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Hohfeld and Property

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Christopher M. Newman, *Hohfeld and the Theory of In Rem Rights: An Attempted Mediation* in **The Legacy of Wesley Hohfeld** (forthcoming 2018), available at SSRN.

Rights come in different types, and the failure to distinguish among them can lead one into errors. So argued Wesley Newcomb Hohfeld, who—in two articles published in the Yale Law Journal in 1913 and 1917—offered a highly influential categorization of rights by type. This marvelous collection of essays, edited by Shyam Balganesh, Ted Sichelman and Henry Smith, assesses the Hohfeldian legacy. I'll largely focus on Christopher Newman's contribution, which I found particularly helpful. Some property scholars have criticized Hohfeld's approach as unable to account for the distinctive character of property rights. Newman argues, I think rightly, that the two are compatible.

That Hohfeld was correct to distinguish rights by their type is undisputed. The right that I have to be present on Blackacre by virtue of owning it and the right that I have as a boxer to punch my opponent are clearly different in structure. As Hohfeld would describe it, my right to punch is a privilege only, whereas my right to be on Blackacre includes privileges and claims. X has a privilege with respect to Y that X perform act ? if and only if, by ?-ing, X violates no duty to Y. X has a claim with respect to Y that Y ? if and only if Y has a duty to X to ?. I have a privilege to punch my opponent, because, by punching him, I do him no wrong. But this "right" to punch includes no claim with respect to him: he has no duty to let himself be punched. My right to be on Blackacre, by contrast, includes not only privileges (by being on Blackacre, I violate no duty to you) but also claims (you cannot interfere with my being on Blackacre, for example, by expelling me from it). (For the record, Hohfeld identified two other types of right—powers and immunities—and would say that my rights with respect to Blackacre include them too, but I leave these details aside.)

The cardinal Hohfeldian sin is to assume that a privilege is the same as (or necessarily entails) a claim. Courts really do commit this sin sometimes. Consider the reasoning of the Irish Supreme Court in *Fleming v Ireland*. (I borrow this example from an excellent article on the Hohfeldian framework by Luis Duarte d'Almeida.) The question the Court faced was whether people can be criminally prosecuted for assisting someone in committing suicide. They cannot be prosecuted if they have a right (read privilege) to assist. But the Court wrongly concluded that no such privilege exists, because if it did it would follow that those possessing the privilege would also have a right (read claim) against the government to defense in their exercise of their privilege. The government would not merely be prohibited from punishing them but also obligated to protect them when they assisted someone's suicide. Since no such claim existed, the Court concluded that no privilege existed either. But that's like concluding that a boxer cannot have a privilege to punch his opponent because his opponent has no duty to let himself be punched. That the Court made this mistake does not mean that its conclusion that there is no privilege to assist suicide was wrong, of course. But the conclusion must be justified by substantive arguments, not false claims of deontic necessity.

Although most everyone agrees that Hohfeld's work is an important starting point in thinking clearly about rights, there is plenty of room for criticism. To bring up one that has always bothered me: Should a privilege be defined purely negatively, as the absence of a duty? The negative definition makes it impossible to distinguish between Jane, who has no legal duties with respect to anyone because she is subject to the legislative jurisdiction of no lawmaker, and Martha, who has no legal duties with respect to anyone because she has been privileged by a lawmaker to act however she wants. In addition, the negative definition makes certain normative conflicts impossible. Nothing about the Hohfeldian framework excludes conflicts of duties (and their correlative claims). Joe can have a duty with respect to Fred to wash Fred's car and a duty with respect to Fred to not wash Fred's car. (Perhaps a lawmaker obligated Joe to do both.) But the negative definition of privileges makes conflicts of duties and privileges impossible. If Joe has a duty

with respect to Fred to wash Fred's car, it simply can't be that Joe has a privilege with respect to Fred to not wash Fred's car, for the privilege is defined as the absence of the duty. But if duties can conflict with other duties, why can't they conflict with privileges? Why can't there be a normative conflict because a lawmaker put a duty on Joe to wash Fred's car and gave Joe a privilege not to?

Property scholars have focused their criticism on two aspects of the Hohfeldian framework. The first is the granularity of property rights for Hohfeld—the fact that property rights can be individuated into countless privileges, claims, powers, and immunities. This appears to give support to the bundle-of-rights approach to property, which is sometimes understood as the view that the bundle is fundamentally arbitrary. The second is the correlativity of rights under Hohfeld's framework—the idea that a person's claim is necessarily correlated with another person's duty, a person's privilege with another person's no-claim, and so on. The property scholars argue that this ignores the way that property rights are *in rem*, that is, focused on everyone's relationships to things, instead of individuals' relationships to one another.

Newman argues that the granularity of rights for Hohfeld can be defended if we understand him as not seeking to offer any account of why rights hang together normatively. To say that property is a bundle of rights is not to say that the bundle is arbitrary. There can be a good story about why those rights belong together (indeed, Newman offers such a story).

Newman's response concerning Hohfeld's correlativity thesis is similar. It is unquestionably true that Hohfeld was a vocal opponent of the idea that property rights are directed at things. Like all rights, property rights hold only between individual rights-bearers. To speak of a right *in rem* is simply a misleading way of describing "a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people."

But Newman argues that the *in rem* character of property rights is actually compatible with the Hohfeldian approach, because it concerns the normative grounding of property rights. It is indeed true that property rights serve a distinctive function, different from the *in personam* rights of contract or tort. It is essential to have legal rules whose existence and content can be decided simply by looking at things rather than individuals' relationships to one another. Property rights serve this role. Hohfeld can accept this normative grounding while still insisting that the rights it justifies always involve relationships between individuals.

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