‘STANDARD JURAL RELATIONS OF OWNERSHIP’: A NOVEL THEORETICAL FRAMEWORK INFORMED BY WESLEY HOHFELD AND TONY HONORÉ

JUAN DIAZ-GRANADOS*

Wesley Newcomb Hohfeld and Tony Honoré’s contributions are foundational to the ‘bundle of rights’ perception of property, the prevailing understanding of proprietary legal relationships in the common law legal tradition. Although Hohfeld and Honoré’s influential works have been conflated in this perception, a comprehensive analysis of how these frameworks interact and complement each other is missing. The article demonstrates that when Hohfeld and Honoré’s contributions are thoroughly and simultaneously analysed, they create a comprehensive theoretical framework for evaluating proprietary legal relationships that moves beyond a cluster of property rights (or proprietary right–duty jural relations). The article argues that, from a Hohfeldian and Honorian perspective, the ‘bundle of rights’ is instead a group of rights, privileges, powers and immunities with correlative duties, no-rights, liabilities and disabilities. The article reshapes the traditional view of the standard incidents of ownership in terms of jural relations in rem and jural relations in personam, offering a novel theoretical framework that refines and clarifies the ‘bundle of rights’ perception of property: the ‘standard jural relations of ownership’.

I INTRODUCTION

Wesley Newcomb Hohfeld and Tony Honoré are two of the most influential jurists of the 20th century.[1] Although Honoré’s work developed after Hohfeld’s death, their academic contributions have been linked together in the field of property law.[2] Hohfeld and Honoré’s works compound the ‘bundle of rights’ perception of

* Dr Juan Diaz-Granados is a Lecturer at the Thomas More Law School, Australian Catholic University. He holds an LLB (Hons), Graduate Diploma in Commercial Law, Graduate Diploma in Business Law, Graduate Diploma in Insurance Law (summa cum laude), LLM (Distinction), and PhD. The author would like to thank Emeritus Professor Murray Raff for his insightful comments.

1 See, eg, NEH Hull, ‘Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910–1919’ (1995) 45(2) *Journal of Legal Education* 235, explaining Hohfeld’s influence in legal education. Shane Nicholas Glackin, ‘Back to Bundles: Deflating Property Rights, Again’ (2014) 20(1) *Legal Theory* 1, also observes that Honoré’s standard incidents of ownership ‘now form the canonical list of sticks in each bundle, on which the “truth,” or legal validity, of judicial determinations about property must supervene’: at 9.

2 See below nn 3–4.

property,[3] the prevailing understanding of property in the common law tradition.[4] According to JE Penner, '[i]n its conventional formulation, the bundle of rights thesis is a combination of Wesley Hohfeld's analysis of rights and … Honoré's description of the incidents of ownership'.[5] Hohfeld and Honoré's works have been evaluated and applied in different pieces of legislation,[6] regulation,[7] case law,[8] and legal scholarship.[9]

The 'bundle of rights' view 'describes property as a collection of rights vis-à-vis others, rather than rights to a "thing," like a house or a piece of land'.[10] It arose as a historical reaction to the 'physicalist' view of property, encapsulated by William Blackstone's conception of property as a 'sole and despotic' relation between a person and a thing.[11] Rather than an absolute, monolithic notion of property, the

3 Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing, 2011) argues that '[t]his idea of the bundle of rights derives from a combination of Honoré and Hohfeld': at 4. Glackin (n 1) explains that '[t]he bundle theory, in its modern form, is primarily the result of work by two figures: Wesley Hohfeld and AM (Tony) Honoré': at 3 (citations omitted). Paul Babie, 'The Spatial: A Forgotten Dimension of Property' (2013) 50(2) *San Diego Law Review* 323, discusses the '"Hohfeld–Honoré bundle of rights picture of property" or simply the "bundle of rights" picture of property': at 712.

4 See, eg, *Yanner v Eaton* (1999) 201 CLR 351, 366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), where it was held that '[t]he concept of "property" may be elusive. Usually it is treated as a "bundle of rights"'. See also JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43(3) *UCLA Law Review* 711, observing that '[t]he currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a "bundle of rights"': at 712.

5 Penner (n 4) 712.

6 See, eg, *Legislation Act 2001* (ACT) Dictionary pt 1 (definition of 'interest'), defining an interest in property as '(a) a legal or equitable estate in the land or other property; or (b) a right, power or privilege over, or in relation to, the land or other property'. See also 21 USC § 1905(a)(2) (2011), which recognises the potential exercise of rights, powers, or privileges in respect to property.

7 See, eg, 31 CFR § 535.218(c) (2023), recognising the potential acquisition and exercise of rights, powers, or privileges in respect to property.

8 See, eg, *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423, 431 [33] (Finkelstein J) (using Hohfeld's scheme of jural relations); *Yearworth v North Bristol NHS Trust* [2010] QB 1, 12–13 [28] (Lord Judge CJ) (analysing Honoré's right to use); *Booth v Federal Commissioner of Taxation* (1987) 164 CLR 159, 165 (Mason CJ) ('*Booth*') (applying Honoré's right to the income); *Newman v Sathyavaglswaran*, 287 F 3d 786, 790 n 5 (Fisher J) (9th Cir, 2002) (relying on Hohfeld's scheme of jural correlatives).

9 See, eg, Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 23, developing a conceptual approach to property based on Hohfeld and Honoré's ideas. See also Jesse Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31(4) *Oxford Journal of Legal Studies* 783, 785, who relies on Honoré's incidents of ownership to discuss the proprietary nature of separated biological material; and Christopher M Newman, 'A License Is Not a "Contract Not to Sue": Disentangling Property and Contract in the Law of Copyright Licenses' (2013) 98(3) *Iowa Law Review* 1101, 1112, who explains 'title' through Hohfeld's scheme of jural relations.

10 Denise R Johnson, 'Reflections on the Bundle of Rights' (2007) 32(2) *Vermont Law Review* 247, 247.

11 William Blackstone argues that 'property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe': William Blackstone, *Commentaries on the Laws of England* (11th ed, 1791) bk 2, 2.

'bundle of rights' approach provides a relative, flexible view of property rights that can be disentangled and reallocated.[12] Apart from the 'bundle of rights' perception of property, other contemporary conceptions of property have been developed over the years.[13] This article, however, focuses on the 'bundle of rights' approach considering its prevalence in the property law narrative.[14] The article does not intend to resolve the debate around which perception of property should prevail from a normative point of view.

Although the importance of Hohfeld and Honoré's works is undeniable[15] and their influence on the 'bundle of rights' perception of property is evident,[16] and despite these contributions having been analysed as influential conceptual lenses for the analysis of property law,[17] the interaction and resulting legal implications of Hohfeld and Honoré's theoretical frameworks have been overlooked. It remains unclear how and to what extent Hohfeld's scheme of 'opposites' and 'correlatives' jural relations (or 'jural opposites' and 'jural correlatives') and his taxonomy of rights in rem and rights in personam interact and influence Honoré's incidents of ownership — the framework that identifies the different categories of 'rights' that compose the 'bundle of rights'. The analysis is critical to informing the discussion because it allows identifying the real scope, nature and implications of the 'bundle of rights' approach.

Taking a comprehensive analysis of Hohfeld and Honoré's theoretical contributions, the article argues that the 'bundle of rights' is not just a cluster of *rights* but a group of *rights*, *privileges*, *powers* and *immunities* to which the owner is entitled as a result of his or her greatest legal interest in the thing. These legal categories (or 'jural conceptions' according to Hohfeld)[18] and associated *right–duty*, *privilege–no-right*, *power–liability* and *immunity–disability* legal

12 Jane B Baron, 'Rescuing the Bundle-of-Rights Metaphor in Property Law' (2014) 82(1) *University of Cincinnati Law Review* 57, 58–9.

13 See Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003) 11–15. For a discussion of influential strands of contemporary property law theory, including legal realists and means-focused and ends-focused theorists, see Baron (n 12) 59, 62–79. JE Penner, for instance, is one of the leading critics of Honoré's and Hohfeld's bundle of rights view. In Penner's opinion, it is not true that the owner has multiple incidents of ownership coupled with a myriad of rights, privileges, powers and immunities. Conversely, Penner (n 4) argues that a single, coherent right is enough to explain proprietary legal relationships — the right of exclusive use: at 742–4. For other criticisms associated with social, environmental and cultural characteristics of property, see, eg, Craig Anthony (Tony) Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26(2) *Harvard Environmental Law Review* 281, 283; Michael A Heller, 'Critical Approaches to Property Institutions: Three Faces of Private Property' (2000) 79(2) *Oregon Law Review* 417, 430; Joseph L Sax, 'Ownership, Property, and Sustainability' (2011) 31(1) *Utah Environmental Law Review* 1, 10.

14 See generally Baron (n 12).

15 See, eg, Walter Wheeler Cook, 'Hohfeld's Contributions to the Science of Law' (1919) 28(8) *Yale Law Journal* 721.

16 See above nn 6, 8 and accompanying text.

17 See, eg, Munzer (n 9) 23; Penner (n 4) 724–38; Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691, 1695–700; Lawrence C Becker, *Property Rights: Philosophic Foundations* (Routledge, 2014) 11–21.

18 See below n 33 and accompanying text.

relationships (or 'jural relations' according to Hohfeld)[19] provide different substantive content for analysing proprietary legal relationships. The article, thus, reshapes the traditional view of the incidents of ownership in terms of jural relations in rem and jural relations in personam. The result is a novel theoretical framework that advances understanding and application of the 'bundle of rights' perception of property: the '*standard jural relations of ownership*'.

The article is divided into four main parts. Part I evaluates Hohfeld's work. It analyses the scheme of 'opposites' and 'correlatives' jural relations, and the taxonomy of rights in rem and rights in personam. The first framework clarifies that different jural relations exist apart from rights and duties, and the second explains the differences, content, and boundaries of rights in rem — such as property rights — and rights in personam — such as contractual rights. Part II discusses Honoré's 'standard incidents of ownership'. This framework explains the concept of 'ownership', which determines the existence, content, and allocation of property rights. Part III analyses the interaction between Hohfeld and Honoré's works and proposes a framework to analyse the 'bundle of rights': the '*standard jural relations of ownership*'. Finally, part IV includes the conclusions of the analysis.

II HOHFELD: SCHEME OF JURAL RELATIONS, RIGHTS IN REM AND RIGHTS IN PERSONAM

Hohfeld's work offers two crucial theoretical frameworks to analyse the 'bundle of rights' approach to property: the scheme of 'opposites' and 'correlatives' jural relations, and his analysis of rights in rem and rights in personam.[20] These frameworks are explained in the next two sections.

A *Scheme of Jural Relations*

Hohfeld's scheme explains that not all jural relations can be reduced to rights and duties. He argues that this generalisation is one of the greatest obstacles to understanding legal problems.[21] As a result, Hohfeld proposes a scheme of 'opposites' and 'correlatives' jural relations in which *rights* are supplemented by *privileges*, *powers* and *immunities*.[22] He explains that

> [a] right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.[23]

19 See below n 32 and accompanying text.

20 See generally Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16 ('Some Fundamental Legal Conceptions'); Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710 ('Fundamental Legal Conceptions').

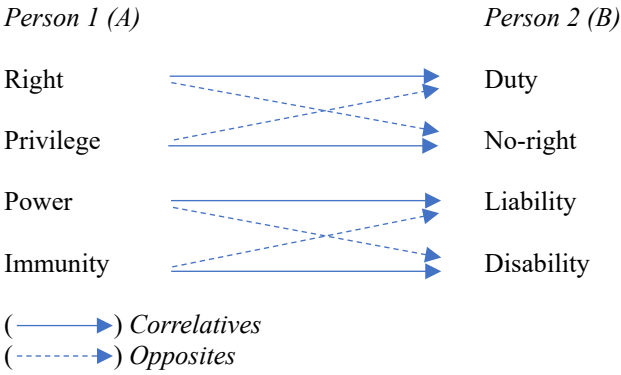
21 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 28.

22 Ibid 30.

23 Ibid 55.

Hohfeld's scheme of 'opposites' and 'correlatives' jural relations can be illustrated with the following diagram:

Figure 1



The diagram clearly illustrates how under Hohfeld's scheme of 'opposites' and 'correlatives' jural relations:[24] (1) *rights* or claims (opposites of 'no-rights') are the correlatives of *duties* or legal obligations (opposites of privileges); (2) *privileges* or liberties[25] (opposites of duties) are the correlatives of '*no-rights*' (opposites of rights or claims); (3) *powers* or abilities[26] (opposites of legal disabilities or 'no-powers') are the correlatives of *liabilities* (opposites of immunities); and (4) *immunities* or exemptions[27] (opposites of liabilities) are the correlatives of legal *disabilities* or 'no-powers' (opposites to powers).

Some examples are helpful to understand the complexity of these concepts and their interrelation. First, the diagram shows that if one person (A) has a *right*, he or she does not have a no-right to claim. In other words, A's right is the negation that A cannot claim against another person (B). For instance, A's right that B shall not enter on Blackacre is the negation that A cannot claim the ejection of B from Blackacre in case of trespassing. Similarly, A's right to possess is the negation of A's no-right to have exclusive control of Blackacre. In this context, B has a *duty* with respect to A's right. In turn, B's duty is the negation that B has a privilege vis-à-vis A, namely, B's duty indicates that B has no freedom from A's claim.

Second, the diagram explains that if A has a *privilege*, A has no duty to B, and B has *no-right* with respect to A's privilege. A's privilege, thereby, is the negation that A has a duty with respect to B. A's privilege of entering on Blackacre is, for example, the negation of A's duty to stay off Blackacre.[28]

24 Ibid 30.

25 Ibid 36, 41.

26 Ibid 44–5.

27 Ibid 57.

28 Ibid 32.

Further, the diagram indicates that if A has a *power*, A does not have a disability. A's power is the negation that A is disabled to exercise affirmative control over the legal relationship with B. For instance, A's power to create a life estate in Blackacre negates A's disability to create this legal relationship (the life estate). In this context, B has a *liability* with respect to A's power. B's liability, in turn, is the negation that B has an immunity vis-à-vis A. Stated differently, B's liability indicates that B has no freedom from A's power.

Finally, the diagram suggests that if A has an *immunity*, A has no liability to B, and B has a *disability* with respect to A's immunity. Consequently, A's immunity is the negation that A has a liability with respect to B. A's immunity that nobody can alienate Blackacre is, for instance, the negation of A's liability that someone else can alienate Blackacre.

A conceptual and terminological clarification is important at this point. Hohfeld differentiates *legal interests*, *jural relations* and *jural conceptions*. According to him, a *legal interest* is an aggregate of legal, or jural,[29] relations.[30] For instance, the contrasting feature of the fee simple interest from the easement interest is that the aggregate of legal relations of the former is far more extensive than the aggregate of the latter.[31] A *jural relation*, as explained above, refers to the four correlative legal relations Hohfeld proposes: the *right–duty*, *privilege–no-right*, *power–liability* and *immunity–disability* relations.[32] Finally, *jural conceptions* are each one of these eight legal categories that are part of the jural relations: *rights*, *duties*, *privileges*, *no-rights*, *powers*, *liabilities*, *immunities* and *disabilities*.[33]

Hohfeld's jural conceptions are crucial for a proper understanding of his theoretical work. Accordingly, a clear definition of these conceptions is necessary. However, although Hohfeld provides a brief definition of *rights*, *privileges*, *powers* and *immunities* (explored above),[34] he does not offer specific definitions of the jural conceptions of *duty*, *no-right*, *liability* and *disability*. Consequently, further analysis of the eight jural conceptions is required. Taking Hohfeld's own work and other sources that interpret it, it is possible to complete the conceptual analysis of the eight jural conceptions.

29 Ibid 59 n 100.

30 Ibid 21, 24.

31 Ibid 24.

32 See above Figure 1.

33 See Hohfeld, 'Fundamental Legal Conceptions' (n 20) 710, 712; Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 58.

34 See above n 23 and accompanying text.

A *right*, therefore, can be defined as an affirmative claim against another,[35] that is, a claim protected by the state for another person to behave in a particular manner.[36] A *privilege* is the freedom from another's right, namely, the freedom to behave in a certain way without violating somebody else's rights.[37] A *power* is an affirmative control over legal relationships or, in other words, it is an ability protected by the state to modify a legal relationship.[38] Finally, an *immunity* is the freedom from another's power; it is the security that other person cannot modify a legal relationship.[39]

In terms of the correlative jural conceptions — *duties*, *no-rights*, *liabilities*, and *immunities* — Hohfeld opines that a *duty* or legal obligation is 'that which one ought or ought not to do. … When a right is invaded, a duty is violated'.[40] Thus, a *duty* is a legal obligation to do or to refrain from doing something in relation to the right holder.[41] This definition is consistent with the relation of a *duty* with its opposite: a *privilege*. If a *privilege* is the freedom of a person from another's *right*, and a *duty* is its opposite, then a *duty* is a no-privilege, a no-freedom from another's claim.[42] It is the subjection (or obligation) of someone to another's claim (or *right*). Additionally, according to Hohfeld's view, a *duty* has the same content as the right it correlates.[43] For instance, the content of X's right is the same as the content of Y's duty. Hohfeld explains that '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'.[44]

35 Ibid.

36 Joseph William Singer explains that

> '[r]ights' are claims, enforceable by state power, that others act in a certain manner in relation to the right holder. … A right holder is entitled to control the behavior of others … An example is the right to exclude; this right places duties on non-owners not to enter property without the owner's permission.

Joseph William Singer, *Property* (Wolters Kluwer, 5th ed, 2017) 5.

37 Singer explains that '"[p]rivileges" or "liberties" 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. An example is the freedom to use your property as you see fit': ibid 5–6.

38 Singer defines 'powers' as 'state-enforced abilities to change legal entitlements held by oneself or others. The prime example of a power in the context of property is the power to transfer title to another': ibid 6.

39 Singer explains that '"[i]mmunities" are security from having one's own entitlements changed by others. An example of an immunity is the entitlement to be free from forced seizure of one's property by the state unless the state takes the property for a public purpose and pays just compensation': ibid.

40 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 32, quoting *Lake Shore & M S Ry Co v Kurtz*, 37 NE 303, 304 (Lotz J) (Ind Ct App, 1894).

41 See above n 36.

42 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) observes that '[t]o 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)': at 37.

43 Ibid 32.

44 Ibid.

A *no-right*, which is self-explanatory, refers to the absence of a *right* or affirmative claim. It is a person's vulnerability to the legal effects of the exercise of a privilege by another.[45] It is the opposite of having a *right* and the correlative of a *privilege*. Consequently, when X has a *privilege* — freedom from Y's affirmative claim — Y has a *no-right* against X. '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'.[46]

A *liability* is the subjection or obligation of someone to another's *power*.[47] This definition is consistent with the relation of a *liability* with its opposite, an *immunity*. If an *immunity* is the freedom from another's *power*, then a *liability* is a no-immunity, a no-freedom from another's affirmative control.[48] For example, in an agency relationship, X may grant different powers to Y, such as the power to convey X's property or the power to impose contractual obligations on X. Each power vested on Y creates a correlative liability on X. Accordingly, X is bound by Y's transactions on the transfer of X's property, as well as those related to the creation of contractual obligations on X.[49]

Last, a *disability* — or 'no-power' — refers to the absence of affirmative control (*power*) over a legal relation.[50] It is the opposite of having a *power* and the correlative of an *immunity*.[51] Y will have a *disability* to control the legal relationship with X if X has an *immunity* — a freedom from Y's affirmative control over X–Y legal relationship. Consequently, if 'X, a landowner, has … power to alienate to Y … X has also various immunities as against Y … Y is under a disability (ie has no power) so far as shifting the legal interest either to himself or to a third party is concerned …'.[52]

45 Singer (n 36) 6 explains that

> [t]he correlative of a privilege is the vulnerability others face of suffering the consequences that exercise of the privilege might entail. For example, an owner who is privileged to build a three-story house may effectively block the neighbor's view of a wooded area beyond and decrease the light available to the neighbor. If an owner is privileged to act in a certain way, others have no right to stop her.

46 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 33.

47 Ibid 53–4. Hohfeld (n 20) explains that a liability means to be 'bound' or 'obliged': at 53, quoting *Booth v Commonwealth*, 16 Gratt 519, 525 (Moncure J for the Court) (Va, 1861). Hohfeld (n 20) explains further that '[p]erhaps the nearest synonym of "liability" is "subjection" or "responsibility"': at 54.

48 See Singer (n 36), observing that '[t]he correlative of a power is the liability others face of having the power holder exercise the power. For example, a tenant at will is vulnerable to the landlord's decision to terminate the tenancy at any time, ending the tenant's right to possess the apartment': at 6.

49 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 46.

50 Ibid 55.

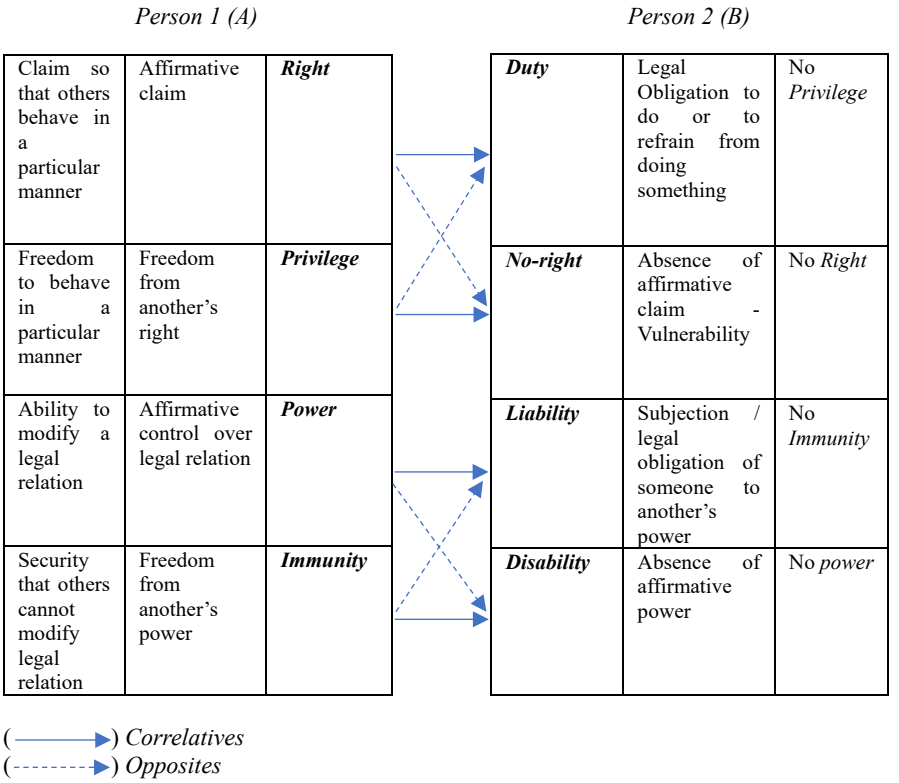
51 Ibid.

52 Ibid. See also Singer (n 36) 6:

> A tenant under a year-long lease … is immune from being evicted or dispossessed by the landlord during the term unless the tenant breaches the terms of the lease. The term of years persists even if the landlord sells the property; the new owner is 'disabled' (has no power) to evict a tenant granted a term of years until the term ends.

Based on this analysis, the following chart expands and supplements Figure 1. It summarises the different concepts and the scope of each of the four jural relations and eight legal conceptions that Hohfeld proposes (see Figure 2).

Figure 2



Importantly, the four jural relations comprising Hohfeld's scheme are not interdependent. The existence of *right–duty*, *privilege–no-right*, *power–liability* and *immunity–disability* relations is not contingent on the existence of each other. Having a *privilege*, for instance, does not necessarily imply that a *right* exists. As a result, the *privilege* of X to deal with others (A, B and C) is independent of the *duty* of others (D, E and F) not to interfere with X's dealings. Hohfeld explains that

> 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. 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.[53]

Hohfeld's scheme of jural relations, therefore, makes it possible to identify the actions expected from each party and the legal consequences arising from the relation. For this to occur, the analysis must look at the correlative legal conceptions: *duties*, *no-rights*, *liabilities* and *disabilities*.[54] For example, the importance of identifying whether A is subject to a *right* rather than a *privilege* lies in the correlative of these jural conceptions, namely, in the determination of whether B has a *duty* — legal obligation — instead of a *no-right* — lack of legal obligation. Under a *right–duty* jural relation, A has a claim, an affirmative action enforceable by state power to compel B to act in a particular manner. Under a *privilege–no-duty* jural relation, the opposite is true. Here, A is not entitled to a state-enforced claim against B and B is not obliged to act in a certain manner in favour of A. B, thus, can be liable for breach of his or her duty in the first case but not in the second.[55] As a result, the type of jural relation between the parties defines the expected actions and corresponding legal consequences.

Hohfeld's scheme of jural relations demonstrates that reducing all proprietary relations to one type of jural relation, the *right–duty* jural relation,[56] oversimplifies legal analysis and prevents a comprehensive understanding of legal issues. The 'bundle of rights' approach, traditionally conceptualised as a set of rights — or *right–duty* jural relations — ignores the conceptual distinctions proposed by this framework.

B *Rights In Rem and Rights In Personam Taxonomy*

The second theoretical framework from Hohfeld explains the content and scope of rights in rem (or 'multital rights') and rights in personam (or 'paucital rights').[57] Hohfeld explains that while rights in personam avail against a determinate person or persons, rights in rem avail against persons in general.[58] It follows that

53 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 36–7 (emphasis in original). See also below n 93 and accompanying text.

54 Ibid 31–2.

55 Hohfeld explains that a privilege: ibid 36

> might very conceivably exist without any peculiar concomitant rights against 'third parties' as regards certain kinds of interference. 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'.

56 Benedict Sheehy, 'Shareholders, Unicorns and Stilts: An Analysis of Shareholder Property Rights' (2006) 6(1) *Journal of Corporate Law Studies* 165, 174.

57 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 712.

58 Ibid 718. The term 'in general' does not mean that rights in rem avail against all persons but to an indefinite group of persons. 'If, for example, A, the owner of Blackacre, has given his friends C and D, "leave and license" to enter, A has no rights against C and D that they shall not enter; but he has such rights against persons in general; and they are clearly to be classified as being "multital" or "*in rem*"': at 719 n 22 (emphasis in original).

proprietary rights — a sub-category of rights in rem[59] — are not rights against a thing; they are rights *in respect of* a thing but against persons generally.[60]

Rights in rem, thus, do not refer to 'a single right with a single correlative duty resting on all the persons against whom the right avails, … [but to] many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person'.[61] Rights in rem are not joint obligations or joint duties with the same content.[62] For example, A, the owner of Blackacre, might extinguish B's *duty* not to enter to Blackacre by giving B a licence, which is a *privilege*, to do so. In this case, the duties resting on C, D, E, and all others continue to exist regardless of B's licence.[63] Hohfeld provides an example to illustrate this characteristic of rights in rem, this time focusing on rights in rem related to individuals rather than physical property like Blackacre:

> Thus, eg, X is under duty not to strike R, S, T, or any other ordinary member of the community. Are we to say that, as regards these many persons, X has but a single duty, and that, correlatively, there is but a *single* right held by R, S, T, and all the others? Manifestly not, for each one of these persons has a distinct and independent right; and any one of such independent rights might cease to exist without in the least affecting the others.[64]

Rights in rem, unlike rights in personam, can relate directly to physical objects (eg A's right that a person does not enter to Blackacre), directly to persons (eg the right that every person has not to be stricken), or directly neither to tangible objects nor to persons (eg the patentee's right that no person can manufacture products protected by the patent).[65] According to Hohfeld, it is an error

> conveying the impression that all rights *in rem* (multital rights), in order to be such, must relate to a *material thing*. Such a limitation would exclude not only many rights *in rem,* or multital rights, relating to *persons,* but also those constituting elements of patent interests, copyright interests, etc.[66]

59 See Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101(4) *Columbia Law Review* 773, 776–7. See also EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, 17th ed, 2006) 153; Edward I Sykes and Sally Walker, *The Law of Securities* (Law Book, 5th ed, 1993) 9.

60 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 720–1. Honoré agrees with this position. According to him, 'the force of [this] proposal is to protest against the habit of thinking of the ownership of a thing, particularly a material object, as if it consisted only in a relation between the owner and the thing, and not at all in relations between the owner and other persons': Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987) 183 ('*Making Law Bind*').

61 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 742.

62 Ibid 741–3.

63 Ibid 743.

64 Ibid 744 (emphasis in original).

65 Ibid 734–5.

66 Ibid 725 (emphasis in original).

Additionally, rights in rem, as distinct from rights in personam, are constructive rather than consensual, which means that rights in rem 'and their correlating duties arise independently of even an approximate expression of intention on the part of those concerned'.[67]

Rights in personam can arise from the violation of rights in rem. [68] These rights are categorised as *secondary rights in personam* arising from *primary rights in rem*.[69] Hohfeld explains:

> Using again the hypothetical case involving A as owner of Blackacre, it is clear that if B commits a destructive trespass on A's land, there arises at that moment a new right, or claim, in favor of A, — ie, a so-called secondary right that B shall pay him a sum of money as damages; and of course B comes simultaneously under a correlative duty. … [Here,] the secondary right — eg, that against B — is a paucital right, or claim, ie, a right *in personam*.[70]

Both rights in rem and rights in personam can have an affirmative or negative content. An affirmative content refers to a positive duty.[71] For instance, '[i]f Y has contracted to work for X during the ensuing six months, X has an *affirmative* right *in personam* that Y shall render such service, as agreed'.[72] A right has a negative content when there is a correlative duty of refraining from doing something.[73] 'Thus if K, a distinguished opera singer, contracts with J that the former will not for the next three months sing at any rival opera house, J has a *negative* right *in personam* against K; and the latter is under a correlative *negative duty*'.[74]

Most of the *right–duty* relations in rem have negative content because, according to Hohfeld, they are constructive in nature.[75] An instance of this situation is the *negative duty* of X not to enter Whiteacre, which Y owns and occupies.[76] X's negative duty has a correlative *negative right in rem* vested in Y. Yet, jural relations in rem can also be affirmative, such as the right of way vested on X over Y's land (Whiteacre). As Hohfeld observes, 'it is the privilege elements in X's interest, involving an *affirmative* activity on Y's land, Whiteacre, that cause his easement

67 Ibid 720 n 23.

68 Ibid 752.

69 Ibid.

70 Ibid (emphasis in original).

71 A 'positive duty' refers to '[a] duty that requires a person either to do some definite action or to engage in a continued course of action': *Black's Law Dictionary* (11th ed, 2019) 'positive duty'. This is the opposite of a 'negative duty', which is '[a] duty that forbids someone to do something; a duty that requires someone to abstain from something': at 'negative duty'.

72 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 719 (emphasis in original).

73 See above n 71.

74 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 719 (emphasis in original).

75 Ibid 720 n 23.

76 Ibid 719.

to be classified as *affirmative*, in contrast to a negative easement, such as that of light'.[77]

The taxonomy of rights in rem and rights in personam can be applied to each one of the eight jural conceptions Hohfeld proposes.[78] Therefore, *rights*, *privileges*, *powers* and *immunities* — and their correlatives *duties*, *no-rights*, *liabilities* and *disabilities* — can be either in rem or in personam in nature.[79] Some examples help illustrate this point:

1. Hohfeld offers a useful example to explain how rights, privileges, powers and immunities interact when they have an in rem nature:

   > Suppose … that A is fee-simple owner of Blackacre. His 'legal interest' or 'property' relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. *First*: A has multital legal rights, or claims, that *others,* respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc, such others being under respective correlative legal duties. *Second*: A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc … and correlative to all such legal privileges are the respective legal no-rights of other persons. *Third*: A has the legal power to alienate his legal interest to another, … to create a life estate in another … to create a privilege of entrance in any other person by giving 'leave and license'; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons, — this meaning that the latter are subject, *nolens volens*, to the changes of jural relations involved in the exercise of A's powers. *Fourth*: A has an indefinite number of legal immunities … Thus he has the immunity that no ordinary person can alienate A's legal interest … the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person X shall not enter on the land … Correlative to all these immunities are the respective legal disabilities of other persons in general.[80]

   This example illustrates how A, the owner of Blackacre, has *rights*, *privileges*, *powers* and *immunities* with respect to this property, all at the same time, all in rem in nature.

2. A lien is another example that shows the application of different jural relations in rem. A lien — the 'right' to retain possession of a chattel — is better understood in Hohfeldian terms as a *privilege* and a *right*, both in rem, in respect of a physical object.[81] Hohfeld explains that this *privilege* exists 'not only against the owner of the chattel but also against

77 Wesley Newcomb Hohfeld, 'Faulty Analysis in Easement and License Cases' (1917) 27(1) *Yale Law Journal* 66, 71–2 (emphasis in original).

78 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 712.

79 Ibid 716–17.

80 Ibid 746–7 (emphasis in original).

81 Ibid 737–8.

all persons in general, and correlating with no-rights in the latter'.[82] The lienor is free from the claims of others, including the owner of the property, regarding the lienor's possession of the chattel. The lienor, thus, has a *privilege in rem* correlated with a *no-right in rem* in everybody else.

Additionally, 'the lienor has, by virtue of his possession *per se*, rights *in rem* against all others that they shall not disturb that possession or harm the object possessed'.[83] As a result, the lienor has a right with a negative content against others. The negative content refers to the obligation not to disturb the possession of the chattel and not to harm it. Consequently, the lienor has a *right in rem* correlated with a *duty in rem* resting on everybody else. The *privilege in rem* and the *right in rem* of the lienor are lost once he or she surrenders possession of the chattel.[84]

3. Abandonment of a chattel provides another example of jural relations in rem. The owner of a chattel has the power to extinguish his or her legal interest — his aggregate of *rights*, *privileges*, *powers and immunities* — with the abandonment of the chattel.[85] This situation, Hohfeld explains, simultaneously and correlatively creates *privileges* and *powers* in other persons, such as the power to acquire title of the chattel through its appropriation.[86]

   Although Hohfeld does not mention it specifically, this situation seems to create *rights*, *privileges*, *powers and immunities* in rem. Each of these jural conceptions arises with the appropriation of the chattel and avails against an indefinite class of people. Thus, if A appropriates and thereby acquires title of a chattel abandoned by B, the different *rights*, *privileges* and other jural relations associated with the chattel arise in A's favour. These jural relations, in rem in nature, avail against an indefinite class of people.

4. The process of formation of contracts is instructive for jural relations in personam. Hohfeld observes that when A mails a letter to B offering to sell A's land and the letter is duly received, A creates a *power* on B with a correlative *liability* on A.[87] This *power* refers to B's ability to create a potential contractual relationship between them. A, however, remains with the *power* to revoke the offer and, consequently, A has the affirmative control to revoke B's ability to create the contractual relationship.[88]

82 Ibid.

83 Ibid 738 (emphasis in original).

84 Ibid.

85 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 45.

86 Ibid.

87 Ibid 49.

88 Ibid.

Therefore, two different powers arise with a duly communicated and non-revoked offer: one *power* in personam in favour of the offeree to create a contractual relation correlated with a *liability* in personam against the offeror, and another *power* in personam in favour of the offeror to revoke the offer correlated with a *liability* in personam against the offeree.[89]

5. An agency relationship is another instance of jural relations in personam. Hohfeld argues that '[t]he creation of an agency relation involves, *inter alia*, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal'.[90] The *power* to impose contractual obligations on the principal and the *power* to discharge a debt on the principal's behalf instantiate such *powers*.[91] These jural conceptions are in personam and create correlative *liabilities*, also in personam, in the principal.[92]

6. Last, Hohfeld provides two examples to illustrate the interaction of jural relations in rem and jural relations in personam. As to the first example, he observes:

> 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.[93]

In this example, X has no *privilege* to eat the salad in regard to Y because of the contract these parties concluded. X has a contractual obligation or, rather, a *negative duty* in personam correlated with a *negative right* in personam vested on Y. Yet, X maintains his or her *privilege* regarding A, B, C, D and others (except Y), who have *no-rights*. This *privilege–no-right* jural relations are in rem in nature.

The second example is related to the owner's *power* of alienation. According to Hohfeld,

89 See ibid 50.

90 Ibid 46 (emphasis in original).

91 Ibid.

92 Jural relations in rem can also arise from an agency relationship. For instance, when A — the owner of Blackacre — gives P the power to convey A's title, A transfers the power in rem to alienate the thing (right to the capital). It creates a power in the agent with a correlative liability in everyone else. The power of the agent will 'divest the rights *in rem*, etc, of his principal and create new and corresponding rights, etc, in the agent's transferee': Hohfeld, 'Fundamental Legal Conceptions' (n 20) 757 (emphasis in original).

93 Hohfeld, 'Some Fundamental Legal Conceptions' (n 20) 35–6.

> if X, a landowner, has contracted with Y that the former will not alienate to Z, the acts of X necessary to exercise the power of alienating to Z are privileged as between X and every party other than Y; but, obviously, as between X and Y, the former has no privilege of doing the necessary acts; or conversely, he is under a duty to Y not to do what is necessary to exercise the power.[94]

This situation is similar to the previous example. Here, X has a *negative duty* in personam vis-a-vis Y correlated with Y's *negative right* in personam. Additionally, X has a *privilege* in rem regarding A, B, C, D, Z and others (except Y), who have a *no-right* in rem.

Hohfeld's second theoretical framework supplements his scheme of jural relations. It explains the scope of different jural relations and provides a lens for analysing and understanding property rights — as a sub-category of rights in rem — and contractual rights — as a sub-category of rights in personam. This framework helps determine the scope and substantive content of the 'bundle of rights'. Although the 'bundle of rights' can be categorised as a set of *right–duty* jural relations in rem due to its proprietary nature, some obligations derived from proprietary transactions could amount to *rights* in personam. If A, for instance, allows B to use A's property in exchange for a monetary payment, A will be entitled to a *right* in personam. This right can only be asserted against B and not against persons generally, as an in rem jural conception would. The precise application of Hohfeld's second theoretical framework to the 'bundle of rights' is, therefore, crucial to define the scope of this perception of property.

III HONORÉ: STANDARD INCIDENTS OF OWNERSHIP

Honoré's work provides a theoretical and taxonomic framework to determine in abstract the existence, content and allocation of property rights in different types of transactions.[95] Honoré argues that certain elements must be present for a person to be considered the owner of a thing.[96] He terms these elements 'standard incidents of ownership' and defines them as 'those legal rights, duties, and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system'.[97] Honoré contrasts this greatest interest in the thing — ownership or *dominium* — with easements, short leases, licences, special property and mere detention, which represent lesser interests in property — *iura in re aliena*.[98] Honoré's eleven standard incidents of ownership are:

1. The right to possess: the right to the exclusive control of the thing;[99]

94 Ibid 52–3.

95 See generally Honoré, *Making Law Bind* (n 60).

96 Ibid 161.

97 Ibid.

98 Ibid 175.

99 Ibid 166.

2. The right to use: the right to use and enjoy the thing at the owner's discretion;[100]
3. The right to manage: 'the right to decide how and by whom the thing owned shall be used';[101]
4. The right to the income: the right to the benefits obtained from the thing;[102]
5. The right to the capital: 'the power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it';[103]
6. The right to security: the right to remain owner indefinitely provided the owner remains solvent;[104]
7. The incident[105] of transmissibility, which refers to the duration of the owner's interest.[106] It is the possibility of indefinite transmission of the owner's interest to his or her lawful successors;[107]
8. The incident of absence of term, which indicates the lack of a term that limits the ownership interest;[108]
9. The incident of residuarity: the owner's residual right to retake the incidents previously transferred to the holders of lesser interests;[109]
10. The duty to prevent harm: the duty to refrain from using the thing to harm others and, in the case of the owner, the additional duty to prevent others from using the thing to harm other members of society;[110] and
11. The liability to execution or incident of executability: the 'liability of the owner's interest to be taken away from him for debt, either by execution for a judgment debt or on insolvency'.[111]

100 Ibid 168.

101 Ibid.

102 Ibid 169.

103 Ibid 170. Honoré (n 60) introduces the concept of 'title' in this incident as follows: '"Title" is an important notion in the analysis of ownership. It denotes the power of the owner (or someone with a lesser interest) to alienate the thing and thereby to transfer the power to alienate and exercise the other rights of an owner or person with a lesser interest': at 170.

104 Ibid 171.

105 Juan Diaz-Granados and Benedict Sheehy, 'The Sharing Economy & the Platform Operator-User-Provider "PUP Model": Analytical Legal Frameworks' (2021) 31(4) *Fordham Intellectual Property, Media and Entertainment Law Journal* 997, 1012 n 77:

> Following Hart's thought, Honoré refrains from calling this incident a right because, under his view, the exercise of a right must depend on the choice of the holder, which does not happen with this particular incident. … This claim can also be applied to the incidents of absence of term and residuarity.

106 Honoré, *Making Law Bind* (n 60) 171.

107 Ibid 172.

108 Ibid 172–3.

109 Ibid 177–9. Honoré explains that this right is necessary but not sufficient for a person to be considered the owner of the thing: at 178–9.

110 Ibid 174.

111 Ibid 175.

The concept of *ownership*, therefore, 'stand[s] not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems',[112] and such common features are the standard incidents of ownership. However, not all the standard incidents of ownership must be present for a person to be considered owner. Honoré observes that the 'incidents, though they may be together sufficient, are not individually necessary conditions for the person of inherence to be designated owner of a particular thing'.[113] This position is based on the argument that a legal system can restrict the incidents without rejecting the legal concept of ownership. Honoré explains:

> Indeed, in nearly all systems there will be some things to which not all the standard incidents apply, some things which cannot be sold or left by will, some interests which cannot endure beyond a lifetime, some things … which it is forbidden to own or to use in certain ways. … But it plainly does not follow that the legal systems in which these cases occur do not recognize ownership.[114]

Funds such as shares, trust funds and floating charges are examples of property where *all* the standard incidents are not present.[115] According to Honoré, incidents like the right to possess, the right to manage and the duty to prevent harm hardly apply to this type of property — which, conversely, usually includes the right to the capital and the right to the income.[116]

The standard incidents that Honoré categorises as *rights* are of special importance and deserve closer analysis. Next, the article analyses Honoré's conceptual approach to each of these incidents, including their substantial content. It shows how Honoré himself classifies many of these 'rights' with different jural conceptions, which indicates that a more accurate analysis of the 'bundle of rights' perception of property should incorporate jural conceptions other than *rights* and their correlative *duties*.

Honoré explains that the right to possess — the right to have exclusive control of the thing[117] — includes 'the right (*claim*) to be put in exclusive control of a thing and the right to remain in control, namely the claim that others should not without permission interfere'.[118] The right to possess, Honoré argues, is in rem in nature considering it avails against persons generally.[119] This right, which should be

112 Ibid 162.

113 Ibid 165. See also Michael Bridge et al, *The Law of Personal Property* (Sweet & Maxwell, 1st ed, 2013) 48.

114 Honoré, *Making Law Bind* (n 60) 163.

115 Ibid 183.

116 Ibid.

117 See above n 98 and accompanying text.

118 Honoré, *Making Law Bind* (n 60) 166 (emphasis added). See also Bridge et al (n 113) 48, quoting AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 114.

119 Honoré, *Making Law Bind* (n 60) 166.

differentiated from the protection given to mere present possession,[120] is recognised by a legal system when the dispossession of the thing without the possessor's consent is forbidden and the possessor 'is entitled to recover from persons generally what he has lost or had taken from him, and to obtain from them what is due to him but not yet handed over'.[121] As a result, the holder of the right to possess has several remedies to obtain, keep and recover the thing,[122] like ejectment, specific restitution, replevin and *vindicatio*.[123] Alternatively, 'the actions for trespass to land and goods, the Roman possessory interdicts and their modern counterparts, are primarily directed towards enabling a present possessor to keep possession'.[124]

Next is the right to use. As explained above, it refers to the right to enjoy the thing.[125] According to Honoré, this definition is the narrow interpretation of the right to use.[126] A broad interpretation of this right encompasses the right to manage and the right to the income.[127] Additionally, Honoré seems to understand the right to use as a *privilege* rather than a *right*. He observes that '[t]he right (*liberty*) to use the thing at one's discretion has rightly been recognized as a cardinal feature of ownership'.[128] This comment suggests that Honoré understands the right to use as a *liberty* (or *privilege*) instead of a *right* (or *claim*).

Regarding the right to manage, Honoré explains that this right depends on a cluster of *powers*.[129] Generally, the right to manage is related to 'powers to license acts which would otherwise be unlawful and powers to make contracts',[130] such as 'the power to admit others to one's land, to permit others to use one's things, to define the limit of such permission, [and] to contract effectively in regard to the use and exploitation of the thing owned'.[131] This cluster of powers, however, may vary depending on the thing owned. For instance, in the case of the ownership of a business, the cluster includes the power to define how particular resources should

120 Ibid.

121 Ibid 167. Honoré (n 60) explains at 167:

> The protection of the right to possess, and so of one element in ownership, is achieved only when there are rules allotting exclusive physical control to one person rather than another, and that not merely on the basis that the person who has such control at the moment is entitled to continue in control. When children understand that Christmas presents go not to the finder but to the child whose name is written on the parcel, when villagers have a rule that a dead man's things go not to the first taker but to his son or his sister's son, we know that they have at least an embryonic idea of ownership.

122 Ibid.

123 Ibid.

124 Ibid.

125 See above n 99 and accompanying text.

126 Honoré, *Making Law Bind* (n 60) 168.

127 Ibid.

128 Ibid (emphasis added).

129 Ibid.

130 Ibid.

131 Ibid.

be used and exploited.[132] Honoré's approach, thus, separates the right to enjoy the thing (right to use) from the right to license the use of the thing (right to manage).

Next to the right to manage is the right to the income, that is, the right to the benefits derived from the thing.[133] Honoré argues that

> [i]ncome in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing the personal use of a thing and allowing others to use it for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by others.[134]

Honoré explains that the right to the income is a *claim* that can be in rem or in personam.[135] When the income 'is in the form of money, the claim before receipt of the money is *in personam*'.[136] Otherwise, the income will be in rem in nature.[137]

The right to the capital includes both *powers* and liberties (or *privileges*).[138] Specifically, it 'consists in the power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it'.[139] The power to alienate comprises the power to make a valid disposition of the thing together with the power to transfer title.[140] Honoré explains that, although these powers usually concur, they can be vested in two different persons, 'as when A has a power of appointment over property held in trust by B. Here A has the power to make a valid disposition of the thing, and B the power to transfer the legal title to it'.[141]

Last, Honoré recognises that the right to security is not really a *right* but an *immunity*.[142] He explains that this 'right' 'is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and

132 Ibid.

133 See above n 100 and accompanying text.

134 Honoré, *Making Law Bind* (n 60) 169. See also *Booth* (n 8) 377 (Mason CJ), analysing Honoré's right to the income and explaining that this right

> contemplates income derived from property in any form. It includes income derived from activities conducted by the owner of the property, such as cropping, as well as income arising under a lease, a licence or for that matter, a contract with respect to the use of the land, but it is by no means confined to income so arising.

Honoré's right to the income is also described as '[embracing] the fruits of flora and the offspring of fauna, together with any rent or profits from an asset': Bridge et al (n 113) 49.

135 Honoré, *Making Law Bind* (n 60) 169.

136 Ibid (emphasis in original).

137 Ibid.

138 Ibid 170.

139 Ibid.

140 Ibid. See above n 102, quoting Honoré's definition of 'title'.

141 Honoré, *Making Law Bind* (n 60) 170 (emphasis omitted).

142 Ibid 171.

execution for debt, the transmission of ownership is consensual'.[143] The right to security, Honoré adds, avails against others.[144]

Honoré's taxonomic framework of incidents of ownership, therefore, conceptualises those property 'rights' that may exist in a legal system, as well as their substantive content. This conceptualisation is the foundation of the 'bundle of rights' perception of property. Importantly, Honoré's framework has proved that it is complete enough to analyse several types of property rights that have been proposed elsewhere. These rights are variations of the standard incidents of ownership. For instance, the right to exclude, namely the 'right to exclude others from a valued resource',[145] can be included under the concept of the right to possess — exclusive control of the thing — and the right to use — enjoyment of the thing.[146] If the owner exclusively controls and enjoys the thing, others are automatically excluded. Similarly, the right to include, that is, the owners' right to 'include others in the use, possession, and enjoyment of their property',[147] can be included under the concept of the right to manage: the right to decide how and by whom the thing will be used. If the owner can decide who uses the thing, the owner is consequently including others in the use, enjoyment and even possession of the thing. It follows that Honoré's incidents of ownership constitute the basis upon which the 'bundle of rights' is built. As such, they are the basis of the analysis. This framework provides the foundational taxonomy of jural conceptions that facilitates discussion on the content and legal implications of the 'bundle of rights'.

IV HOHFELD AND HONORÉ'S INTERACTION: THE 'STANDARD JURAL RELATIONS OF OWNERSHIP'

The article has analysed Hohfeld's and Honoré's works. The analysis has shown early interactions between these theoretical frameworks. Honoré's work, which came after Hohfeld's contribution, has multiple elements from the latter. For instance, Honoré's recognition that the right to possess is a *claim in rem* or that the right to security is an *immunity* 'availing against others' is a clear example of Hohfeld's influence in Honoré's account.[148]

However, the full scope and legal implications of this interaction have been overlooked. As a result, further analysis is required. For this purpose, Hohfeld's theoretical frameworks are applied to Honoré's work, allowing classification of the incidents of ownership according to the scheme of jural relations in rem and jural relations in personam. This analysis provides a thorough examination of the interaction of these frameworks, resulting in a novel theoretical framework for the

143 Ibid.

144 Ibid.

145 Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77(4) *Nebraska Law Review* 730, 730.

146 According to Bridge et al (n 113), Honoré's right to possess 'embraces both the claim to be in exclusive physical control of an asset and the right to exclude others from interference without permission': at 48.

147 Daniel B Kelly, 'The Right to Include' (2014) 63(4) *Emory Law Journal* 857, 859.

148 Honoré, *Making Law Bind* (n 60) 171.

analysis of proprietary legal relationships: the '*standard jural relations of ownership*'. This approach demonstrates that the 'bundle of rights', more than a cluster of *rights*, is instead a group of *rights*, *privileges*, *powers* and *immunities* with correlative *duties*, *no-rights*, *liabilities* and *disabilities*. It reshapes the traditional view of the standard incidents of ownership in terms of jural relations in rem and jural relations in personam, which, in turn, clarifies the parameters under which the 'bundle of rights' perception of property has been understood and developed. The following diagram summarises the analysis (see Figure 3).

Figure 3: *Standard Jural Relations of Ownership*

Honoré's Framework		**Hohfeld's Framework**
Right to possess	→	*Negative right in rem* + *privilege in rem*
Right to use	→	*Privilege in rem* + *negative right in rem*
Right to manage	→	*Powers in rem*
Right to the income	→	*Affirmative right in personam* (payment of money) or a cluster of *rights*, *privileges*, *powers*, and *immunities in rem* (other material chattels)
Right to the capital	→	*Power in rem* + *privilege in rem*
Right to security	→	*Immunity in rem*
Incident of transmissibility	→	*Immunity in rem*
Incident of absence of term	→	*Immunity in rem*
Incident of residuarity	→	*Immunity in rem* + *affirmative right in personam*
Duty to prevent harm	→	*Negative duty in rem* + *affirmative duty in rem*
Incident of executability	→	*Liability in rem*

As is evident from the diagram, the incidents of ownership are more than *rights* in some cases or not even amount to *rights* in others. First, Honoré's right to possess, when analysed with Hohfeld's frameworks, is more than a *right*. It is comprised of

two different jural relations *in rem*.[149] Primarily, the right to possess is a *right in rem* with a *negative content*. There is an indefinite number of people with a duty not to interfere with the exclusive control that the right holder exercises over the thing. For instance, if A rents his or her bicycle and delivers it to B in exchange for a price, A will transfer the right to possess the bicycle.[150] As a result, B will have a *right* with a negative content against everybody else (including A) that they will not interfere or disturb B's possession of the bicycle.

Additionally, the right to possess is clothed with a *privilege in rem*. The holder of the right to possess is free to control the thing without subjection to others' affirmative claims. Third parties are vulnerable to the way the right holder controls the thing or, stated differently, other persons have *no-right* against the right holder derived from his or her control of the thing. Accordingly, following the same example, B will be free from third parties' claims (including A's) regarding the possession of the bicycle when the right is transferred.[151] Honoré's right to possess is, therefore, a *negative right* and a *privilege*, both *in rem* in nature.[152]

Importantly, the *negative right in rem* comprised in the right to possess can lead to an *affirmative right in personam*. As explained above, *secondary rights in personam* can arise from the violation of *primary rights in rem*.[153] Thus, if C wrongfully dispossesses A of the bicycle, a *right* or claim *in personam* will arise in A's favour. 'The latter is a paucital right, or right *in personam*; for there are no fundamentally similar rights against persons in general'.[154] This *secondary right in personam* has a correlative *affirmative duty* on C to return the bicycle or to pay for damages. The *right* against C will operate at the same time as A's *negative right in rem* that people in general (B, D, E, etc) do not interfere with A's exclusive possession of the bicycle (*primary negative right in rem*).[155]

Honoré's right to use is a *privilege in rem* accompanied by a *right in rem*. First, it is fundamentally a liberty to enjoy property.[156] The holder of the right to use is free to enjoy the thing without the potential risk of another's claim. People in general will have no right against A that qualifies his or her use of the bicycle. A is free to use it in accordance with the law. B will assume this position once A rents the

149 Honoré agrees that the right to possess is in rem in nature: see above n 118 and accompanying text.

150 In this case, a bailment (hire or *locatio et conductio*) will arise: see *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107, 109 (Holt CJ).

151 B's privilege to control the bicycle, however, is subject to the limitations agreed with A in the bailment agreement. A and B will be subject to rights and duties in personam in this contractual relationship.

152 See above nn 80–3 and accompanying text describing Hohfeld's analysis of a lien, which is illustrative for this explanation.

153 See above nn 67–9 and accompanying text.

154 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 753.

155 See ibid, including wrongful dispossession as an example of secondary rights in personam.

156 Honoré acknowledges that the right to use is a liberty (privilege): see above n 127 and accompanying text. See also Singer (n 36) 7, discussing the privilege to use.

bicycle to B. If this transfer occurs, B will have a *privilege in rem* 'existing not only against the owner of the chattel but also against all persons in general, and correlating with no-rights in the latter'.[157] Second, the right to use is also a *right in rem* with a negative content. People in general have a duty not to interfere with the use of the thing by the right holder. For instance, B, as the renter of the bicycle, shall have the right not to have anyone (including A) disturb his enjoyment of the bicycle.

The 'right' to manage is not a *right* but a cluster of *powers*.[158] Primarily, this 'right' is a *power in rem* to create legal relationships to use the thing, which results in the creation of *privileges* to use such a thing. For example, A's 'right' to decide that B can use the bicycle is really A's control over the legal relationships that may ensue in respect of the bike. Once A has exercised this *power*, A creates a *privilege* for B to use the bicycle. Additionally, the 'right' to manage includes the *power* to make contracts to use and exploit the thing. A's *power* to enter into a binding agreement with B for the use of the bicycle is an example of this *power*. This cluster of *powers* is *in rem* in nature considering people in general are subject to the exercise of the *power* and, as a result, must respect the new legal relationships created by the owner of the thing — *liability in rem*.

Honoré's 'right' to the income, properly understood, is an *affirmative right in personam* or a cluster of *rights*, *privileges*, *powers* and *immunities in rem*. As Honoré observes, the right to the income is a *right in personam* when the income is in the form of money.[159] If A allows B to use Blackacre in exchange for a monetary payment, A will have an *affirmative right in personam* against B, who will have an *affirmative duty in personam* to pay A. However, when the benefits derived from the property are other material chattels, the owner will be entitled to a cluster of *rights*, *privileges*, *powers* and *immunities in rem*. For instance, if the benefits derived from Blackacre are fruits or timber, A will have *rights*, *privileges*, *powers* and *immunities* regarding these chattels. A will have a *negative right* that no other person harms these chattels, a *privilege* to use them, a *power* to sell them and an *immunity* that no other person will transfer A's interest in them. Therefore, while the right to the income is an *affirmative right in personam* when the benefit is money, it includes a cluster of *rights*, *privileges*, *powers* and *immunities in rem* when the benefit is another chattel.

The 'right' to the capital, as Honoré acknowledges, comprises the *power* to alienate the thing — the *power* to make a valid disposition of the thing and transfer title — and the *privilege* to consume, waste or destroy part or all of it.[160] Considering that this *power* and *privilege* avail against people in general, they are *in rem* in nature. A, for instance, has the *power* to transfer title of the bicycle to C, which is correlated with everyone else's *liability* to respect and accept the transaction.

157 Hohfeld, 'Fundamental Legal Conceptions' (n 20) 737–8.

158 See Honoré, *Making Law Bind* (n 60) recognising that '[t]his right depends, legally, on a cluster of powers': at 168.

159 Ibid 169.

160 See above nn 137–40 and accompanying text.

Similarly, A's *privilege* to consume, waste or destroy the bicycle is accompanied by the absence of *right*s (affirmative claims) of third parties to request state intervention to modify A's behaviour (*no-rights*).

Honoré is also correct in categorising the 'right' to security as an *immunity*.[161] Specifically, the 'right' to security is an *immunity in rem* with a correlative *disability* resting in everyone else. It is a security that no one but the owner has the *power* to modify his or her ownership status regarding the thing owned. B, C, D and everybody else, thus, have a *disability*, a 'no-power' to alter A's ownership of the bicycle — comprised by all of A's incidents of ownership.

The incident of transmissibility is an *immunity in rem*. Owners are immune from losing ownership in respect of their property. They have a security that, after their death, title will be transferred to their lawful successors.[162] This *immunity* operates provided the owner does not transfer title of the thing inter vivos, that is, through the exercise of the 'right' to the capital. Consequently, B, C, D and everybody else have 'no-power' to modify A's successors of title; they have a *disability* with a correlative *immunity* in A.

The incident of absence of term is also an *immunity in rem*. It is an *immunity* from not losing a proprietary interest due to the passage of time with a correlative *disability* in everybody else (indefinite people) to affect or extinguish such a proprietary interest. A, thus, is free from anyone else's *power* to modify A's title in the bicycle.

The incident of residuarity, when analysed with Hohfeld's theoretical frameworks, is an *immunity in rem* clothed with a *right in personam*. When the owner transfers some of the incidents of ownership to another person, this person is entitled to these incidents — a lesser interest in the property — for a period of time. After this time, the incidents transferred will return to the owner *ipso jure*. Consequently, the incident of residuarity creates an *immunity* in the owner with a correlative *disability* in all persons other than the owner, including the transferee, to affect the owner's right to retake the incidents transferred. As a result, once the duration of the bicycle rental agreement between A and B elapses, the right to use the bicycle will return to A *ipso jure*, and A may exercise this right or assign it to another person.

When a formality is required for the owner to retake the incidents transferred or when the incident transferred is accompanied by the delivery of the physical possession of the thing, the incident of residuarity includes an *affirmative right–duty* jural relation *in personam*. The transferee has an *affirmative duty* to comply with the required formality or to return the physical thing to the transferor correlated with an *affirmative right* in the latter, the owner of the thing. This *right* only avails against the holder of the lesser interest, the transferee, creating a *right*

161 See above nn 141–2 and accompanying text.

162 Honoré, *Making Law Bind* (n 60) 170. Honoré (n 60) explains that the holder's successors are those 'persons designated by or closely related to the holder, who obtain the property after him': at 172.

in personam rather than a right *in rem*. B, therefore, will have a *duty* to return the bicycle to A once the hire period has elapsed.

The duty to prevent harm is both a *negative duty in rem* and an *affirmative duty in rem*. First, it is a *negative duty in rem* resting on the owner of the thing and the holder of the right to use it with a correlative *negative right* in everybody else. The owner and the holder of the right to use have a legal obligation not to cause harm to others when exercising the *privilege* to use the thing. Consequently, A is obliged to use the bicycle without causing harm to others (B, C, D, etc) and, once A rents the bicycle to B, B will be subject to this legal obligation. Additionally, the duty to prevent harm is an *affirmative duty in rem* that the owner has in respect to everyone else to prevent others from using the thing to harm another member of society. A, as the bicycle owner, is therefore obliged to prevent B from using the bicycle to harm C, D, E or any other person.

Finally, the incident of executability is a *liability in rem*. As explained above, the 'right' to security is an *immunity* to remain owner of the thing provided the owner remains solvent.[163] If the owner does not remain solvent, he or she loses this *immunity*, and a *liability* arises. Consequently, the incident of executability refers to a *liability in rem* resting on the owner who is no longer immune from losing his or her interest as a result of 'execution for a judgment debt or … insolvency'.[164] A, therefore, will be subject to lose his or her incidents of ownership in respect of the bicycle as a consequence of debts, regardless of who the creditors are. This liability has a correlative *power* in the creditors to, with the help of the state, affect and extinguish the owner's interest in the property as a result of debts.

V CONCLUSION

The theoretical contributions of Hohfeld and Honoré have been crucial to conceptualising the 'bundle of rights' perception of property, the predominant approach to property in the common law tradition. Although Hohfeld and Honoré's contributions are conflated under this approach, a comprehensive analysis of the interaction and related legal implications of these theoretical frameworks has been overlooked.

The article examined Hohfeld and Honoré's theoretical contributions to demonstrate that, when thoroughly analysed, they create a comprehensive theoretical framework for evaluating proprietary legal relationships that has not been used or explored before. The article argued that, from a Hohfeldian and Honorian perspective, the 'bundle of rights' is not merely a cluster of rights or *right–duty* jural relations. Instead, it is comprised of a group of *rights*, *privileges*, *powers* and *immunities* to which the owner is entitled as a result of his or her greatest legal interest in the thing. These jural conceptions and associated *right–duty*, *privilege–no-right*, *power–liability* and *immunity–disability* jural relations provide different substantive content to proprietary legal relationships. Consequently, the article reshaped the traditional view of the incidents of

163 See above nn 141–2.

164 Honoré, *Making Law Bind* (n 60) 175.

ownership in terms of jural relations *in rem* and jural relations *in personam*, offering a new approach: the '*standard jural relations of ownership*'.[165] This novel theoretical framework provides an additional lens to analyse proprietary legal relationships that refines and clarifies the traditional understanding of the 'bundle of rights' perception of property.

165 See above Figure 3.