Class Outline – c03

This class has now become Henry Smith and Jeremy Waldron.

The Henry Smith part will be with Henry Smith; hence heavily dependent on both on what he wants to say and on what you want to ask.

I. GOLD-SMITH (their outline with selected quotations and points, preceded by some definitions of terms)

1. Some terms:
    a. Intension vs. Extension. Prof. Smith has a Ph.D. in linguistics. I do not. I think you can intuit what he means by this distinction, but if you want a further explanation, you can ask him.
    b. Modularity: "Modularity is a system property which measures the degree to which densely connected compartments within a system can be decoupled into separate communities or clusters which interact more among themselves rather than other communities. In a highly interconnected system with low levels of modularity, a shock to one compartment may cascade to other compartment and thus increase the risk of a system-wide collapse. Conversely, in a system with high levels of modularity, a disturbance to one component can be better contained and the disturbance will be less likely to spread to other components. The idea of modularity is widely practiced in the management of various systems, for example, forest firebreaks prevent the spread of fire or port quarantines prevent the spread of epidemics or biological pests. As an important attribute of resilience, modularity has been the subject of increasing research in ecological research. Recent empirical work conducted on food-webs have confirmed that food-webs are more compartmentalized than a null model where species interact with equal probability with other species." *Ali Kharrazi, in Encyclopedia of Ecology (Second Edition), 2019* https://www.sciencedirect.com/topics/earth-and-planetary-sciences/modularity
    c. Scaling up. In math it means increasing according to a fixed ratio (Webster, first usage 1945). It is now commonly found in management-speak where we are talking about leaders of companies who are good at making them grow. Getting Covid-19 vaccine into the arms of 70% of the world's population is said to be a problem in 'scaling up'.
2. Introduction
    a. "It is rare for something as precise and analytical as Wesley Hohfeld's system of legal relations to serve as a Rorschach blot. For a century now, legal theorists have seen reflected in it their picture of a flat undifferentiated landscape of law – protean material for refashioning on policy grounds. This was not Hohfeld's vision and yet it is not wholly untrue to it either. Hohfeld believed, as did many others in his day, that greater clarity about basic legal concepts and clearing away ambiguities would make law transparent to policy and lead inexorably to improvement in the law. The first step in clearing away the cobwebs was to ground the law in its micro foundations. This is where the trouble starts."
    b. "And as in other fields, law tames complexity through modularity: breaking the world of interactions into chunks within which interaction is intense but between which interaction is less intense."
    c. "Analyzing notions like ownership and corporations into basic legal relations availing between individuals (both in and out group) is an important first step, but, as we will see, doing so does not automatically answer normative questions. Nor does it furnish a

practical way for actors to navigate the world or judges to assess situations that come before them. What we need is a law that will be simple enough for individuals on the ground to navigate and at the same time that will organize the complexity of their interaction on larger scales in a manageable fashion."

3. Part 1: Flat and Structured Legal Institutions
   a. The distinction between a sound and a complete logical system.
   b. Hohfeld's multital, unital and paucital rights.
   c. "Structure beyond the aggregation of primary legal relations is accommodated with some ambivalence."
   d. Hohfeld's scheme is extensional.
   e. "Kocourek gave an example of a landowner A who gives each individual in society a license to come onto his property except for B, who remains under a duty to keep off. According to Kocourek, B was still under an in rem duty even though it is (now) single, and so would presumably be unital on Hohfeld's scheme. Pre-realists like Corbin had a hard time seeing this: surely A knows who B is. Yet Kocourek's thought experiment shows how Hohfeldian multital rights are not equivalent to in rem rights in an "intensional" sense. Correspondingly, the two methods are not equivalent in terms of delineation cost. Setting up a right wholesale (against the world) communicated through the thing (the *res*) is highly economical compared to spelling out extensionally equivalent unital rights one by one. In Kocourek's fanciful example one would be doing something on that order if one gave licenses individually to everyone except B."
   f. "By defining a thing and using trespass as a basic mode of protection, many of the protected privileges of use can remain implicit. The very ambiguity that Hohfeld decried in using the term "right" to cover both true claims and privileges (liberties) may be seen as a byproduct of costly delineation. Property involves innumerable privileges of use; one can always specify the use more narrowly, as in use for parking cars, use for parking cars on Mondays, use for parking cars on Mondays between 2 and 3 p.m., use for parking Chevrolets on Mondays between 2 and 3 p.m., etc. But generally, leaving the use privileges implicit is sufficient. When a resource conflict becomes severe enough, the law will pick out a use and may regard that use as a subject of a right rather than a privilege. This tendency is most explicit in the case of easements, but it also occurs with nuisance. The "Hohfeldian" intensions – functions from states of the world to packages of entitlements – are usually more elaborate than the delineation of actual property interests. Relatedly, consider the residual claim: it too could be formed synthetically out of all the small pieces or sticks. Or we can define it as the right to an asset after all the other more specific claims have been carved out. Same extension, different intensions." [Henry E. Smith, On the Economy of Concepts in Property, 160 U. Pa. L. Rev. 2097, 2104 (2012)]
   g. The notion that what caused all this was the shift from natural rights to something else (here used in the context of nuisance). Another cause suggested was the fusion of law and equity. Closes with an argument that the late 19th century types were doing the best they could. They were not making logical errors.
4. Part 2: The Problem of Delineation
   a. "We can protect a wide range of largely unspecified privileges with one right," the right to exclude.

b. "For example, the "privilege-no right" relationship is not nearly as significant systemically as the "right-duty" relationship, and it is a fiction to assume otherwise."

c. In rem rights communicate.

d. "Finally, it is easy to confuse a concern about delineation with empty formalism. Not all formalism is empty. If formalism is the (relative) invariance to context, it is a matter of degree. Everyday language is replete with pronouns and indirect expressions leaving much information implied. Formal speech tends to spell things out, and artificial languages (computer languages, the language of first-order logic) are even less context-dependent. In the law, the issue is not whether or not to be formal but when and how much. The Hohfeldian scheme tends to suppress this question. On the one hand, it can be regarded as a species of conceptualism, and concepts, even very concrete ones, are somewhat invariant to context. The beauty of Hohfeld's system is that in vastly different contexts and at very different levels of grain (a privilege of agricultural use versus a privilege of growing beans in May), the relations involved will fall into the four pairs. On the other hand, the Hohfeldian scheme is maximally sensitive to context: as we have seen it can be interpreted as specifying the entire jural context even when it seems irrelevant and even when to some it does not seem jural or legal at all."

5. Part 3: Scaling Up and Emergent Properties of the Legal System

a. Modular Structures. The advantages of modularity.

b. Second-order Adjustments.

i. We must consider the possibility that when we scale up, the system should (a normative concept) not be simply the aggregate of the local: the example of the navigation servitude.

ii. Equity intervenes when we scale up. The problem of opportunism. Hohfeld vs. Maitland on equity. Equity as a law about law. It operates on the second order.

c. Dynamic Potential.

i. The example given is *ad coelum* and its collapse in the face of the airplane. The argument is that it was advantageous that the *ad coelum* principle was vague and hence could be modfied without having to pay for it.

ii. A defense of Lord Lindley in *Quinn v. Leathem*.

II. JEREMY WALDRON (his outline)

"Property is a general term for rules governing access to and control of land and other material resources. Because these rules are disputed, both in regard to their general shape and in regard to their particular application, there are interesting philosophical issues about the justification of property. Modern philosophical discussions focus mostly on the issue of the justification of privateproperty rights (as opposed to common or collective property). 'Private property' refers to a kind of system that allocates particular objects like pieces of land to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society. Though these exclusions make the idea of private property seem problematic, philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents."

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1. Issues of Analysis and Definition (p. 67–71). Starting with the basic proposition that all societies have some form of property, then proceeds to divide types of property into common, collective, and private. Recognizes the 'bundle of rights' theory, and notes the criticisms of it. Then raises the problem caused by the distributional consequences full private property with a full right to exclude, privilege of use and power to convey.
2. Historical Overview (p. 71–73) Plato, Aristotle, Aquinas, Hegel, Hobbes, Locke, Hume, Kant, Marx, and Mill. Can you come up with a one-liner about what each of these thinkers said about property?
3. Is Property a Philosophical Issue? (p. 73–76). Why might it not be? What is the relevance of the concept of self-ownership to the answer to this question?
4. Genealogies of Property (76–79). Is there any advantage to telling these stories if it turns out that they are almost certainly not true?
5. Justifications: Liberty and Consequences (p. 79–82). Can we end up here with two basic justifications?
6. Bibliography (unnumbered) (p. 82–87) The longest section. As a starter bibliography for any paper that intends to deal with the philosophy of property, I can't think of a better one. For a starter bibliography for any paper that intends to deal with the jurisprudence of property, the Breakey bibliography from last week is first-class. Angela Fernandez's bibliography is in her footnotes and not broken out separately, but what's in the footnotes is an good guide for anyone who wants to do an historical paper.