Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie
Journal of the Max Planck Institute for Legal History and Legal Theory

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.lhlt.mpg.de

http://www.rg-rechtsgeschichte.de/rg31
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 31 (2023)
http://dx.doi.org/10.12946/rg31/291-292

Rg 31 2023 291 – 292

Matthew H. Kramer*

Hohfeld and Some Missed Opportunities

* Cambridge University and Churchill College, Cambridge, mhk11@cam.ac.uk

Matthew H. Kramer

Hohfeld and Some Missed Opportunities*

Although this book contains some commendable essays, the volume overall misses opportunities for greater engagement between legal theory and other areas of philosophy. Notwithstanding that the American legal philosopher Wesley Hohfeld died at the age of 39 in 1918 and was therefore able to publish only a small body of work, his schema of legal positions (entitlements and their correlates) has been immensely influential not only in legal theory but also in moral and political philosophy and even in logic and computing science. Thus, a proper celebration of his work more than a century after his death would have brought together philosophers and legal theorists in roughly equal proportions with the aim of encouraging synergistic interaction between the members of those two broad groups. In that respect, the volume under review largely falls short. It is predominantly a collection of essays written by law professors (mostly American law professors) for law professors. To be sure, four of the eighteen chapters – or twenty-one chapters, if the initial three substantive portions of the volume are counted – are assigned to a part entitled »Philosophy of Jural Relations«. Moreover, several of the other chapters are written by scholars who are philosophically quite sophisticated. Nevertheless, a clear majority of the essays in the collection are addressed to issues that are of interest primarily to legal scholars. Most of those essays engage very little if at all with the philosophical literature on Hohfeld's analysis of legal positions. Of course, my complaint here is not that the issues of interest primarily to legal scholars are tackled prominently and sustainedly in a volume that pays tribute to the work of Hohfeld. Those issues are of great intrinsic interest and are important for philosophers as well as for legal scholars, and they were certainly central to Hohfeld's concerns. My complaint instead is about the lop-sidedness of the collection. I fear that the book may incline some legal scholars – and perhaps some philosophers as well – to neglect the philosophical profundity of Hohfeld's analytical framework and the philosophical complexities of it that have yet to be investigated adequately.

Indeed, even in the short opening essay in the »Philosophy of Jural Relations« section, the inattentiveness to the philosophical literature on Hohfeld is striking. Frederick Schauer there ignores that literature altogether, as his only gesture toward the commentaries on Hohfeld is a handful of citations to lawyerly treatments of Hohfeld's work from the mid-1960s or earlier. Particularly startling is that one of the very few publications on Hohfeld cited in Schauer's essay is a 1963 *Minnesota Law Review* article by Roy Stone, one of the worst such publications ever to appear.

In this short review, I have space to engage with only one essay in the collection. I will concentrate on a piece in tort-law theory that is written by two of the philosophically knowledgeable contributors to the volume: John Goldberg and Benjamin Zipursky. Goldberg and Zipursky strongly support the proposition that no one is ever legally entitled to a legal remedy without having held a relevant legal claim-right that has been contravened. I too have argued sustainedly elsewhere in favor of that proposition, which I have designated as the »No Wrongs Without Claim-Rights Proposition«. Moreover, I concur with Goldberg and Zipursky that it is a substantive principle rather than a logical tenet, and I further agree with them that it is not a corollary of Hohfeld's schema of jural relations even though it is very smoothly consistent with that schema. However, Goldberg and Zipursky go astray by purporting to come up with a judgment from the Anglo-American law of negligence that deviates from the No Wrongs Without Claim-Rights Proposition. They condemn the reasoning by the California Supreme Court in the 1968 case of *Rowland v Christian*, as they declare that »the Court in *Rowland* scrapped entirely the

* Shyamkrishna Balganesh, Ted Sichelman, Henry Smith (eds.), Wesley Hohfeld a Century Later, Cambridge: Cambridge University Press 2022, XX + 532 p., ISBN 978-1-107-19288-1

idea that the power to obtain damages, in tort, is predicated on the plaintiff having a claim right [vis-à-vis] the defendant, and the defendant owing a relational duty to the plaintiff« (380). In *Rowland*, so Goldberg and Zipursky assert, »the power to recover damages is detached from claim rights and corresponding duties« (383). Such contentions by Goldberg and Zipursky are unsustainable, for the California Supreme Court in fact affirmed that a legal duty of care is owed by a proprietor or an occupier to anyone who might enter the proprietor's or occupier's premises. Far from suggesting that no legal duty of care is owed, the Court averred that such a duty is owed to *every*one on the premises; the owing of the duty of care to someone is not dependent on his or her status as a licensee or an invitee rather than a trespasser. Hence, the judgment of the Court is fully consistent with the No Wrongs Without Claim-Rights Proposition, and indeed the judgment takes that proposition for granted. Goldberg and Zipursky have gone amiss on this matter because they incorrectly think that the duty of care articulated by the Court is non-relational. They write that the Court »rejected the idea that tort law contains rules that specify relational duties of conduct and corresponding rights. Instead, [the Court] deemed tort law's primary or substantive duties to be nonrelational – to be owed ›to the world‹« (380). Goldberg and Zipursky are doubly in error when they suggest that the legal duties of care incumbent on proprietors and occupiers in California are non-relational. In the first place, those duties of care can be explicated in line with Hohfeld's analysis of duties owed »to the world«. According to his analysis, applied to this context, every legal duty of care borne by a proprietor or an occupier in California is owed in tandem with an indefinitely expansive array of cognate legal duties of care also borne by that proprietor or occupier. Each of those parallel duties of care is correlated with a claim-right held by a party to whom each duty is respectively owed. In short, each such duty is relational rather than non-relational. Furthermore, such a conclusion is also warranted by my alternative explication of duties owed »to the world« that has been presented in my book *Rights and Right-Holding*. As I there recount, any such duty is owed through distributive universal quantification to every one of an indefinitely expansive array of parties. In other words, a proposition that ascribes such a duty to some party P contains a logical quantifier that picks out everybody else in the relevant jurisdiction as a holder of a claim-right correlative to that duty. To each one of those parties the specified duty is separately owed, for a proposition ascribing a claim-right to each party is entailed by the proposition that ascribes the duty to P. Hence, both under Hohfeld's account of legal duties owed »to the world« and under my account thereof, every duty of care in California is relational rather than non-relational. Goldberg and Zipursky stumble when they declare otherwise, and they therefore stumble further when they contend that the California Supreme Court in *Rowland v Christian* abandoned the No Wrongs Without Claim-Rights Proposition.[1] Contrary to what they suggest, the Anglo-American law of negligence has always been firmly in accordance with that proposition.

Despite my reservations in the opening paragraph of this quick review, I recommend *Wesley Hohfeld a Century Later* to moral and political and legal philosophers (as well as to legal theorists and historians). Philosophers will find much of value on which to ruminate in the volume, even though it could profitably have addressed more of the matters that are especially of interest to them.

■

1 Of course, nothing said here is an endorsement of the Court's obliteration of the distinction between trespassers and visitors. Like Goldberg and Zipursky, I view with dismay the Court's effacement of that distinction.