 DOI: http://dx.doi.org/10.5216/phi.v30i1.81598

A HOHFELDIAN CONCEPTION OF NORMATIVE POWERS[1]

Daniel Simão Nascimento[2,3]
danielsimaonascimento@gmail.com

Abstract: In this article, I examine Hohfeld's concept of legal power, and what I take to be the main contributions made over the past century to refine that concept, in an effort to develop a broader notion: the concept of normative power. In Section 1, I introduce the topic and present an initial definition based on Hohfeld's work. In Sections 2 through 5, I offer successive refinements of that initial definition, incorporating at each stage what I consider to be the valid insights raised by the four major questions that have shaped the discussion of Hohfeld's concept of legal power over the last hundred years, namely: (1) How can we distinguish legal (and normative) powers from other types of power (Section 2)?; (2) In what ways do legal (and normative) powers resemble or differ from privileges (Section 3)?; (3) What kind of volitional control is implied in the exercise of a legal (and normative) power (Section 4)?; And (4) should we be concerned that the definition includes unjust exercises of power, and if so, how might we revise it to exclude them (Section 5)?

Keywords: Hohfeld, power, rights, voluntary, intentional.

---

[1] Recebido: 31-01-2025/ Aceito: 27-05-2025/ Publicado on-line: 23-06-2025.
[2] É professor na Universidade Federal do Rio de Janeiro (UFRJ), Rio de Janeiro, Rio de Janeiro, Brasil.
[3] ORCID: https://orcid.org/0000-0001-5451-7417.

I. Introduction

Wesley Newcomb Hohfeld published a series of articles between 1909 and 1917 that significantly influenced 20th century analytical philosophy of individual rights. Since Hohfeld presented his articles, it has become commonplace among "Hohfeldian specialists" to distinguish rights into four groups – privileges (or liberties), claims, powers and immunities – which came to be known as "the Hohfeldian incidents".

More than one century has passed since Hohfeld's works first appeared, and the time has been ripe with discussion of his apparatus. While some still adhere to his original formulation, others have pointed out the problems they raised and proposed new formulations of these incidents that attempt to do away with these problems. In this article, I examine Hohfeld's concept of legal power and assess what I take to be the most important contributions made over the past hundred years that have sought to clarify and refine this concept.

Hohfeld viewed his work as an attempt to clarify the meaning of legal terms. Although he himself wondered what was the intrinsic nature of a legal power, he doubted the feasibility of fully analyzing this concept as used in legal discourse. Fearing that too close an analysis might seem metaphysical rather than useful, he ultimately decided to present only what he calls "an approximate explanation sufficient for all practical purposes" (Hohfeld, 1913, p. 44). According to this explanation,

> A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem (Hohfeld, 1913, p. 44).

Two straightforward examples should suffice to clarify this initial explanation: a property's owner power to sell his property and a judge's power to sentence someone who has been found guilty by a court of law. The right to sell is a power because, once exercised, the seller loses all the rights it had regarding his property, while gaining the right (which is a claim) to some form of compensation, and the buyer gains all the property rights previously had by the seller and the duty to compensate the seller. Similarly, a judge's right to sentence someone who has been found guilty by a court of law is a power because it extinguishes at least some of the convicted party's rights – if, of course, there is no appeal – and creates new duties and perhaps even new rights for that same person, such as the right to be jailed in a facility in a way that does not violate one's human rights.

Despite Hohfeld's hesitation, one could extract a general definition of legal power from the preceding passage. According to this definition, a legal power would be a right to change a given legal relation through some superadded fact or group of facts which are under our volitional control. While Hohfeld himself was only concerned with legal rights, many contemporary Hohfeldian theorists use his scheme, or

some version of it, to analyze different realms of rights[4]. Now, if we take a legal power to be defined as the right to perform an action or group of actions that are under the one's volitional control and result in a change in some legal relation, a moral power as the right to perform an action or group of actions that are under the one's volitional control and result in a change in some moral relation, etc., we may generalize further and define normative power as the right to perform an action or group of actions which: (a) is under the volitional control of an individual or group of individuals; and (b) results in a change in some normative rule system, such as the legal system.

From now on, this article will focus on the concept of normative power in general. As we shall see, the initial definition I just proposed will require refinement in light of four central challenges that have long been raised against Hohfeld's account of legal power – challenges which, as will become evident, apply equally to the broader notion of normative power. These are: (1) How can we distinguish legal (and normative) powers from other types of power (Section 2)? (2) In what ways do legal (and normative) powers resemble or differ from privileges (Section 3)? (3) What kind of volitional control is implied in the exercise of a legal (and normative) power (Section 4)? (4) Should we be concerned that the definition includes unjust exercises of power, and if so, how might we revise it to exclude them (Section 5)?

[4] In a recent article, Wenar (2020, p. 33-34) identifies four realms of rights, namely, the realm of conduct (which includes legal, moral and institutional rights), the epistemic realm (rights to believe), the affective realm (rights to feel) and the conative realm (rights to want).

In each of these sections I shall offer a further refinement of the initial definition of normative power, incorporating each time those which I take to be the valid points raised by each question.

II. On the difference between normative power and other kinds of power

Hohfeld began his clarification of the concept of power with the following words:

> Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional. (...) As another instance of this essentially metaphorical use of a term borrowed from the physical world, the word "power" may be mentioned. In legal discourse, as in daily life, it may frequently be used in the sense of physical or mental capacity to do a thing; but, more usually and aptly, it is used to indicate a "legal power", the connotation of which latter term is fundamentally different (Hohfeld, 1913, p. 24).

As we can see, Hohfeld himself was worried about distinguishing the concept of legal power from the concept of power understood as a physical or mental capacity. In what follows, I shall call power so understood – namely, as the capacity, ability or possibility, of suffering or producing effects – the general concept of power. Examples of this general concept can be found in statements such as "heat has the power to warm," "a towel has the power to absorb," "acid has corrosive power," "birds have the power to fly," "a doctor has the power to heal," or "Brazil has the power to overcome the crisis." Such statements attribute power to objects, individuals, or groups of individuals, who may or may not be human beings.

This general concept encompasses the concept of social power as defined by, for example, Stoppino (1998, p. 933-934). According to the author, social power regards a human beings', or group of human beings', ability to determine another human beings', or group of human beings', behavior. So defined, human beings are both the subject and the object of social power. Examples of social power include not only a father's power to give orders to his children or a government's power to give orders to its citizens, but also a father's ability to make his son study harder by expressing disappointment or enthusiasm with his grades, and a government's ability to make another government change policy by imposing economic sanctions.

The concept of social power encompasses the concept of legal power as defined by Hohfeld, and one of the primary challenges for any Hohfeldian definition of legal power is to duly differentiate it from social power. This challenge has not always been adequately met. Indeed, Hohfeld himself gave us an ambiguous formulation when he characterized a legal power in terms of facts or groups of facts that were under the volitional control of individuals and which "resulted" in a change in a given legal relation (Hohfeld, 1913, p. 44). Much the same ambiguity can be found in the work of Alf Ross, for example, when he defines a legal power as the ability "to cause certain desired legal effects" (1958, p. 166). As Raz correctly remarked, a husband may be able to cause – in some pertinent sense of the word – his wife to make a gift of all her property to him, but it is she, not him, who has the legal power to make a gift of her property (Raz, 1972, p. 80). In this case, what the husband has is the social power to

influence his wife so that she will exercise her legal power accordingly.

Hence, we should follow Raz when he states that "I have a legal power only if it is my act which is recognized by law as effecting a legal change" (1972, p. 80). As far as I can see, Raz's point has become a consensus among Hohfeldian scholars in the field. The best formulation of it we have today is the one offered by Lindahl and Reidhav. As the authors so aptly put it, it is "the behavior of the power-holder that must be the legal ground for achieving the legal result" (Lindahl and Reidhav, 2017, p. 163).

Incorporating this point into the definition of a normative power given above, I shall take normative power to be defined as the right to perform an action or group of actions which: (a) is under the volitional control of an individual or group of individuals; and (b) is recognized by some normative rule system, such as the legal system, as the ground for effecting a change in that same normative rule system.

III. On the similarities and differences between powers and privileges

A few pages after the passage quoted earlier, Hohfeld emphasizes the importance of distinguishing legal powers not only from powers in general but also from the concept of legal privilege. He does this with the following example:

> As regards all the "legal powers" thus far considered, possibly some caution is necessary. If, for example, we consider the ordinary property owner's power of alienation, it is necessary to distinguish carefully between the legal power, the physical power to do the things necessary for the "exercise" of the legal power, and, finally, the

> privilege of doing these things – that is, if such privilege does really exist (Hohfeld, 1913, p. 52).

Hohfeld's concern is well justified. First, because there are some striking similarities between privileges and powers as Hohfeld conceives them and, second, because these two kinds of rights had been much confused up until then.

Regarding the similarities between privileges and powers as Hohfeld conceives them, we should note that both are rights to do something, i.e. so called "active rights", and in both cases it is possible to have a right and either to be or not to be under a duty to exercise it. Normally, one has the power to sell one's property but no duty to do so. Selling, in this case, is an optional act for the property holder. But a judge has both the power and the duty to sentence a criminal convicted by the court. Therefore, it makes sense to speak of single and paired powers just as we have spoken in a previous article of single and paired privileges – selling being a paired power (i.e. a power to sell or not to sell) and the judge's duty to sentencing a single power (i.e. a power to sentence which is accompanied by a duty to sentencing)[5]. If we do so, we will say that an individual has a single power when he has (a) the capacity to modify a given legal relation and (b) a duty to do so, and that an individual has a paired power when he has (a) the capacity to modify a given legal relation and (b) no duty to modify or not modify it.

[5] For the way I conceive Hohfeld's concept of duty, see Nascimento (2018). For two different ways of conceiving the difference between single and paired privileges see Wenar (2005, p. 231) and Nascimento (2019). The same points about the impossibility of defining paired privileges as the agglutination of two single privileges made in Nascimento (2019) apply to the case of powers as they are understood here.

That being said, it is also important to keep in mind the difference between privileges and powers, for they have not always been recognized. If we take the work of Bentham, for example, we see no clear distinction between the two. Indeed, even if we accept Hart's thesis that such a distinction could be gathered from Bentham's examples it seems that this distinction, at least as proposed by Hart, would make powers a kind of privilege. According to Hart, Bentham thought that "a legal permission only constitutes a legal power if it is in some way an exception to or contrasts with general duties imposed by law and so can be regarded as a kind of legal favor or advantage and not merely as an absence of duty" (Hart, 1972, p. 801-802). As far as I am aware, Hohfeld was the first to draw a sharp distinction between powers and privileges, and the distinction he drew certainly became the most influential since then.

The first difference we can see in the way he separated these concepts lies in their normative consequences. Privileges, as conceived by him, don't necessarily create any rights or duties when they are exercised – when I exercise my freedom of expression, for example, I don't necessarily give myself or anybody else any rights or duties. This can also be the case when I exercise my freedom of movement, but moving from a non-smoking area to a smoking area should rather be called a power than a privilege because it gives the one who moves from the one to the other the right to smoke and extinguishes his duty not to smoke – or, alternatively, we could say this person has both the privilege and the power to move from non-smoking to smoking areas.

This second alternative seems preferable, because the second difference pointed by Hohfeld is that it is possible to have a power to do something and, at the same time, to have a duty not to exercise it. To illustrate this point, he offers the following example:

> (...) 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 (Hohfeld, 1913, p. 52-53).

There seems to be no disagreement over Hohfeld's meaning here. The standard interpretation has been encapsulated by Sichelman's recent note to the passage in which he says that in this example X still has the legal power to sell the land to Z but, if he does so, he will violate a duty to Y – which would likely result in him owing some form of contractual damages to Y (Sichelman, 2022, p. 59)[6].

Given that this second difference pertains primarily to potential conflicts between powers and privileges – and not the definition of power itself (i.e., it does not separate this concept from other concepts of the same *genus* or adds anything to it that belongs to this concept because of its own nature) – it seems best to treat this point as supplementary rather than integral to the definition.

Incorporating the two points made in this section into the definition of a normative power given above, I shall take

[6] The same point is made by Lindahl and Reidhav (2015, p. 82).

normative power to be defined as the right to perform an action or group of actions which: (a) is under the volitional control of an individual or group of individuals; (b) the individual or group of individuals may or may not have a duty to do; and (c) is recognized by some normative rule system, such as the legal system, as the ground for effecting a change in that same normative rule system. We will then supplement the definition by adding that an individual may or may not have the privilege of doing that action which he has a power to do.

IV. On the volitional control involved in the definition of normative powers

When considering the kind of volitional control involved in the definition of a legal power, we can see two apparently different approaches in the secondary bibliography. According to the approach which Raz took to be dominant in 1972, a legal power should be defined as the right to effect a legal change by a voluntary act (Raz, 1972, p. 80). Although Raz states this, he does not specify how exactly "voluntary" should be understood within this tradition. Fifty-seven years later, Lindahl and Reidhav suggested an alternative. According to them, a legal power is a right to achieve a certain legal result through some sort of intentional behavior that is a legal ground for achieving that result and manifests the right holder's intention of achieving that result (Lindahl and Reidhav, 2017, p. 169).

As we can see, the theoretical difference between the two approaches is about whether we should use the concept of voluntariness or the concept of intentionality to explain

the kind of volitional control that is pertinent to the definition of a legal power. In order to understand how important that difference is and why, in the end, the difference between them might be only an apparent one, we should look at two paradigmatic theories of voluntariness and intentionality – namely, Aristotle's theory of the voluntary act and Anscombe's theory of intentional action.

As I have argued elsewhere, Aristotle established two criteria for separating involuntary actions from voluntary actions: the criterion of force, which is made to separate the actions we suffer voluntarily for those we suffer involuntarily; and the criterion of ignorance, which is made to separate the actions we perform voluntarily for those we perform involuntarily (Nascimento, 2017). According to the first criterion, a person can only say that she was forced to suffer some action if she contributes nothing to that action – as, for example, if the wind or some other person or group of persons with control over her carried her off somewhere (NE, III 1, 1109b35-1110a3). According to the second criterion, a person can say that she performed some action involuntarily only if (a) she was ignorant of some of the particular circumstances involved in the action – namely, of the action she was doing, of the thing or person to which she was doing it, of the instrument she was using to perform the action, of the manner in which she was performing the action or of the result of the action (NE, III 1, 1110b26-111a18) – and (b) if the person was not herself responsible for that ignorance (NE, III 5, 1113b17-25). According to Aristotle as I understand him, the cases in which (a) obtains but (b) doesn't are the "cases where someone seems to be ignorant because of

negligence" (NE, III 5, 1113b30-1114a3) (see Nascimento, 2017, p. 47-49).

So understood, the negligence clause encompasses all actions that are performed because the agent is culpably ignorant of at least one of the particular circumstances involved in the action. As I defended in that paper, that means that Aristotle thought that the agent in question was culpable not only of his ignorance, but also of the actions that he performed because of it. Since Aristotle thought that we were only responsible, i.e., could only be praised, blamed, rewarded or punished, for our voluntary actions, that also means that he thought these actions were voluntary – marking them off from the cases of involuntary action in which the agent was ignorant of at least one of the particular circumstances involved in the action but was not himself responsible for his ignorance.

One important consequence of Aristotle's theory so understood is that if the agent is not ignorant of a given result of his action, i.e., if he knows that his action will bring about a given result, then that result can be said to have been achieved voluntarily regardless of whether or not the action was performed with the intention of bringing about that result. That is one of the main differences between intentionality and voluntariness highlighted by Anscombe in her analysis of intentional action. According to Anscombe if an action is involuntary, it is also unintentional (Anscombe, 1965, p. 12), but not every voluntary action is also an intentional action. In Anscombe's words:

> Something is voluntary though not intentional if it is the antecedently known concomitant result of one's intentional action, so that one could have prevented it if one would have given up the action; but it is not intentional: one rejects the question "Why?" in its connection (Anscombe, 1965, p. 89).

To illustrated this point, consider the sadly too familiar example of the political leader ordering the bombing of a building in order to kill a terrorist knowing that there are civilians inside and that they will die as a result of the bombing. If he indeed ends up killing both the terrorist and the civilians, according to Anscombe's theory we should say that he killed the terrorist intentionally and the civilians unintentionally, but that he killed both the terrorist and the civilians voluntarily.

The reason this is important for the present context is that, although Lindahl and Reidhav use the concept of intentionality in their definition of a legal power, they employ a much broader notion of intentionality. One that ends up erasing much of the difference between intentionality and voluntariness.

Indeed, the authors take their analysis to be compatible with the expression "intends" being given such a wide interpretation that if X performs behavior B aiming at an effect D as a consequence of B but envisages that C will also be a consequence of B, then X intends C as well as D (Lindahl and Reidhav, 2017, p. 173). By admitting this, they are erasing one of the main differences between voluntary and intentional action as they are understood in the two paradigmatic theories considered here.

One page later they'll erase another, when they approvingly mention an example from Zitelman. According to them:

> The person who marries a girl, knowing that her mother is a Xanthippe, cannot claim that he had only intended to become the bridegroom of his wife, not the son-in-law of her mother. Rightly, he would be laughed down, getting the reply: You knew that this would result, didn't you – now bear the consequences, "tu l'as voulu, George Dandin!" (Lindahl and Reidhav, 2017, p. 174).

Although on the surface this example might appear a mere repetition of the point already made, the authors are in fact making a connection between their concept of intentional action and the idea of responsibility that was not made before. Their point here seems to be that claiming not to have intended a given result would excuse the agent from bearing the consequences of his action. But acting intentionally, as it is understood both commonly and by Anscombe, is not a prerequisite for being responsible for one's action. It is not their intentionality, but their voluntariness, which marks off the actions for which we are responsible from those for which we are not[7]. Their intentionality might make us more blameworthy for them, but their being unintentional is not enough, in itself, to exculpate us.

By extending the notion of intentionality in this way, Lindahl and Reidhav have actually blurred the distinction between the voluntary and the intentional to a point where it seems to make little difference as to which of the concepts

[7] That we still believe that voluntariness is the limit of our responsibility for or actions is shown, f. ex., in Sistare (1989) and taken for granted by authors such as Hyman (2015, p. 5).

we use to define normative powers. In what follows, I shall stick to the distinctions between the two concepts presented here and, therefore, shall side with the tradition that Raz took to be dominant in 1972 in taking voluntariness to be the appropriate concept to understand the kind of volitional control involved in the definition of normative powers. But I shall also use the Aristotelian concept of voluntariness presented above as the pertinent concept for our understanding how exactly voluntariness should be understood.

That being said, it is still worth asking whether we should adapt Lindahl and Reidhav's manifestation requirement and add a manifestation of voluntariness requirement to our understanding of a normative power.

Now, the first thing to be said about that requirement as formulated by the authors is that it needs an important clarification. At first glance, talk of manifestation might suggest that there is something which is at first hidden in some way and then comes to light when it manifests itself. In this case, it would be easy to assume that the authors take the intention to be what is at first hidden, because it would be some sort of mental event, and then manifests itself in the appropriate behavior. But if that was the case, then "X intends in fact C as a consequence of B" would be part and parcel of the manifestation requirement – which is something the authors categorically deny, claiming that it would make the concept of a legal power too narrow since it would only hold in some areas of the law (Lindahl and Reidhav's, 2017, p. 175).

According to the authors, the manifestation requirement should be interpreted as saying that behavior B is such

that it gives others reasons for concluding that X intends C as a consequence of B (Lindahl and Reidhav's, 2017, p. 173) and that, for X's behavior B to be an exercise of legal power, X's manifestation of intention is a necessary part of the legal ground for X's achieving C by B (Lindahl and Reidhav's, 2017, p. 171). So understood, they argue, the manifestation requirement provides a criterion for distinguishing behavior B as an exercise of legal power from the "direct effect" of behavior B by means of the following counter-factual test:

> Suppose that a legal effect C follows from behavior B of X's. Then the test is as follows. Is it relevant (for the result C to follow from B) that X appeared to have the intention to achieve the legal effect C by B? If this is irrelevant, in the sense that C follows from B, irrespective of X's intention to achieve C by B, then the legal effect is not the result of X's exercise of legal power. Rather it is a "direct effect" (Lindahl and Reidhav's, 2017, p. 171).

Adapting this requirement to include voluntariness instead of intentionality, we would then say that a legal power is a right to achieve a certain legal result through some sort of voluntary behavior that is a legal ground for achieving that legal result and manifests the right holder's voluntariness of achieving that legal result, insofar as it gives others reasons for concluding that X aims at achieving C voluntarily as a consequence of B. We would also say and that for X's behavior B to count as an exercise of a legal power, X's manifestation of voluntariness is a necessary part of the legal ground for X's achieving C by B, with the corollary being that if manifesting such voluntariness is irrelevant to achieving the said result, then we are not talking about a normative power, but only of a direct effect of something that is not under X's volitional control.

The problem with this requirement is that it seems to posit an arbitrary difference between the exercise of a power and the direct effect of some behavior that does not seem to be a necessary feature of normative systems. Consider the case of crossing international borders or moving between a smoking and a non-smoking area. Should we say that any normative system would necessarily have to include the difference suggested above between a power and a direct effect of these behaviors? What difference would it make, from a normative point of view, whether we say that the change in question was caused by the exercise of a power on the part of the individuals who changed their location in this way or was a direct effect of their changing their location in this way?

On the other hand, it could be objected that if we follow this line of argument, we will end up discarding Hohfeld's own idea that what characterizes a legal power is an individual's volitional control over the behavior that is a sufficient ground for the legal effect it produces. After all, he himself started his own characterization of a legal power by distinguishing changes in legal relations which resulted from some superadded fact or group of facts not under the volitional control of a human being, and changes in legal relations which resulted from some superadded fact or group of facts which are under the volitional control of one or more human beings. Only then he asserted that only in the second class of cases the person (or persons) whose volitional control is paramount may be said to have the legal power to effect the particular change of legal relations (Hohfeld, 1913, p. 44). So, what meaning can we give to the distinction he made if we discard the manifestation requirement?

I propose we could give it some meaning if we bear in mind the following. The point for a normative rule system, such as the legal system, to attribute a normative power to an individual or group of individuals is to make it possible for the individual or group of individuals to change some legal relation according to their own will, desires, goals, etc. In order for that function to be fulfilled the behavior that triggers the normative consequence must be a behavior that the individual *can* perform voluntarily. Now, if we adhere to Aristotle's formulation of the voluntary act it seems that there are some acts which would be very nearly impossible to perform involuntarily - such as promising or marrying, for example. It seems impossible to make a promise without knowing that one is making it and knowing what one is promising. One might not know the costs of the promise, its effects, etc., but it is hard to conjure an example where one is ignorant that one is doing it or of its content. But there are many other acts, such as crossing a border or moving from a smoking to a non-smoking area, that the individual might very well perform involuntarily. A non-contradictory rule system could posit that in such cases the consequences are generated whether the behavior is voluntary or not without compromising the ability of the individual to perform this behavior voluntarily.

Such a conception of the volitional control involved in the definition of a legal power would still draw a difference between changes in normative relations that resulted from the exercise of powers and changes that did not, insofar as it posits that a legal power cannot specify as its trigger any sort of behavior that can't be performed voluntarily. That would

exclude not only clearly impossible acts, such as flying without the aid of machinery in the case of human beings, but also events that happen and are attributed to individuals but which are not taken to be actions of their own – such as ageing, getting sick, etc. We would then be able to say that whatever normative consequences these events eventually trigger under some normative rule system would not be thought of as the consequence of the exercise of a power by the individual, but simply as direct legal effects of events that happened to the individual over which he had no volitional control.

Incorporating this point into the definition of a normative power given above, I shall take normative power to be defined as the right to perform an action or group of actions which: (a) can be performed voluntarily by an individual or group of individuals; (b) the individual or group of individuals may or may not have a duty to do; and (c) is recognized by some normative rule system, such as the legal system, as the ground for effecting a change in that same normative rule system. We will then supplement the definition by adding that an individual may or may not have the privilege of doing that action which he has a power to do.

V. On the issue of injustice

The final challenge raised against Hohfeld's concept of power I will address here is that, according to it, the act of committing an injustice would count as the exercise of a legal power since, in Raz's words, it usually makes the offender liable to a sanction and imposes on him an obligation to

compensate (Raz, 1972, p. 80)[8].

While it does seem counterintuitive to speak of a legal power to commit injustice – given that legal injustices are illegal by definition – the objection is not unanimously accepted amongst interpreters. Kramer, for instance, has argued that, even though we might find it odd to speak in this way, there is nothing inherently wrong with doing so given Hohfeld's definition of a power as a person's ability to change legal relations through a specified act or set of acts (Kramer, 1998, p. 103-104).

Now, Hohfeld was clear about his intent to reform our legal rights language when he presented his apparatus. That such a reform would end up excluding certain uses of the rights-terms we used to see as normal, and introducing some uses we would see as somewhat odd is, I think, to be expected. Besides, we've seen in section III that Hohfeld clearly thought that powers and privileges did not always go hand in hand. So, one could really wonder whether he himself would be at all deterred by Raz's objection.

Nevertheless, there seems to be a pertinent difference between the type of cases considered in section III where one would have a power to do something and a duty not to do it – e.g., X, a landowner, who sells his land to Z even though

[8] In their article, Lindahl and Reidhav argue that their requirement of manifestation of intention would deal with that problem (Lindahl and Reidhav, 2017, p. 162). Since that requirement was already criticized and discarded, we cannot make use of it now. But I will say that the authors' argument relies on the idea that it would be somehow impossible for the wrong-doer to have and manifest an intention to be punished in accordance with the law. Although I agree that we would need to stretch our imagination a little bit to come up with an example in which that would be the case, I fail to see why we should say that it is impossible. If the penalty for murder is imprisonment and if the living conditions of imprisonment are better than one's conditions outside of jail, for example, it seems perfectly possible for someone to kill with the intention of being imprisoned.

he has contracted with Y that he will not do so – and the case of someone who murders. In the former case, the legal consequences that are being considered as consequences of the exercise of the legal power in question are not generated by the fact that the act was considered a contravention by the legal system. Indeed, it seems Hohfeld implicitly considered in that example that the consequences that were generated by the fact that the act was considered a contravention by the legal system were to be treated separately.

Now, it is impossible to know whether or not Hohfeld would be inclined to say that these different consequences should be treated as consequences of the exercise of a different power, i.e., the power to contravene in a given way, or if he would prefer to treat contraventions in general as distinct from legal powers. Nevertheless, since nowhere in his articles about individual and group rights Hohfeld ever addressed the case of injustices, it seems plausible to say that he followed our everyday use of these concepts in this case and did not think that committing an injustice counts as the exercise of a right.

Incorporating this final point into the definition of a normative power given above, I shall take normative power to be defined as the right to perform an action or group of actions which: (a) can be performed voluntarily by an individual or group of individuals; (b1) is recognized by some normative rule system, such as the legal system, as the ground for effecting a change in that same normative rule system; (b2) the reason why this change is effected is not because that normative rule system takes the action or group of actions in (a) to contravene its norms; and (c) the individual or group

of individuals may or may not have a duty to do. We will then supplement the definition by adding that an individual may or may not have the privilege of doing that action which he has a power to do.

Each part of the definition encapsulates an important part of the concept: (a) establishes the kind of volitive control that is involved in the definition of legal powers while leaving open the possibility that legal powers can also be exercised involuntarily; (b1) establishes the difference between normative powers and other kinds of powers; (b2) establishes the difference between normative powers and contraventions of a normative rule system; and (c) establishes the division of powers into single and paired. Last but not least, the addendum supplements the definition by highlighting the fact that powers can conflict with privileges.

Resumo: Neste artigo, examino o conceito de poder legal de Hohfeld, e o que considero serem as principais contribuições feitas ao longo do último século para o refinamento deste conceito, na tentativa de delinear um conceito mais abrangente: o conceito de poder normativo. Na seção 1, introduzo o tema e apresento uma primeira definição baseada no trabalho de Hohfeld. Nas seções 2 a 5, apresento novos refinamentos da definição de poder normativo dada na seção 1, absorvendo a cada vez na definição de poder normativo aqueles que considero serem os pontos válidos de cada uma das quatro principais questões que moldaram a discussão sobre o conceito de poder jurídico de Hohfeld ao longo do último século, a saber: (1) Como podemos distinguir os poderes legais (e normativos) de outros tipos de poder (Seção 2)?; (2) De que maneiras os poderes legais (e normativos) se assemelham ou diferem dos privilégios (Seção 3)?; (3) Que tipo de controle volitivo está implícito no exercício de um poder legal (e normativo) (Seção 4)?; E (4) devemos nos preocupar com o fato de que a definição inclui exercícios injustos de poder e, em caso afirmativo, como podemos revisá-la para excluí-los (Seção 5)?

Palavras-chave: Hohfeld, poder, direitos, voluntário, intencional.

VI. References

ANSCOMBE, G. E. M. *Intention*. Cambridge: Harvard University Press, 1965.

ARISTOTLE. *The Nicomachean Ethics*. Translated by H. Rackham. Cambridge: Harvard University Press, 1934.

BENTHAM, J. *Of the Limits of the Penal Branch of Jurisprudence*. Edited by Philip Schofield. Oxford: Clarendon Press, 2010.

HART, H. L. A. Bentham on Legal Powers. *The Yale Law Journal*, v. 81, n. 5, p. 799–822, 1972.

HOHFELD, W. N. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *The Yale Law Journal*, v. 23, n. 1, p. 16–59, 1913.

HYMAN, J. *Action, Knowledge, and Will*. Oxford: Oxford University Press, 2015.

LINDAHL, L.; REIDHAV, D. Legal Power: The Basic Definition. *Ratio Juris*, v. 30, n, 2, p. 158-185, 2017.

NASCIMENTO, D. S. Constrangimento e ignorância na teoria aristotélica do ato voluntário. *Revista Hypnos*, v. 38, p. 33-55, 2017.

NASCIMENTO, D. S. Hohfeld on the Duties in Privileges and Claims. *Filosofia Unisinos*, v. 19, n. 2, p. 150-155, 2018.

NASCIMENTO, D. S. Hohfeld on Privileges and Liberties. *Philósophos - Revista de Filosofia*, v. 24, n. 1, p. 55-67, 2019.

RAZ, J. Voluntary Obligations and Normative Powers. *Aristotelian Society*, supplementary v. 46, n. 1, p. 79-102, 1972.

ROSS, A. *On Law and Justice*. Berkeley: University of California Press, 1958.

SICHELMAN, T. M. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Edited and Annotated by Ted M. Sichelman. In: BALGANESH, S.; SICHELMAN, T. M.; SMITH, H. E. (ed.). *Wesley Hohfeld A Century Later: Edited Work, Select Personal Papers, and Original Commentaries*. Cambridge: Cambridge University Press, 2022. p. 15-70.

SISTARE, C. T. *Responsibility and Criminal Liability*. Dordrecht: Kluwer Academic, 1989.

STOPPINO, M. Poder. In: BOBBIO, N.; MATTEUCI, N; PASQUINO, G. (ed.). *Dicionário de política*. Brasília: UnB, 1998. p. 933-943

WENAR, L. The Nature of Human Rights. In: FOLLESDAL, A.; POGGE, T. (ed.). *Real World Justice*. Studies in Global Justice 1. Springer Netherlands, 2005. p. 285-293.

WENAR, L. Rights. In: ZALTA, E. N. (ed.). *The Stanford Encyclopedia of Philosophy*. 2020.