The Very Modern Value of Wesley Newcomb Hohfeld:

A Centennial Appraisal

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Accusations

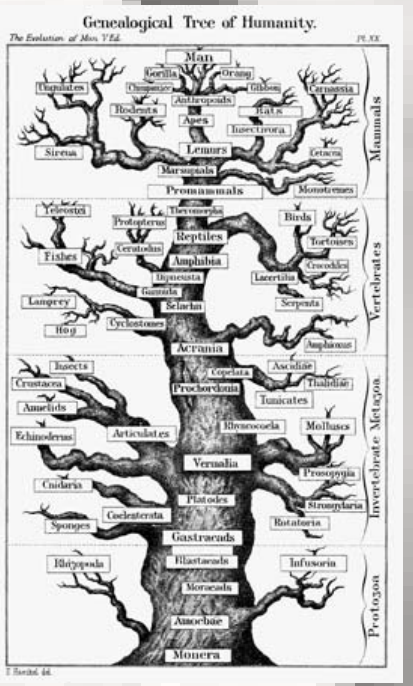
[Hohfeld's] '… elaborate and indeed bizarre ideas are mainly to be found lurking in footnotes which nobody today ever reads' AWB Simpson, 'The Salmond Lecture' [2007] *VUW Law Rev* 36

'it is somewhat doubtful that his analysis… solves any bafflement that any lawyer has ever actually experienced' J Penner, "The Bundle of Rights' Picture of Property' [1996] 43 *UCLA Law Rev* 711, 728-9

Overview

- The Man and His Mindset
- The Scheme of ‘Rights’ – Trimmed and Potted
- Influence and Criticisms
- Revival and Modern Applications
- Conclusions

The Man and his Mind -Set



‘Rights’ Scheme – Trimmed and Potted

‘Rights’ A	Correlatives B
(Claim-)Right	Duty
Liberty (Privilege)	No Right
Power	Liability
Immunity	Disability

Level

Scope

Primary
(Basic Relation)

Rights	Correlatives
Claim-Right	Duty
Liberty	No Right
Power	Liability
Immunity	Disability

Multital

Paucital

Secondary
(Remedies)

Rights	Correlatives
Claim-Right	Duty
Liberty	No Right
Power	Liability
Immunity	Disability

Multital

Paucital

Tertiary
(Enforcement)

Rights	Correlatives
Claim-Right	Duty
Liberty	No Right
Power	Liability
Immunity	Disability

Multital

Paucital

Influence

Court Citation Data 1920-2018 by Decade

Heffernan USSC 2016 –liberty of speech

Burns (US CA) 2008 – interference with property claim right

R v Maloney HCA 2013- freedom to possess liquor

JT v Aus HCA 2012

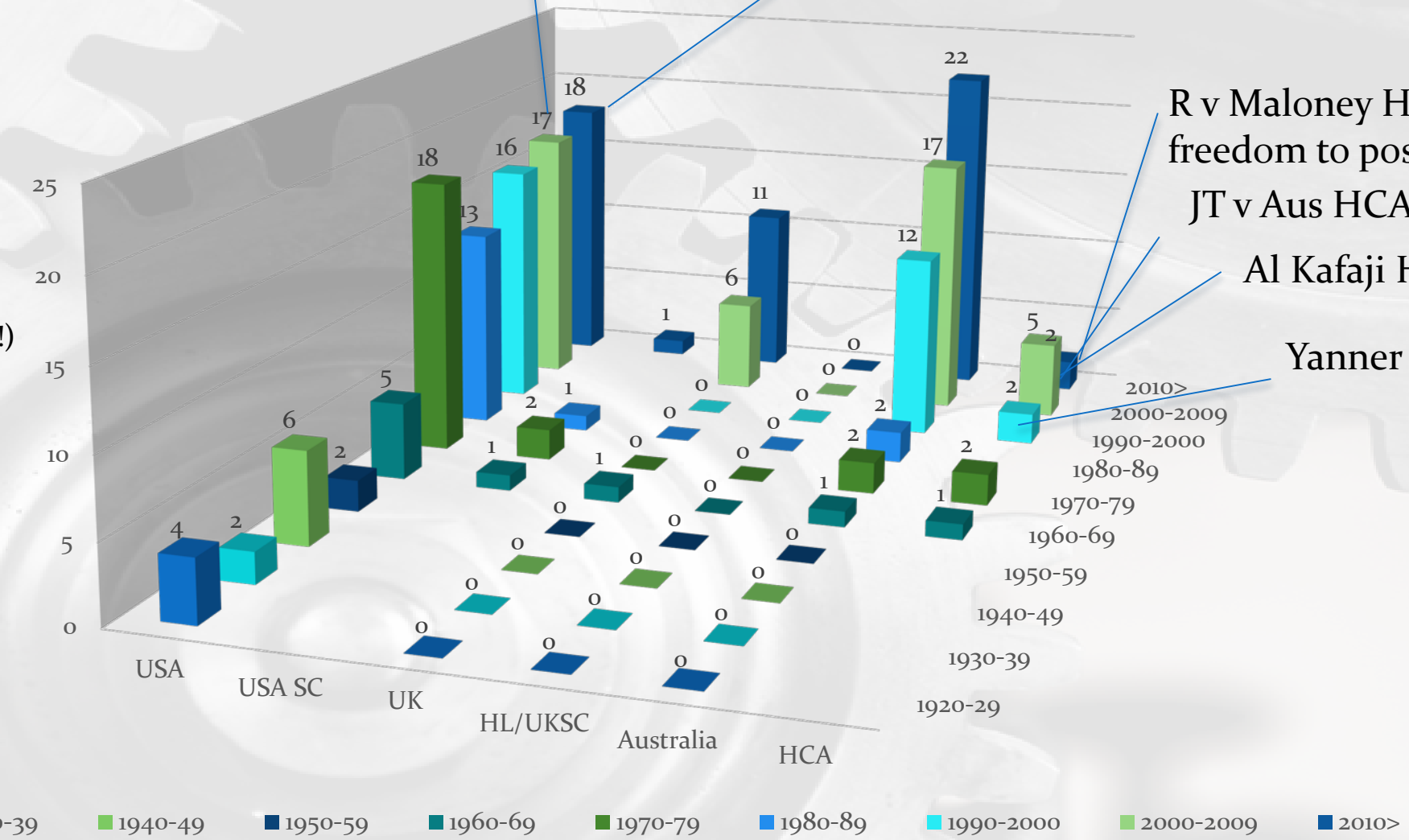
Al Kafaji HCA 2004

Yanner HCA 1999

USSC-5 decisions

HCA- 12 decisions

HL/UKSC- Zero decisions (!)



Criticisms

- No use in relation to public law?
- Attacks on the Correlativity Axiom?
- Normatively Unattractive/Uninspiring?
- Out of Touch with Ordinary Language?
- Unhelpfully de-constructive (eg re ‘Property’)?

C 21st Applications
Disciplining ‘Rights Speak’ and the Political Inflation of ‘Claim Rights’

- Primary claim rights to assert facts, opinions, feelings and personal values ?
- Primary economic claim rights?
- Claims to strong ‘vindication’ of rights?
- Liberty Costs of (Positive) Fundamental Human Rights

C 21st Applications
Deconstructing State Liabilities

Public Duties (admin law, HRA)
Public Liabilities
Public Immunities

D
State

Public Powers (Statute or Prerogative)

Private Law Duties?

P
Private Party

Confusion 1:
Power with No Public Duty means no Private Duty of Care
East Suffolk – Lord Romer; *Stovin*-Lord Hoffmann *Gorringe* – Lord Hoffmann

Confusion 2:
Private Duty depends on presence/absence of 'discretion' regarding Power.

1. *No public duty* to use power ?
2. *Liberty* from duty to take care in using power? (Kirby J-*Crimmins*)
3. *Immunity* from liability re use of power? (Wilberforce- *Anns*)
4. Specialised *judgement* resulting in lower standard of care? (Dyson LJ- *Carty*)

C 21st Applications
Deconstructing Private Law- Civil Recourse Theory

Consequences?

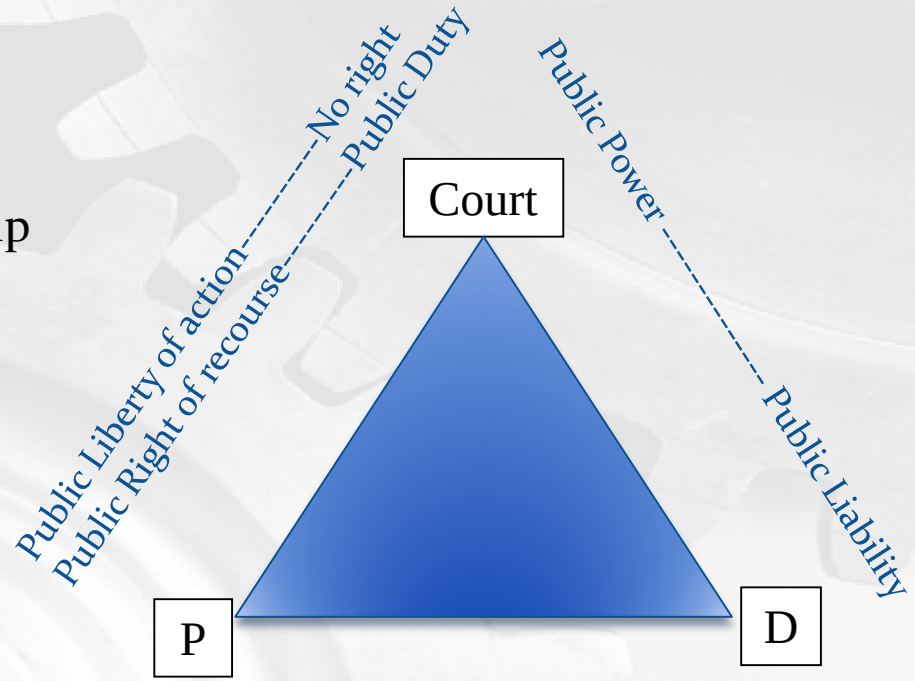
1. No immediate secondary claim rights
2. Looser primary right-secondary remedy relationship

Primary Right ---------- Primary Duty

Secondary RIGHT ---------- Secondary **DUTY**

Breach

Bilateral 'Corrective Justice' Conception



Primary Right ----------Primary Duty

Secondary POWER---------- Secondary LIABILITY

Breach

Trilateral 'Civil Recourse' Conception

Conclusions

3 Reasons for Resurrection

- ‘we are living in an immaterial world’
- check politicised accounts of rights
- unravel complexities of the private/public interactions