Musings for Bialystok proposal

20 mins

Questions on Socrative or other:

1. What is your work context – you can choose more than one a. teach English for law students b. teach law for law students c. teach translation in law d. teach academic English e. work in legal translation f. other – please specify 2. agree/disagree to what extent There are specific strategies to read in law (different from other subjects) 0- don't know/can't say 1-disagree 7 agree

Slide 1 – my name, title, animation link to my links

Start bialystok presentation with a question they'd like to understand/answer.

Good morning. What bothers you most about reading legal texts? If one of the things you are thinking about is the demand on your memory resources to understand a legal concept, then this presentation might help. What I'm here to talk about is reading strategies. Now, if you're hoping to get some insights into reading more efficiently, you'll be disappointed. The reading strategy I'm going to talk about is a slow process, so it's only for really close reading and analysis. I won't be discussing any skimming and scanning. My interest is in a cognitive reading strategy that assists with cognitive load.

I recently did a survey of EAP teachers, primarily in UK and Ireland, and found that in a question to what extent there were reading strategies that were specific to particular subjects or disciplines, here is the result

Slide 2 – graph of teacher responses

Intro – get some data on who is in attendance – some questions via Socrative? Google forms? Also introduce myself briefly.

Slide 3 overview

1. complex legal relations

2. paraphrase the rules

3. examine the language of rules

4. overview of Hohfeld's model

5. my theorical positioning of this model in education

6. some practical considerations for teaching

Brief intro to me and my context:

Work in EAP at Glasgow University. Context specific for this presentation:

32 hour course supporting LLM students in legal and legal English skills such as reading and writing essays. Presentation comes from my own experiences as a law student, in legal practice, and in teaching law at college.

I want to look at a teaching method I use to help law students deal with legal rules. I think this technique is useful at any stage, but particularly those who have not developed (yet) effective means of making sense of legal rules effectively, and *perhaps* efficiently (I say perhaps because the technique I show is not especially fast).

I found from talking to non-fluent English users they had habits of reading such as googling legal rules when they encountered them in articles or books, sometimes looking at primary law but mostly looking at Wikipedia or other websites, and occasionally translating e.g. through google translate. While the final option may be faster, it presents its own risks that, if we have time, I'd love to hear your views on at the end or, if you can't wait, via padlet.

Section 1 – complex legal relations

Slide 4 – What is a trust?

What is a trust? I used to work in setting up trusts, and companies to run them.

Trust
Settlors divest themselves of legal ownership. Legal title to the trust assets is vested in the trustee and beneficial ownership to the beneficiary. There is an equitable obligation which binds the trustees to deal with the trust property (which is owned by them as a separate fund) for the benefit of beneficiaries who have an equitable proprietary interest in the trust property.

Synthesis from Ogiers website and Halsbury's laws

Slide 5

Settlor has liberty to dispose of property to a trustee.
Settlor has power to name a protector.
Settlor has power to name beneficiaries.
Trustee has duty to manage property for beneficiaries.
Trustee has duty to follow protector's instructions
Beneficiary has no right to receive trust property (in case of discretionary trust).
Trustee has immunity in day to day managing of property in respect of settlor and beneficiary.

Section 3 – the language of rules

Slide 6

Settlor can dispose of property to a trustee.

Settlor can name a protector.

Settlor shall name beneficiaries.

Trustee must manage property for beneficiaries.

Trustee must follow protector's instructions

Beneficiary might not receive trust property (in case of discretionary trust).

Trustee has discretion in day to day managing of property in respect of settlor and beneficiary.

Section 4 – overview of Hohfeld

Slide 7 – quote to introduce jural relations

"In dealing with *law .. we are considering the conduct of societal agents and the rules expressing … uniformity with which they are expected to act.*

…with respect to societal agents, our relations to our fellow men are commonly called legal (or jural) relations."

Corbin, Arthur L. "Jural relations and their classification." *Yale LJ* 30 (1920): 226.

I'm going to talk about this phrase jural relations so it's important to understand, and perhaps not difficult to understand, that legal rules express relations between societal agents, whether individual humans, groups of humans, governments, states etc. Certainly that is the basis for Hohfeld's model.

Slide 8 Introduce hohfeld

Original article is this:

Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 Yale L. J. 16, and. Ibid. (1917) 26 Ibid. 710.

There isn't too much time to go into detail on Hohfeld's work (1913) but essentially he saw rights, broadly speaking, not as a relationship with things but as social relations e.g. you don't own a house, rather you have certain rights against other people in respect of that house.

To take an example of the philosophical position from one of the articles that discusses Hohfeld, there is no such thing as property on a desert island with one person. Robilant the fundamental building blocks …

Hohfeld's Jural Relations			
Right (legal claim against the duty bearer below)	**Liberty** (freedom from a right or duty; a privilege – a special advantage)	**Power** (legal ability)	**Immunity** (freedom from a power/control)
Duty (must act or must not act)	**No-right** (no duty to act; cannot legally stop liberty holder or legally force liberty holder to act)	**Liability** (a responsibility or subject of someone's power)	**Disability** (no legal power)

The table above represents four sets of various Hohfeldian jural relations. Hohfeld was a law professor who created this framework as a way of aiding legal analysis. Partly he wanted to resolve practical problems in court when it was linguistically difficult to differentiate between 'rights', when the term 'right' in respect of a particular act might be vague or even lead to contraditctions. Distinguishing more effectively would lead, he thought, to practical judicial conclusions instead of impasse.

All concepts on the top row are loosely referred to as rights, whereas Hohfeld only has one of these as a true right (a claim right). All of the Hohfeldian rights (in the top row) necessarily represent entitlements against a specific person in the bottom row. The vertical relationship shows jural correlatives (the bottom row can broadly be labelled 'disadvantages').

Each Hohfeldian right resolves only <u>one issue</u> between <u>two specific parties.</u>

So, when considering a legal rule, it can be expressed using a variety of jural relations, but when considering a particular act, it would be possible to settle on/focus on which specific relationship became the issue, and thus enable a better sense of what legal consequences there might be.

Slide 9: examples

A few *practical example may help to better illustrate each of Hohfeld's relations:* *1) a party to a binding* contract has a right to the other party's performance; 2) since flag bur ning is protected speech, a person has a privilege to burn a flag; 3) the state of Massachuset ts has a power to call me to jury duty; 4) I have an immunity from being called to jury duty in Rhode Island. These examples are taken from Nyquist (2002, 240),

Nyquist, Curtis (2002). Teaching Wesley Hohfeld's theory of legal relations, Journal of Legal E ducation, 52.1/2: 238-257. cited in Beyond Legal Relations Wesley Newcomb Hohfeld's Influence on American Institutionalism, Fiorito

NB From a linguistics or language perspective, it is noticeable that legal writers, including drafters of primary law, may use words that appear in Hohfeld's table in a sense that is not the same as Hohfeld uses it e.g. one can find the word 'right' used by legal writers when in a Hohfeldian sense, the meaning is probably liberty/freedom. Also, modal verbs such as 'may' and 'can' are used, which lack precision and require further analysis.

Slide 10: the left four – first order

The **left 4** are first order. They all describe the NOW. The right 4 are second order – they involve POTENTIAL and may lead to further relations.

Right and duty = a legal claim against the duty bearer for breach of the duty. That legal claim would force the duty bearer to do something or not do something.
Liberty = a freedom to act as you please in respect of another person, with that person having no legal control or legal action, but also no legally enforceable obligation e.g. to enable a freedom. Liberty may often be accompanied by rights, but if they are not, then the liberty holder would have no legal recourse in the event his liberty is restricted by another.

Pairs of diagonally opposite elements in the first two columns (duty/liberty and right/no-right) are jural opposites i.e. two legal positions that negate each other (mutually exclusive)

Slide 11: the right four – second order

involve POTENTIAL and may lead to further relations

Regarding the right 4, firstly power is the legal ability to change another's legal position, that person having a liability (often confused with duty), being a responsibility or answering to the person with power. The opposite of liability is immunity i.e. you cannot have your legal position changed. Thus, the diagonals are the same as with the left four – jural opposites.
i.e. two legal positions that negate each other.

Some writers, e.g. Commons (1924) Commons, John R. [1924] (2007) Legal Foundations of Capitalism, New Brunswick, NJ: Transaction Publisher. have looked at the right four as more appropriate for analysing relationships that involve institutions, particularly the state.

Section 5 explain the theory: what is my interest and disciplinary position on this:

Slide 12: pedagogical positioning

I'm a teacher first and foremost. Whether I'm influenced by legal science, linguistics – eap; SFL and other approaches to language and discourse analysis – my primary interest is in how I can deliver a learning benefit for students, and that may be anecdotal, it may be interpretivist (taking account of satisfaction), or it may be positivist (empirically supported). In the case of the latter, as a teacher I have little resource to check that.

Pg197 of Routledge handbook: interesting about the work between SFL and LCT where this is said, linked to heuristics, which gets closer to my interest in brain science i.e. simplifying – considering how ideas are expressed, and how the expression is read and processed i.e. the route from writer's brain to reader's brain.

One key finding relevant to tertiary EAP is the need for teachers not only to unpack the technicality and grammatical metaphor of textbooks and readings, but, critically, to repack them. In other words, if we analogize or explain technical meanings into everyday language, we cannot abandon students there. We need to guide them back into using the specialized knowledge and language of their disciplines.

In relation to cognitive load and its umbrella, information processing (little known in survey of eap teachers) Alexander pg11 mentions the following relating to deep processing and surface processing reading strategies

levels of processing are used to explain the degree of analysis individuals exercise to make sense of sensory input and information stored in short-term and long-term memory (Craik & Lockhart, 1972). In this model, surface-processing strategies include rehearsing information, while deep-processing strategies include elaboration and connection to prior knowledge (Craik & Tulving, 1975).

And on page 12 Similar to the approaches to learning model, deep-processing strategies in the information-processing approach are associated with more efficient and effective retention of memory than surface-processing strategies.

Is my hohfeld strategy a type of 'analogy' strategy (a type of 'relational' strategy) – page 20 of Alexander? These are proven successful.

[note – if this is to be written up as an article, I'll need to expand the background. Starting this with file – hohfeld notes]

Slide 13 closing comments on applying this in the class

Students needs to believe in the strategy!

it seems reasonable to assume that decisions to engage in conscious, deliberate, and effortful procedures to promote learning and performance would be influenced by students' beliefs regarding whether knowledge is simple or complex or whether it is bestowed by authorities or derived via critical analysis and justification (Alexander et al., 2011; Schommer, 1993). From A Retrospective and

Prospective Examination of Cognitive Strategies and Academic Development: Where Have We Come in Twenty-Five Years? Pg6 at this point they also mention that emotion and motivation have an interplay with how strategies are used and what strategies valued and used.

We're looking at a domain specific reading strategy. Alexander, cited above, talks about the following as examples *Domain-specific strategies are frequently algorithmic (Case & Marshall, 2004) and include common examples such as the five-paragraph sandwich model for essay writing, the FOIL (first, outer, inner, last) method in algebra, and the use of roman numerals to identify chord progressions in music.*

My research showed what about eap teachers' beliefs in subject specific reading strategies?

Page 27 talks about classroom environments necessary for effective strategy training.

Slide 14

The text below regarding insider trading, used by students on our LLM course corporate governance.

Instruction: look at the information below on manipulative and deceptive practices. I have put together some texts a law student might read – firstly an academic article they are reading, and then two supplementary texts they might use to assist them in understanding the main text (the first text). Your task is to try to remember what SEC rule 10b-5 means.

A. Journal article extract

Securities law has, without doubt, become an important field in many European countries during the past two decades. In a development traced by scholars analysing convergence in corporate governance, formerly dormant markets across the Continent have experienced growth, and the concerns of shareholders have again become important in the public discussion. The motherland of securities law is of course the United States, whose model has been very influential, in particular with respect to the creation of capital markets regulators following the model of the SEC as an independent regulatory agency. Arguably, the other core element of US securities law is the securities class action, most of all under SEC Rule 10b-5, which was made possible by the development of a 'private right of action' by the courts.[1]

1 Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D.Pa. 1946) (first case establishing a private right of action for injured investors).

B. The text of the primary law:

"**Rule 10b-5**: Employment of Manipulative and Deceptive Practices":

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

C. **Some additional information:**

As a general rule, neither party to a business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relationship.1 Until recently, securities lawyers, lower federal courts, and the Securities and Exchange Commission (SEC) believed that SEC rule 10b-5,2 promulgated under section 10b of the Securities Exchange Act of 1934 (Exchange Act),3 radically altered the general nondisclosure rule.
DISCOURSE ON THE SUPREME COURT APPROACH TO SEC RULE 10b-5 AND INSIDER TRADING, Douglas M. Branson

SEC Rule 10b-5, codified at 17 C.F.R. 240.10b-5, is one of the most important rules targeting securities fraud promulgated by the U.S. Securities and Exchange Commission, pursuant to its authority granted under § 10(b) of the Securities Exchange Act of 1934. The rule prohibits any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security. The issue of insider trading is given further definition in SEC Rule 10b5-1.
Wikipedia

can you paraphrase SEC Rule 10b-5?

Here is a paraphrase, which could be useful to improve understanding of the legal rule or a way of incorporating it into a piece of my own writing:

paraphrase of 10-b

> *Any person involved in selling securities/shares has a duty to a person buying shares/securities not to lie or mislead the buyer. The buyers have a claim against the sellers if this rule is broken. [note, the Securities and Exchange Commission (SEC) also have a claim].*

Explanation/language focus:

Some key phrases highlighted below which will be important when we consider my approach to paraphrasing the rule. I'm interested here in the WHO – the parties, the subject and human object in grammatical terms, and the language of RIGHTS and OBLIGATIONS etc, the *can*, the *must*, the *can't* etc.

Courts developed a private right of action

Unlawful to employ … to make… to engage…

General rule … neither party has an obligation to disclose …

The rule prohibits any act or omission

> *Any person involved in selling securities/shares has a duty to a person buying shares/securities not to lie or mislead the buyer. The buyers have a claim against the sellers if this rule is broken.*

Put below in the google doc too

A. Journal article extract

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(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Insert here the citation of the above law

C. ***Some additional information:***

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Wikipedia

Slide 15: thank you, reminder of my email and link to survey

1. how many students do you work with who could potentially benefit from legal reading strategies

2. what are the chances you would show them the Hohfeld approach to analysis : I'd use it, maybe, I wouldn't use it (why not)

3. What works better for you to help students paraphrase and process information deeply

Example to practise with

Discretionary trust

An express trust is created when a person (the 'settlor') directs that certain identified property (the 'trust property') will be held either by him or by others in whom he has vested the property as trustees under an equitable obligation which binds the trustees to deal with that property (which is owned by them as a separate fund) for the benefit of beneficiaries who have an equitable proprietary interest in the trust property and its fruits from the moment the trust is

created [7].
Once the settlor has created his trust by vesting property or rights in a trustee, he drops out of

the picture and has no rights in respect of the trust [8] unless he happens also to be a beneficiary or a trustee of the trust or he has expressly reserved some power within the trust structure (for example a power of revocation, a power to appoint capital to members of a

specified class, a power to replace the trustees with new trustees) [9].
The trustee holds the property or must exercise his rights of property in a fiduciary capacity,

and stands in a fiduciary relationship to the beneficiary [10]. The property affected by a trust

(the 'trust property' or 'trust estate') must be vested in the trustee [11], whether the property is a legal estate, a legal right or an equitable interest where the legal title is vested in

some other person [12]. The trustee will normally have administrative powers over the trust

property, enabling him to manage and administer it for the benefit of the beneficiaries or to further purposes, as well as powers to distribute income or capital to the beneficiaries or to

further purposes [13]. Sometimes a person other than the trustee (for example the settlor or the settlor's widow) may have some distributive powers of appointment over income or capital, while occasionally someone commonly known as a 'protector' will have certain specified powers (for example to monitor the trustee's conduct and replace him if appropriate, or to add or

subtract persons as beneficiaries) [14].
'Power' is a term of art denoting an authority vested in a person (called the 'donee') to deal with

or dispose of property that is not his own [15]. A power may be created by an authority in favour of the donee or by reservation in favour of the grantor of property. A power is distinct

from the dominion that a man has over his own property [16]. The power to make oneself owner of property by revoking one's trust or exercising a general power of appointment does not make one the owner of that property. However, for the purposes of equitable execution, equity regards such a power-holder as having 'rights tantamount to ownership' so that the

property can be made available to a judgment creditor of the power-holder [17]. The authority conferred on the donee may be total or partial and will normally be for the benefit of others, though it may be for the benefit of the donee himself.
Differing views have been expressed as to whether the right of a beneficiary is a right in rem or

a right in personam [18]. It has been said in terms that the owner of an equitable estate has

a right in rem and not merely a right in personam [19]. It has, however, been held that a claim for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as may be necessary to vest the legal

ownership in the claimant does not constitute a claim in rem but a claim in personam [20].
The origin and core of the trust lies in the in personam obligations owed by the trustee to the beneficiary, but an in rem vindicatory aspect has been developed by the courts such that a beneficiary may trace wrongfully disposed of trust property into property substituted for it and

may claim that the traced property is part of the ring-fenced trust property [21].

Property that is held by a trustee, given by a settlor, property is for the benefit of beneficiaries.

Who ‘owns’ the property? In traditional conception, no one.

In jural relations: trustee has freedoms/liberties to deal with the property but have duties as set out in the trust deed, always one of which is to use the property for the benefit of a category of people (the potential beneficiaries). If you are a member of the beneficiary group, you have the correlative right, because the courts will allow you to enforce the duties of the trustees. The settlor has no rights, but does have a power to appoint a protector. https://www.ogier.com/publications/the-use-of-trusts-in-jersey

Areas for possible discussion at the end

On translation

Also, consider from translation perspective. In English you'll get many versions of the duty/right relationship for example. In google translate to French I tried

The settlor has a duty to pay the capital.

The settlor must

The settlor should

The settlor has to

All of those came out as an inflection of devoir e.g. doit in French.

The beneficiary has a right to the income. – uses the word droit (law)

The beneficiary should receive the income – uses devrais (should)

A French speaker, translating, may either be less confused due to the single lemma or stem in the first set. Or, the technicality of the translation may be missing. My approach will reduce uncertainty because you wouldn't stop at say Settlor's relationship to X, but look at X's relationship to the settlor, to clarify you are 100% clear on the relationship.

References

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ADDIN ZOTERO_ITEM CSL_CITATION {"citationID":"ab3NjNPV","properties":{"formattedCitation":"(Corbin, 1920)","plainCitation":"(Corbin, 1920)","noteIndex":0},"citationItems":[{"id":230,"uris":["http://zotero.org/users/5212000/items/2VUI5FR9"],"uri":["http://zotero.org/users/5212000/items/2VUI5FR9"],"itemData":{"id":230,"type":"article-journal","title":"Jural relations and their classification","container-title":"Yale LJ","page":"226","volume":"30","source":"Google Scholar","author":[{"family":"Corbin","given":"Arthur L."}],"issued":{"date-parts":[["1920"]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} (Corbin, 1920)

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5. Pg197 of Routledge handbook

Alexander text

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