**Philosophy of Law 1/29/18**

* Hohfeld: the term “rights” is broad - captures all of these concepts:
  + each of which involves two people and an act type (act type can be an action or an omission)
* Claim: X has claim against Y that ƪ
  + Is correlated to Duty: Y has a duty to X that ƪ
  + For example: X has a claim against Y that Y not go on Blackacre
    - Is correlated with Y having a duty to X that Y not go on Blackacre
* A privilege: X has a privilege with respect to Y to ƪ
  + - when you talk about X’s privilege concerning Y to ƪ, ƪ refers to X’s act
  + Is correlated to No Claim: Y has a no claim with respect to X that not ƪ
  + Which is itself equivalent to X having no duty with respect to Y that not ƪ
  + For example: boxer X has a privilege with respect to boxer Y to hit Y
    - means that Y has a no claim with respect to X that not hit Y
    - or equivalently that X has no duty with respect to Y that not hit Y
* Important to Hohfeld: Is this idea of a privilege
  + Not sensitive to the fact there are these privileges then you can make errors in legal reasoning.
  + People naturally thing that I have a privilege to ƪ then people thing that means people have a duty to let you/aid you/not to interfere with ƪ
  + but this is not the case
* Hohfeld would say that the fact that the Fleming wants a privilege to be recognized for a person to aid her in committing suicide does not mean the person has any claims against the government (that is, that the government has any duties to let him, aid him, etc.)
  + Makes it legally possible/could be there is a struggle between the government and the person trying to aid the suicide: government can stop him; but if he aids her the government cannot bring charges against him.
    - Could be a state of affairs, legally possible
* This doesn’t mean the Irish Supreme Court was ***wrong in its conclusion***, it was wrong in its reasoning that a privilege with respect to the government would entail a claim against the government to non-interference in one’s exercise of the privilege
  + the court just spent their time talking about the improperness of a claim against non-interference
* Powers: X has a power as to Y if X has has capacity to change Y’s rights.
  + Power is just capacity to change rights by engaging in an action, not necessarily a privilege to engage in that action
  + you can have a power by performing act A and yet have a duty not to perform act A
  + for example a lawyer can have a power to waive his client’s attorney client privilege no without the client’s consent, but a duty not to so
  + you have a duty not to hit someone, but in doing so you exercise a power because you change that person’s rights – you make it such that they have a right of compensation against you
* A power is correlative to a Liability (that is Y is vulnerable to having his rights changes): Y has a Liability
* An Immunity is the absence of power (a no power with respect to you)
  + Correlative, Disability
* Inalienable rights- right and don’t have power to change that right – you have no power with respect to yourself (could also say you have an immunity with respect to yourself)
  + The way used in the declaration of independence, colloquially, is wrong because an inalienable right is one you don’t have a capacity to change
    - but these “inalienable” rights can be waived which means their owners have powers over them
* Can these distinctions in Hohfeld illuminate both legal and moral rights?
  + Yes; moral philosophers use Hohfeld all the time, Lawyers use Hohfeld all the time.
    - e.g. idea that property is a Bundle of rights- Hohfeldian origin
* back to privileges
  + as we have seen, one confusion is to think that a privilege entails a claim of noninterference in one’s exercise of the privilege
  + Green thinks there is a comparable confusion
    - that the absence of a privilege to do something entails the absence of a claim against non-interference in doing it
    - that also isn’t so
    - assume that I do not have a privilege to enter onto your land
      * meaning I have a duty not to enter on your land
    - it does not follow that I lack a claim against you to non-interference in my going on your land
      * in fact I can have such claims to an extent
      * for example, you cannot do anything you want in interfering with me
        + Can’t behave recklessly, maybe can’t forcibly eject me-
      * you lack a privilege to interfere in these ways

strangely, as Hohfeld uses the terms I exercise a power when I violate duties to the extent that I create a claim of compensation in the person to who I held a duty

but it does not seem that all cases where one exercises a power to create a duty of compensation are those where one has violated a duty

* got into as discussion about the Vincent v. Lake Erie Tr. case
* Boat owner in storm- exercising privilege to dock boat on another’s dock
  + because there was a storm, he had no duty not to dock
    - indeed he also had a claim against non-interference by the owner in his docking
  + but still, by docking he created a claim by the owner to compensation
  + Storm changed the situation- before I had a duty not to dock, but after variable X, now I have a privilege
* John suspected that the boat owner did have a duty not to dock, but the duty was simply overridden
  + Green: this gets into issues we will deal with later
    - when I promise to take you to the zoo but don’t because my mother got sick and needed to go to the hospital, is this a case where the duty to take you to the zoo was still there but was overridden or is it a case where there was no duty anymore because an exception to the duty applied
  + but in the Vincent case Green would say that there was no duty not to dock at all (indeed there may have been a duty to dock)
* duty is the core concept for Hohfeld
  + but what is it?
* does it necessary follow from a duty that when it is violated there is a remedy – a claim against the violator (e.g. to compensation)
* Green thinks Hohfeld would say no
  + that would be confusing a duty with a power
  + it is possible to have a duty but no power
    - when one violates the duty no one’s rights change
    - and thus the person to whom one had the duty does not have a claim to compensation
    - where there is a right there is a remedy?
      * not necessarily
* Green thinks by a duty Hohfeld means they have done something wrong by violating the duty but it does not necessarily mean anything else such as that there is a claim of compensation etc.
* Trump has a duty to everyone not to violate the emoluments clause
  + When he violates the duty he does not exercise any power because there is no claim to a remedy against him.
* Powers
  + Legislators have power- could give people privileges/say all we have is privileges
  + Probably we would describe courts as exercising powers.
* This will be very useful in talking about the legitimacy of government
* Property
  + Hohfeld said rights were about people, not things
    - in rem right really means a right with respect to many people
  + property is a bundle of rights- what are the Hohfeldian rights?
    - Powers
      * you can gift property, abandon it, sell it, create licenses to it
        + these are ways you can change your own and others rights
    - Claims against others to not use your property
      * Properties comes with a set of duties to other people too i.e. nuisance laws.
    - Privileges-
      * Privilege to do with the property what you want
      * If I used my power to give someone only a privilege to use the land, then I could still interfere because I did not give them a claim against me to non-interference in the exercise of their privilege
* no Criticism of Hohfeld
  + Privileges defined as the absence of duty - just a negation:
    - Does a Cougar have privileges?
      * I guess yes, if we define it as the absence of duty.
        + If you sue the cougar there is no cause of action
      * But seems weird to talk about privileges as the absence of duties
      * privileges seem more positive – a *license* to do something
        + How do we solve this problem? Distinction Cougar v. Person
        + the reason that a cougar’s absence of duties does not mean that it has privileges is that only persons can be bearers of rights?
        + Green doesn’t think this works

assume a world without law

would we say that people in that would have legal privileges?

no – they don’t have anything

that is why we think that if there is a legal system there is a law in the background licensing people to act (giving them privileges) even when no one has legislated

e.g. if it I not forbidden it is permitted

* + Another problem: I have a privilege to not hit you in the face (because if I don’t hit you in the face I have violated no duty to you)
    - but I also have a duty not to hit you in the face
    - Normally when we talk about privileges we talk about paired privileges; privileges to do something and to do the opposite
      * To do it or to not do it
    - Hohfeld does not talk about them this way: privilege not to hit you in the face does mean I have a privilege to hit you in the face
      * a privilege to ƪ is compatible with a duty to ƪ
    - Halpin criticizes this - says only three stable positions
      * duty to ƪ
      * duty to not-ƪ
      * privilege to ƪ and to not-ƪ
    - d’Almeida- says not a problem because Hohfeld not capturing the total normative situation, he is just trying to capture these relations
      * it does indeed follow from a privilege to ƪ that there is an absence of a duty to ƪ
      * Green – think about it from someone X suing because X ƪ-ed
      * all X needs to do is point to the privilege to ƪ
        + that he had a duty to ƪ is irrelevant
      * d’Almeida: also, it is not clear that duty to ƪ is stable compared to the privilege to ƪ
      * there might at the same time be a duty to not-ƪ
        + contradictory duties
      * Green thinks this line of argument by d’Almeida is a problem though
        + once we allow for contradictory duties there is a problem
        + We are told by Hohfeld that if we have a privilege to ƪ we don’t have a duty not to do it – those are simply the same things
        + but Green says if we allow for the contradictions of duties we should allow for contradiction between privileges and duties

the privilege to ƪ could contradict with the duty to not -ƪ

if so, then Hohfeld cannot define a privilege to ƪ as the absence of a duty to not ƪ

Problem for Hohfeld, Green says we should understand privileges as positive.