations.

Models now are structures:  $\mathfrak{M} = \langle W, f_a, R_{a,b}^O, R^{\Box}, V \rangle_{a,b \in A}$  where  $v$  is a valuation function for atomic propositions:  $V : \Phi \rightarrow \wp(W)$

The truth conditions for  $\Box$ :  $w \models \Box\varphi \Leftrightarrow \forall w' (wR^{\Box}w' \Rightarrow w' \models \varphi)$

### 3.1 Legal Rights in Private Law

The formula (13) is not perfect yet, it needs some refinement—which refinement depends on the area of law in which we would like to use it. In private law (paradigmatically, law of contracts) actually it is not the *original* duty whose fulfillment is enforced by the judiciary: the original duty had a deadline which is per definitionem over when the whole enforcement comes to the picture, so the description of the state of affairs that needs to be seen to must differ at least in a date from the original one. That is, the enforced state of affairs is a *compensation* ( $C$ ) of (not fulfilling) the original duty. Therefore, we need to refine the formula above:

$$(14) \quad \mathbf{O}_{x \rightarrow y} E_x F \leftrightarrow \Box(\neg E_x F \rightarrow \mathbf{CR}_y E_j E_x C F)$$

But at this point we stop and do not go into the details of what a compensation is, how it behaves formally, as our topic here is not private law, but criminal law.

### 3.2 Legal Rights in Criminal Law

Considering rights that are handled, protected by the means of criminal law sheds some light on further difficulties of a right-definition building on *power* to initiate a legal action. Consider, for instance, the right to physical integrity. There is a crime called assault which is obviously about the violation of one's right to physical integrity. What happens after a serious assault (grievous body harm)? The police starts investigation *ex officio*, the public prosecutor brings charges *ex officio* and represents the prosecution. The person whose right to physical integrity has been violated actually gives testimony but has no power to be considered. But, as we saw above, a claim-right "definition" without involving power avoids the problem raised by the *ex officio* steps of authorities, so for us, this won't be a problem. It might raise the question, though: why is it not the person with the violated right who stands in front of the court opposing the perpetrator's defense? This is something we need to be able to answer if we want our model to work in criminal law.

Another right protected in criminal law makes the situation even more difficult: the right to life. The obvious crime violating one's right to life is murder after which the person whose right has been violated is dead so it is problematic to speak about his right against the judiciary as in the most legal systems we cannot even consider a dead person's rights. But the structure of rights that are handled and protected by the means criminal law is different. In case of a criminal action it is not a specific person who opposes the perpetrator: it is everyone in the given society. Just consider what the court clerk says when trial starts: after naming the case with the name of the accused person, he says 'vs. the people of the given state' (for instance, as it happens in the movie *Goodfellas*: 'Henry Hill. People of the State

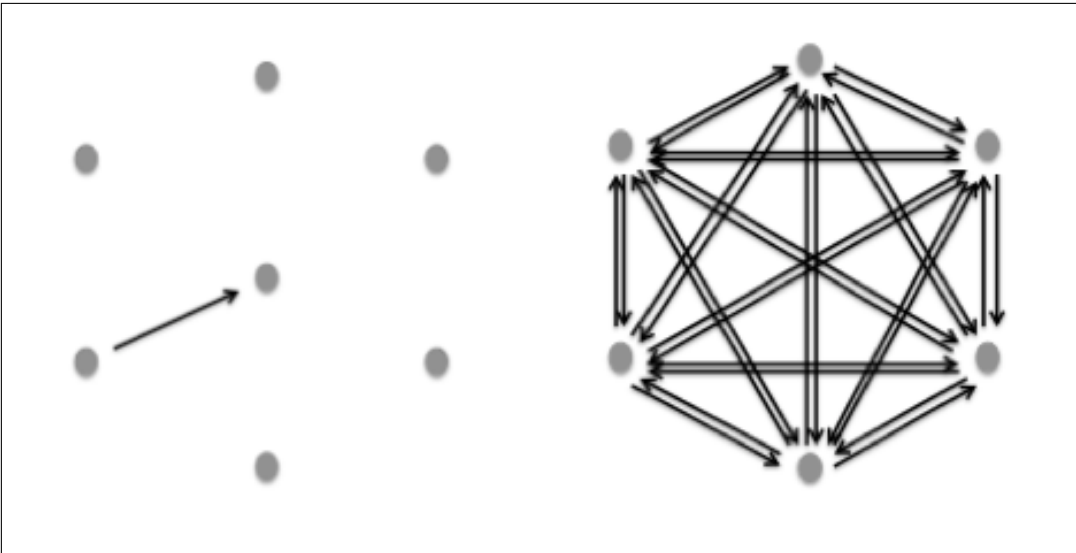


Figure 1: The left graph shows the paradigmatic case of a Hohfeldian right relation between agents (that he calls paucital right). The graph on the right hand side shows what rights handled in criminal law look like (a case of the one Hohfeld called multital right).

of New York vs. Henry Hill'). This is because everyone's right in that society (concerned by a given legal system) has been violated: their right that no felony (murder, assault, etc.) be committed. The right to life is a clear value whose *legal form* in criminal law is a right of everyone that no one commit a murder. If we think about directed graphs where the nodes are agents and the edges are legal relations, for instance an agent  $a$  has a claim-right against another agent  $b$  iff there is an edge going from  $a$  to  $b$  (of course, the edge going the other way around would represent the correlative duty).

Figure 1 below shows a claim-right resulting from e.g. a contract between the people it connects (on the left), and how a claim-right looks like in criminal law, e.g. the right to life which actually means that everyone has a claim-right against everyone else to that no one see to it that a murder is committed (on the right). That is, rights in criminal law are complete directed graphs.

Putting this into the "definition" we provided above, we get the description of how rights in criminal law work: all of us have a claim-right against everyone else that no one commit a felony (murder) iff it is (necessarily) the case that if anyone does commit a felony (murder) then all of use have a claim-right against the judiciary that it punish (sanction,  $S$ ) them for committing the felony. That is:

$$(15) \quad \bigwedge_{x \in A} \mathbf{CR}_x \neg \bigvee_{y \in A} E_y F \leftrightarrow \Box \bigwedge_{y \in A} (E_y F \rightarrow \bigwedge_{x \in A} \mathbf{CR}_x E_j S_y F)$$

Please note that the sanction is considered not just as a punishment but also as a tool of enforcing that the convicted person refrain from committing the felony again—so we still build on enforcement. But what does a sanction mean?<sup>13</sup> This is what we pursue to answer in the second half of this paper.

## 4 Sanction in Terms of Rights and Duties

In order to get some insight what a sanction is it seems to be practical to check what criminal codes declare to be a sanction. The Chapter 3 of German Criminal Code says:

*Title 1: Punishments:*

a) imprisonment;

b) fine

c) property fine;

d) driving ban;

e) loss of the capacity to hold, or be elected to public office and the right to vote.

Section 9 in the Dutch Criminal Code looks like:

*The Punishments are:*

a) *Principal punishments*

1. imprisonment;

2. detention;

3. community service;

4. fine.

Section 33 in the Hungarian Criminal Code lists the followings:

*(1) Penalties are:*

a) imprisonment;

b) custodial arrest;

c) community service work;

d) fine;

e) prohibition to exercise professional activity;

f) driving ban;

g) prohibition from residing in a particular area;

h) ban from visiting sport events;

i) expulsion.

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<sup>13</sup>The word ‘sanction’ is sometimes used to refer generally to the third part of a legal norm (hypothesis, disposition, sanction), but in this paper it is to denote a narrower sense: the negative legal consequence, the punishment (or penalty). These are used as synonyms here.

The lists of these different countries are pretty similar, but what are these things listed?

#### 4.1 Punishment as Duties

What is sure that punishment comes with imposing a sentence: the judge (the judiciary) has the *power* to change our rights and duties, and this is the *tool* of enforcement. But what changes are these? In the case of driving ban it is clear that the punishment is a prohibition: the convicted must not drive (which is an obligation to refrain from driving). Same in the case of prohibition to exercise (a given) professional activity. But there are noun phrases in the lists, too, where there is no direct reference to the deontic nature. It seems obvious, though, that in the case of a fine and community work it is also an obligation: an obligation to pay and an obligation to conduct community work. It is general to consider the sanction as an obligation, this is how it is characterized in LegalRuleML, too, see [1].

This seems to be the most obvious interpretation of imprisonment, too: it is an obligation of the convicted person to go to prison (and stay there for a while). In terms of duty, that is, a directed obligation, it seems to be reasonable to talk about an "undirected", multital duty: a duty towards everyone else in the given society. We, all of us, have a claim-right against convicted people that they stay in prison while. It fits the image of prison break being a *felony*: all of us have a claim-right against everyone else that no one escape from the prison, which also means according to the description we gave above that it is necessary that if anyone escapes then all of us will have a claim-right against the judiciary to sanction him or her. Checking the Hungarian Criminal Code we find indeed that escaping from prison is a felony:

*Section 283: Any person who escapes from the custody of the authority in the course of criminal proceedings or from imprisonment or custodial arrest is guilty of a felony punishable by imprisonment not exceeding three years.*

#### 4.2 Right to Freedom vs. Right to Escape

We might think at this point that all that have been said here is straightforward, no wonder the presupposition that the imprisonment is a duty to go and stay in prison works so well. But while—in accordance with this presupposition—it is a felony to escape from the jail in most of the countries, there are some—Germany, Belgium and the Netherlands, among others—in which *prison break is not a crime*. These countries' criminal codes do not declare prison break a felony. In some of these countries the prisoners are punishable for causing any damage or committing another felony while escaping—without which it is pretty difficult to manage an escape of course, still: *the escape itself is not penalized*. The reason is: it is basic human instinct to want to be free, so it should not be punished. Gold

says in [22] that this kind of regulation (she mentions the German one) reflects to the philosophy of Hobbes according to which the law should not impose impossible obligations and refraining from pursuing freedom is impossible (see [6]), being in accordance with the Kantian principle of ‘ought implies can’.

Until a year ago, this was the case in Mexico, too, where the penal code not just missed to list the prison break among the crimes, but directly declared in Section 154 that the person who escapes won’t be punished because of this action, and the explanation referred to freedom as an ideal brought with the French Revolution.<sup>14</sup> (In 2017, after 86 years, Mexico amended this section making the prison break punishable. While the argument<sup>15</sup> raises whether the earlier regulation was justifiable at all—as an inmate who evades compliance with the punishment imposed on him by the State attacks the rule of law and goes against the sovereign will—they refer to the direct reason leading to the amendment: the third—as the document refers to it: shameful—escape of C. Joaquín Guzmán Loera.<sup>16</sup>) Some online articles<sup>17</sup> refer to this regulation as those in which one has the right to escape from prison. Taking the Hohfeldian model, this is true: if we don’t have a duty to refrain something, we have a privilege to do that, which a type of right at Hohfeld.

This means, though, that the presupposition that imprisonment means the duty of the convicted person to go to and stay in prison cannot be upheld—given, of course, that we would not like to consider these legal systems as contradictory ones. What else the imprisonment as a sanction can then be? The answer is also in the Hohfeldian system. All of us have a right to freedom. This right is a *claim-right* normally: all of us have a claim-right against everyone else that no one see to it that our freedom is restricted (that is, that everyone refrain from restricting our freedom)—this is why freedom restricting actions like illegal detention and kidnapping are crimes: everyone has a duty against everyone else (which we usually consider it as a general obligation) to refrain from kidnapping. In case of imprisonment, this claim-right to freedom *turns—weakens—into a privilege*: the convict still does not have a duty to go and stay in prison but loses his claim-right against others that they refrain from detaining him. At the same time (as this change in his right would not ensure that the imprisonment will be, or at least pursued to be, realized), one—practically the penal insti-

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<sup>14</sup><https://bit.ly/2R7vZxu>

<sup>15</sup><https://bit.ly/2DSO27E>

<sup>16</sup>Joaquín "El Chapo" Guzmán is a very powerful Mexican drug trafficker who first spent 20 years in prison, then escaped. He was captured and imprisoned in 2014, but in 2015 he escaped again through a 1.5 km tunnel equipped with artificial light leading to a construction site. After his third arrest, Mexico extradited him to the US—and changed the penal code.

<sup>17</sup>This phrasing appears on the Washington Post (<https://wapo.st/2PMZzMf>), and gives the title on the Hungarian Index.hu (<https://bit.ly/2R6je6i>), what is more, in the text ‘human right’ is mentioned.

tution as such—has a change in their duties: concerning the convict’s detention, their *duty not to* turns into a *duty to*. That is, while they, like everyone else, had a duty to refrain from detaining the person, when this person becomes a convict (getting imprisonment), they are going to have a duty to detain him.<sup>18</sup> And this duty remains until the end of the term of imprisonment, this is why, basic instinct or not, once the convict is caught, he is put back to prison.

## 5 Conclusion

Areas of law where we consider general or absolute rights and obligations do not fall out of the scope of the Hohfeldian theory. The basis of this latter is the relationality, the directness, but handling this feature systematically enables us to talk about and handle clearly the so-called absolute normative positions. An amended formalism based on the one used by the classical formalizations can be easily used to show this as interpreting the absolute position as a series, that is, a conjunction of each directed one. In criminal law, the rights relations go from everyone to everyone else, that is, they create a complete directed graph on the given society.

The Hohfeldian theory is also useful in understanding the notion of sanction or punishment in terms of rights and duties: using the theory enables us to explain how it can be the case that there are countries where it is not forbidden to escape from the prison, that is, convicts have such a right. This can be so because this kind of right is a weakened one: not a claim-right anymore protecting (that is, a claim-right against everyone else not to interfere) my freedom, but only a privilege in the Hohfeldian sense: there is no duty of the convicts to stay in the prison in these countries. What still makes it realizing a punishment is a joint change in the penal institution duties: while they had a duty to not detain me, after my conviction, they have a duty to do so.

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