Singapore Journal of Legal Studies
[2024] 361–376

RIGHTS IN REM AND THE MULTITAL MÉNAGERIE

Gopal **Sreenivasan***

Unlike rights *in personam*, which are held against a limited number of people (paradigmatically, one), rights *in rem* are held against everyone else in the world. Among other things, "everyone" denotes a dynamic collection of persons. However, in Wesley Hohfeld's analysis of rights, every right is a relation between exactly two people. For Hohfeld, a right *in rem* must therefore be analysed as an aggregate of rights, where each relation in the aggregate features the right-holder at one pole and one other person in the world at the other. Even for aficionados, this is one of the oddest aspects of Hohfeld's account — which he crowns with a curious label to boot, "multital" right — and critics have had a field day with it. For example, Penner (2020) criticises Hohfeld's multital analysis on the grounds that its information costs are too high. In this paper, I show how Hohfeld's treatment of rights *in rem* can be amended to avoid Penner's critique.

I. Introduction

According to Wesley Hohfeld's canonical analysis of claim-rights, "X has a claim-right against Y that Y φ if and only if Y has a duty to φ that is owed to X".[1]

Many aspects of this analysis call for attention. For present purposes, I am only interested in one of them, which is that a claim-right is defined in terms of a relation that holds between exactly two people. In my rendition, they are X and Y. Unlike rights in the everyday understanding, a Hohfeldian claim-right is not something that the right holder holds all by herself. In this respect, Hohfeld's claim-duty relation is isomorphic to the other three jural relations he famously describes and distinguishes. Each of Hohfeld's four "fundamental jural relations" holds between exactly two people. Still, for simplicity, I shall limit my discussion to claim-rights.

On the face of it, the feature of Hohfeld's analysis that I have singled out creates a difficulty for accommodating rights *in rem* under its umbrella. To anticipate in a nutshell, Hohfeld's definition seems precisely geared to fitting the structure of a claim-right *in personam*. However, rights *in personam* contrast with rights *in rem*, which have a different structure. So how does Hohfeld accommodate claim-rights *in rem*?

In the second, and less well known, of the two articles that make up his classic treatise, Hohfeld addresses this challenge directly. But what results is possibly the

* Lester Crown University Distinguished Professor of Ethics at Duke University. An earlier version of this paper was presented to a meeting of the Research Forum on Basic Legal Positions, in Lisbon in September of 2023. I am grateful to my fellow participants for very useful discussion. I should also like to thank Andrew Halpin and James Penner for their extremely helpful written comments.

1 Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919) [Hohfeld, *Fundamental Legal Conceptions*].

most idiosyncratic aspect of his entire account of rights, one which has served as something of a lightning rod for critics. Hohfeld even coins some awkward terminology to baptise his analysis, replacing the traditional distinction between rights *in rem* and rights *in personam* with a distinction between "multital" rights and "paucital" rights. In this paper, I shall consider a recent critique of his multital analysis lodged by James Penner.[2] My aim will be to rescue Hohfeld from Penner's critique.

To set the stage, I shall begin, in Part II, by reviewing the structural distinction between rights *in rem* and rights *in personam*. I shall conduct this review generically, without regard to certain details of Hohfeld's discussion. Thereafter, in Part III, I shall distinguish two options for defining a claim-right *in rem* along the lines of Hohfeld's canonical analysis, but in such a way as to capture the distinctive structure of rights *in rem*. As we shall see, only one of these options preserves the feature, common to all Hohfeldian jural relations, that a claim-right *in rem* is defined in terms of a relation holding between exactly two people. Not surprisingly, this is the option that Hohfeld adopts. I shall take it that this choice constitutes the heart of his multital analysis.

In Part IV, I shall then present Penner's critique; and finally, in Part V, I shall defend Hohfeld against Penner. My strategy will be to concede the substance of Penner's objection, while proposing an amendment to the multital analysis that avoids the objection completely. Or so I shall argue. My amendment has the further advantage of cohering nicely with the fundamental basis of the structural distinction between rights *in rem* and rights *in personam*.

II. What are Rights in rem?

Rights *in rem* and rights *in personam* differ with respect to the *scope* of their correlative duties.[3] The simplest way to capture this difference would be to say that the duty correlative to a right *in personam* is borne by one person, whereas the duty correlative to a right *in rem* is borne by everyone. For various reasons, this is too simple. One reason is that the holder of a claim-right *in rem* may elect to *release* one or more others from their correlative duties, in which case it will no longer be true that everyone bears the relevant correlative duty. For example, a landowner may grant some people permission to enter their property, and yet their property right

---

2 Penner, *Property Rights: A Re-Examination* (Oxford: Oxford University Press, 2020) at ch 5 [Penner, *Property Rights*].

3 Here and often in what follows I omit to specify *claim*-rights explicitly, though that detail should be clear from the reference to correlative duties. In this paper, I restrict my attention to the *structural* dimension of the distinction between rights *in rem* and rights *in personam*. Philosophically, this is its most important dimension. But there is also a material dimension, which is concerned with the difference in remedial rights associated with the two sets of primary rights. For some discussion, see Sreenivasan, "Rights against the world" (2024) 84(2) Analysis 311 at §3 [Sreenivasan, "Rights against the world"], which draws its examples from Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) at ch 7–8.

does not then cease to be a right *in rem*. This was clearly among Hohfeld's reasons for not relying on the simple formulation.[4]

To prepare the way for correcting this formulation, let me introduce the idea of "everyone" in what I shall call the dynamic sense. I shall abbreviate it as *everyone**. In the dynamic sense, "everyone" refers to a collection of persons whose extension expands *automatically*, whenever a new person is born (or attains moral personality, if this only occurs later). Thus, for any pre-existing claim-right, the correlative duty is borne by everyone* if any new person, upon "birth", will automatically bear this same duty.[5] Otherwise, if a new person will not automatically bear it, the correlative duty is *not* borne by everyone*, even if it somehow happens to be borne by everyone currently in existence.

With this idea in hand, we can now describe the structural difference between rights *in rem* and rights *in personam* correctly.[6] What distinguishes a right *in rem* is that its correlative duty is borne by everyone* initially, where the qualification "initially" accommodates the possibility that some bearers of this correlative duty may later be released from it (or find that it otherwise goes out of existence).[7] By contrast, the duty correlative to a right *in personam* is not borne by everyone*. Typically, it is borne by exactly one person. Sometimes it is borne by (quite) a number of people. In principle, it might even be borne by everyone. But it is never borne by everyone*.

Property rights and rights to bodily integrity are paradigmatically rights *in rem*, whereas promissory or contractual rights are the paradigms of rights *in personam*. To grasp what my emphasis on the structural difference between these two groups of examples contrasts with, it may help to introduce a second distinction between kinds of rights and to spell out how it differs from the distinction that interests us. What I have in mind is the distinction between "general" rights and "special" rights, with which the distinction between rights *in rem* and rights *in personam* is commonly confused.[8]

---

4 See, *eg*, Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 73: "If, for example, A, the owner of Blackacre, has given his friends C and D 'leave and license' to enter, A has no rights against C and D that they shall not enter; but he has such rights against persons in general; and they are clearly to be classified as being 'multital' or '*in rem*'."

5 Prior to the new person's birth, the correlative duty need not have been borne by everyone (in the static sense), since some people may already have been released from it.

6 In this paragraph, I reproduce some conclusions from Sreenivasan, "Rights against the world", *supra* note 3, where they are discussed more extensively.

7 Licence from the landowner is not the only thing that can result in some bearers of the correlative duty not to enter Blackacre finding that they no longer have that duty. In the legal realm, for example, the correlative duty not to enter private land can also be circumscribed by legislation, as when Parliament enacts a right to roam. Still further from a release by the right-holder, someone who has fallen into a coma no longer bears certain duties they used to bear, and perhaps not any duties — at least, not as long as they remain in the coma. Some of these lapsed duties may correlate with a right *in rem*.

8 Penner, *Property Rights*, *supra* note 2 at 88–93 also employs the contrast with the distinction between general rights and special rights to help elucidate the distinction between rights *in rem* and rights *in personam*, although his account of it differs somewhat from mine. My adoption of this strategy follows

Rather than turning on the scope of their correlative duties, the distinction between general rights and special rights concerns the *basis* of the rights themselves. A *general* right is a right whose basis or justification is such that either everyone has the right initially or no one has it.[9] Everyone has the right initially if the justification succeeds and no one has the right if it fails. Hence, if anyone has a general right, then everyone has it (or at least, had it initially). Rights to bodily integrity — *eg*, the right not to be assaulted — are standard examples of general rights. By contrast, a *special* right is a right whose basis or justification is consistent with only some people having the right. Promising is the standard example (again). Typically, only the promisee has a right arising from the promise. Exceptions to this rule are sharply limited in number. As a basis for rights, promising is fully consistent with only some people having the right consequent upon a given promise.

One source of confusion, then, as between these two distinctions, is that the same pair of examples often serves to illustrate two ostensibly different contrasts. In my account, rights to bodily integrity served as the example of both general rights and rights *in rem*, while promissory rights served as the example of both special rights and rights *in personam*. There is nothing wrong with these examples. However, to exhibit the independence of the two distinctions, we either need an example of a right that is both special and *in rem* or of a right that is both general and *in personam*.

Waldron's analysis of property rights provides us with an example that combines a special right with a right *in rem*.[10] As we can see in Table 1, this is enough to pull the two distinctions apart. The key to this result is to recognise that the classification of a right as either a general right or a special right *varies*, depending on the basis one ascribes to it. Since different theories of property propose different justifications for property rights, the classification of property rights as general rights or special rights will vary with the theory. On Locke's theory, the original basis of property rights is first time labouring under certain background conditions. This is a basis that some people can satisfy, while others never do. In that case, some people will be justified in having property rights initially, while others justifiably never have any property rights. It follows that, under Locke's theory, property rights are both special rights and rights *in rem*.

Table 1. Waldron's insight

	in rem	**in personam**
general	bodily integrity	?
special	property (Locke)	promises

Penner proposes a nice candidate to fill the empty upper right box in Table 1, which combines general rights and rights *in personam*.[11] His example is a right

Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at ch 4 [Waldron, *Private Property*], on whom the table below is modelled.

9 Here the qualification "initially" serves to accommodate the possibility that a given right can be forfeited or waived in a particular case *without* thereby turning everyone else's corresponding right into a special right. Cf Waldron, *supra* note 8 at 115.

10 Waldron, *Private Property*, *supra* note 8 at ch 4.

11 Penner, *Property Rights*, *supra* note 2 at 91.

to the care of one's parents. This is clearly a right *in personam*, since only one's parents bear the correlative duty. Presumably, the idea is furthermore that since everyone necessarily has parents, there is no obstacle to regarding a right to their care as a general right, *ie* a right that everyone has initially. Unfortunately, this idea equivocates on the meaning of "parent".

What cannot be denied is that everyone necessarily descends from the union of a sperm and an egg. One's *biological* parents are the persons whose sperm and egg formed the union from which one descended. In that sense, everyone necessarily has parents. A different sense of "parent" is someone who plays what might be called the parent role in one's upbringing. With apologies for my lack of imagination, let me call the occupant of this role, one's *parent**. It does not follow from the facts of biology that everyone necessarily has a parent*, not even initially. Some people are born without any living biological parents. We do not even need a science fiction or high tech scenario to make sense of these orphans from birth. To invoke one literary staple, the biological father may have been killed at war during the pregnancy and the biological mother may have died in childbirth. Against whom does an orphan from birth hold their right to parental care? Is anyone besides their biological parents duty-bound to be their parent*? Without some definite person to bear the correlative duty, orphans from birth cannot hold a right to parental care. In that case, however, the right to parental care is not a general right, but rather a special right.[12]

III. Rights Multiplication versus Duty Multiplication

As we have seen, Hohfeldian jural relations are defined as holding between exactly two people. Among these relations is the claim-duty relation, which constitutes Hohfeld's definition of a claim-right. The structure of a Hohfeldian claim-right therefore fits the case of the typical promise perfectly, since typically only the promisor bears the duty created by a promise and only the promisee holds the correlative right. Thus, if Y promises X to paint X's fence tomorrow, we get:

(a) X has a claim-right against Y that Y paint X's fence tomorrow; and
(b) Y has a duty to paint X's fence tomorrow that Y owes to X,

where X's right and Y's duty are correlatives because they have the same content — Y's painting X's fence tomorrow — and the same two people (X and Y) occupy the two poles of each relation, in reverse order. In other words, the normative situation resulting from Y's promise instantiates the terms of Hohfeld's definition of a claim-right precisely, reading "Y's painting X's fence tomorrow" for φ. Since promissory

[12] In Sreenivasan, "Rights against the world", *supra* note 3, I discuss and reject another candidate to fill the empty upper right box in Table 1. Both examples fall at the same structural hurdle, which is the fact that a correlative duty bearer is not guaranteed to exist for *everyone*, not even for everyone who has neither forfeited nor waived the right in question.

rights are the paradigmatic rights *in personam*, Hohfeld's definition fits the typical claim-right *in personam* straight out of the box, as it were.[13]

On the other hand, as we have also seen, the duty correlative to a right *in rem* is always held by more than one person, and hence *this* claim-duty relation always holds between more than two people. At a minimum, the correlative duty here is borne by everyone initially,[14] which is always a great multitude, even when an unusual number of people have had their duty waived. How, then, can the structure of Hohfeld's analysis of claim-rights be preserved, while applying as between the right holder and a great multitude of duty bearers at the same time? Some kind of adjustment to the analysis is required to accommodate claim-rights *in rem* within Hohfeld's framework.

As far as I can discern, there are two obvious options available to Hohfeld, which I shall call the "rights multiplication" (RM) model and the "duty multiplication" (DM) model.[15] Both of them respond directly to the fact that the relation of interest holds between *more than two* people. That is, they respond to this fact by multiplying something in the analytical structure. I shall set each model out in my own terms, commenting a little on their respective features along the way. Although Hohfeld himself adopts the RM model, as we shall see, I shall begin with the DM model.

According to the *duty multiplication* model, there are as many duties initially correlative to a given claim-right *in rem* as there are people in the world, minus the right holder.[16] Each of these duties correlates with one and the same right. Thus, on the DM model, in the case of rights *in rem*, the claim-duty relation is not a one-to-one relation holding between exactly two people. It is rather a one-to-many relation holding among all the people in the world. In this signal respect, it differs from the other Hohfeldian jural relations, including the claim-duty relation for rights *in personam*.

To illustrate, consider one of Hohfeld's favourite examples, A's ownership of Blackacre, which partly consists in A's claim-right *in rem* that others not enter Blackacre. On the DM model, A's claim-right correlates with as many initial duties that another does not enter Blackacre as there are other people in the

---

[13] Of course, rights *in personam* are not restricted to holding between two people, so a question remains about how Hohfeld's definition accommodates *atypical* claim-rights *in personam*. We shall return to it at the end of this part.

[14] As we saw in Part II, the duty correlative to a right *in rem* is actually borne by *everyone** initially, and not simply by everyone initially. But I shall ignore the difference between "everyone" and "everyone*" to begin with and return to it in Part V.

[15] I do not mean to deny that other options may be available. For example, a third option is to have everyone else *share* one and the same correlative duty, and so not to multiply either rights or duties. This would be to treat the language of "the" duty correlative to a right *in rem* quite literally. Hohfeld explicitly disparages this option: "Surely no one would assert that A has only a single right against B, C, and D, with only a single or unified duty resting on the latter. A's right against B is entirely separate from the other two. B may commit a breach of *his* duty, without involving any breach of C's duty by C or any breach of D's duty by D. For, obviously, the content of each respective duty differs from each of the others. To make it otherwise C and D would have to be under a duty or duties (along with B) that B should not enter on X's land": Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 93. Strictly speaking, Hohfeld is here discussing an imagined case of a right *in personam*. But then later, on the same page, he continues: "Point for point, the same considerations and tests seem applicable to A's respective rights *in rem*, or multital rights, against B, C, D, and others indefinitely …".

[16] In the case of legal rights, "in the jurisdiction" can be substituted for "in the world".

world. Specifically, B, C, D, and so on each initially bears a duty "that B not enter Blackacre" or "that C not enter Blackacre" or whatever the appropriate equivalent may be. In other words, each of the correlative duty bearers is under a duty whose content matches the content of A's right *in rem* — that others not enter Blackacre — except that the subject in question, "others", is indexed to the bearer himself or herself (B, C, D, as the case may be).

By multiplying the *duties* that correlate with a given right *in rem*, and indexing them to the respective duty bearers, the DM model preserves the "separateness and independence" of each correlative duty bearer's duty, and thereby avoids assimilating it to the case of a joint duty, an assimilation to which Hohfeld strenuously objects.[17] In particular, it allows for B, say, to infringe his duty not to enter Blackacre (or not to infringe it) without implying anything about whether anyone else's correlative duty not to enter Blackacre has been infringed. Likewise, it allows for B to be released from this duty without implying anything about the continued existence of anyone else's correlative duty.

At the same time, the multiplication and indexing of correlative duties allows the claim-duty relation to have the specifically *bilateral* character in the case of rights *in rem* that Hohfeldian claim-rights feature generically.[18] To continue with the Blackacre example, on the DM model, A's claim-right *in rem* that others not enter Blackacre can be a right that A holds *against* B (among others); and B's duty not to enter Blackacre can be a duty that B *owes to* A.

Thus, when our focus is confined to A and B, the claim-duty relation here has very nearly the same character and structure found in Hohfeld's canonical analysis of a claim-right. There are two differences. First, there is the slight difference in content between the generic object of the right ("others") and the indexed subject of the duty (B); and second, when the focus expands, A's right turns out to be held against others, too, besides B.

According to the *rights multiplication* model, A, the owner of Blackacre, has more than one claim-right *in rem* that others not enter Blackacre. In fact, A has as many claim-rights that others not enter Blackacre as there are people in the world, minus the right holder (*ie*, A himself).[19] Moreover, this multiplication of rights does not come as a substitute for the multiplication of duties in the DM model, but in addition to it. On the duty side of a claim-right *in rem*, the RM model is actually identical to the DM model. However, thanks to its parallel multiplication of rights, the RM model can assign one claim-right on A's part to correlate with *each* of the duties not to enter Blackacre that B, C, D, and so on respectively bear (and owe to A).

---

[17] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 93; quoted in part at *supra* note 15.

[18] In neither the generic case nor this case has this bilateral character been explained. So I am not suggesting that the DM model does anything to explain it. How best to provide the explanation is the subject of a long-running dispute. For some discussion, see Sreenivasan, "Duties and their direction" (2010) 120(3) Ethics 465. However, since the question arises equally for rights *in rem* and rights *in personam*, there is no reason to expect an answer from accounts of rights *in rem* specifically. All I mean in the text is that the DM model *makes room for* this feature (along with its explanation, whatever the explanation may be).

[19] For simplicity, I omit the qualification "initially" from my exposition of the RM model here. Still, to accommodate the possibility that a correlative duty — in this case, not to enter Blackacre — may be waived, the qualification is required. In this respect, the RM model resembles both the DM model and my generic analysis of rights *in rem*.

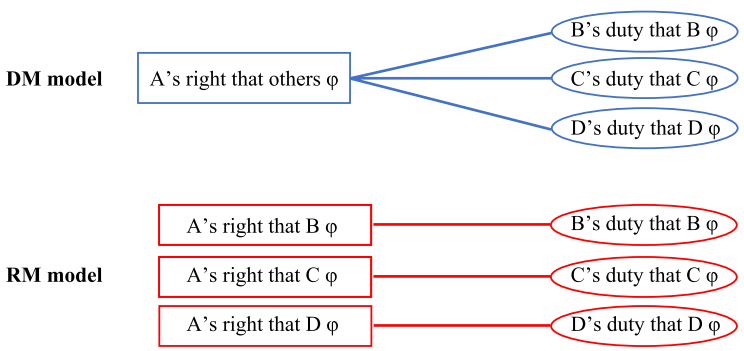
Two principal consequences ensue. To begin with, "a" claim-right *in rem* turns out, on the RM model, to be better described as an *aggregate* of one-to-one claim-duty relations. Furthermore, in place of having a generic object ("others"), the content of each claim in the aggregate can be indexed to the bearer of its correlative duty, too. Thus, each relation in A's aggregate, of which there are initially as many as there are other people in the world, has the precise character of Hohfeld's generic definition of a claim-right. To wit:

(a) A has a claim-right against B that B not enter Blackacre; and
(b) B has a duty not to enter Blackacre that B owes to A,

where "B" is, of course, replaced by "C", "D", and so on, in each of the remaining relations.

Table 2 illustrates the difference between the one-to-many relation found in the DM model and the aggregate of one-to-one relations found in the RM model. For the purposes of this illustration, imagine that A, B, C, and D are the only people in the world.

Table 2. Two models of claim-rights in rem



Although my two models, DM and RM, are meant to present Hohfeld with options for analysing rights *in rem*, I have articulated them without much reference to his text. Hohfeld's official proclamation of his multital analysis reads as follows:

> A multital right, or claim (right *in rem*), is always one of 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.[20]

Various things could be said to unpack or even simply to comment on this passage. I shall restrict myself to a pair of comments. Hohfeld's reference to "a very large and indefinite class of people" invokes his own effort to improve on "everyone" as

[20] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 72; footnotes and italics omitted.

the bearer of the duty correlative to a right *in rem*.[21] I am going to continue ignoring this bit, as I prefer my own "everyone* initially" solution. Most obviously, however, only glancing reference can be found to the structure of the RM model, and even that only arrives implicitly via Hohfeld's use of the plural "separate rights".

Nevertheless, it is quite clear that Hohfeld adopts the RM model. For more explicit confirmation, one has to wait until his dissection of various "common errors" involving rights *in rem*. Hohfeld describes the third such error this way:

> (c) A single multital right, or claim (right *in rem*), correlates with a duty resting on one person alone, not with many duties (or one duty) resting upon all the members of a very large and indefinite class of persons.[22]

That is more or less an explicit rejection of the DM model.[23] Clear affirmation of the RM model follows on the next page, where Hohfeld writes:

> instead of there being a single right with a single correlative duty resting on all the persons against whom the right avails, there are many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person.[24]

I shall therefore take it that a "multital" right is equivalent to a claim-right *in rem* on the RM model, either one of the individual rights in its aggregate or the aggregate itself entire, as context requires.

Before moving on to Penner's critique, let us return briefly to the point that atypical claim-rights *in personam* do not fit Hohfeld's canonical definition of a claim-right either.[25] As we have just seen, the DM and RM models both accommodate the existence of multiple correlative duty bearers, which is what makes a right *in personam* "atypical". In principle, then, the choice of either model is available to analyse atypical rights *in personam* as well. On reflection, however, the DM model is not suitable for rights *in personam*. Only the RM model suits them.

To see why, consider the standard mechanism for generating "a" right *in personam* to φ that X, say, can hold against multiple others, namely, promising. Suppose, for example, that B, C, and D each promises X to φ, on separate occasions and unrelated to each other. In that case, X holds a claim-right *in personam* to φ against each of them. If these four were the only people in the world, one could say, furthermore, that X holds "a" right to φ against "everyone". Intuitively, however, the "unity" of this right is no more than a superficial side-effect of the mere coincidence in the content of what B, C, and D each owes X (namely, φ-ing). X's rights to φ against each of them remain distinct, as the independence of their respective bases

---

[21] Hohfeld's effort on this score has been the subject of a century of criticism, including by Kocourek, "Rights in rem" (1919–1920) 68 U Pa L Rev 322 and Penner, *Property Rights*, *supra* note 2 at ch 5.

[22] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 91.

[23] Strictly speaking, what Hohfeld rejects here is an amalgam of the DM model and the joint duty model. However, his specific objections only target the joint duty model. Cf text *supra* note 15.

[24] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 92.

[25] See text *supra* note 13.

confirms. While the RM model preserves X's rights *in personam* as separate rights, the DM model (wrongly) assimilates them to a single right against everyone.

IV. Penner's Critique

Penner criticises Hohfeld's multital analysis of rights *in rem* on several grounds,[26] but only one of them concerns me here. For simplicity, I shall refer to his critique in the singular. Although he does not distinguish (naturally enough) between the DM and RM models, Penner's critique applies to both of them.[27] However, I shall only discuss it in relation to the RM model, since that is the model Hohfeld himself adopts for rights *in rem*. In this paper, I do not engage the free-standing question of which of the two models is the better model of rights *in rem* as a matter of fact (as distinct from the matter of understanding Hohfeld). My aim is only to defend both models against Penner's critique.

Penner's objection is that Hohfeld's multital analysis is "outlandishly epistemically onerous".[28] More specifically, he complains that in "order to comply with one's duties, one must know the identity of each right-holder and each item of property he particularly owns".[29] To illustrate this charge, let us return to the familiar territory of Blackacre. For every person in the world (save himself), the owner of Blackacre, A, has a right against this person that he or she not enter Blackacre;[30] and this person, in turn, has a duty not to enter Blackacre that is owed to A. Since I am not the owner of Blackacre, I have a duty not to enter Blackacre that is owed to A. Penner's claim is that in order for me to *know* that I have this duty, I have to know *who A* is and *that A owns* Blackacre; and his objection is that this is much too much to ask. To make things worse, this unreasonable demand is repeated for every piece of private property I am likely to encounter. I take it that no one would disagree that this is, indeed, too much to ask. I certainly do not.

In that sense, Penner's objection is clearly successful. To put it another way, if his claim is correct, then his objection is good. Before we examine his grounds for the claim, it may be helpful to appreciate the alternative, much less demanding basis on which Penner holds that I can come to know that I have a duty not to enter Blackacre. Among other things, introducing this basis provides an occasion to observe that Penner's critique of Hohfeld belongs to a larger argument prosecuted across his book, about the nature of property rights. The target of his larger argument is the so-called "bundle of sticks" theory of property, of which Hohfeld's multital analysis is a constituent element.[31]

---

[26] Penner, *Property Rights*, *supra* note 2.

[27] For that matter, the amendment I proceed to offer in reply, in Part V, is equally available to both models. I should perhaps add that Penner's more detailed descriptions of the multital analysis nevertheless conform to the RM model. For example, "a right *in rem* is not *one* right good 'against the world'. Rather it is a *battery of one-to-one rights in personam*" (*Ibid* at 87, original italics).

[28] Penner, *Property Rights*, *supra* note 2 at 97.

[29] *Ibid*.

[30] Cf text *supra* note 19.

[31] This is not to say that Hohfeld himself holds or advances the bundle of sticks theory, but simply to observe that Hohfeld's multital analysis is employed by those who do affirm that theory.

On Penner's own preferred account of property, there is a basic property norm (BPrN) that enjoins, "do not trespass on property that is not one's own".[32] Against that background, Penner suggests, I only have to know three things in order to know that I have a duty not to enter Blackacre: BPrN itself; the fact that Blackacre is the sort of thing that is typically "privately owned" in my society (or around here);[33] and the fact that I do not own Blackacre myself.[34] Since knowledge of each of these things is "easily acquired", the contrast with the epistemic demands of Hohfeld's multital analysis is meant to be stark.

But why does Penner think that Hohfeld's multital analysis *requires* that I know A's identity and the fact that he is "the owner of Blackacre", as a condition of knowing that I have a duty not to enter Blackacre? While the beginning of his explanation is clear, the rest is somewhat obscure (to me, at least). Hohfeldian jural relations have two "poles", each one occupied by a different person. In the case of the claim-duty relation, the poles are respectively occupied by the right holder and the duty bearer. According to Hohfeld, the identity of the occupant of each pole of a given jural relation belongs to its conditions of individuation. Thus, if the person occupying one of its poles changes, the effect is to transmute that particular jural relation into a (structurally similar, but nevertheless) *different* jural relation.

No doubt, this sounds a little peculiar. Still, it is quite clear that Hohfeld does affirm this doctrine. Notably, his affirmation manifests itself in his unusual treatment of property transfers. Under this doctrine on the individuation of jural relations, Hohfeld cannot analyse the sale of Blackacre, say, from A to Z as a *transfer* of A's rights related to Blackacre (to Z). For when A owns Blackacre, it is A who occupies the right-holder pole of the relevant claim-duty relations (*eg*, of B's duty not to enter Blackacre). By contrast, when Z owns Blackacre — that is, after it has been sold — it will be *Z* who occupies the right-holder pole of B's duty not to enter it. *Ex hypothesi*, these are different jural relations, since a different person occupies their respective "right-holder" poles. This means that there is no right against B that B not enter Blackacre that A *can* transfer to Z. Something analogous goes for every other relation in A's multital aggregate.

Rather, to keep faith with this doctrine, Hohfeld would have to say that the sale of Blackacre is effected by extinguishing A's various rights in relation to it, and simultaneously creating a corresponding aggregate of mostly matching "new" rights for Z. Z's new rights "match" A's old ones except, of course, that Z is now at their right-holder pole (and not A).[35] The proof that Hohfeld affirms the doctrine lies in the fact that this is precisely how he does speak: "A has the legal power to alienate his legal interest to another, *ie* to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person".[36] He eschews the term "transfer", and goes as far as to place scare quotes around substitute verbs:

---

[32] Penner, *Property Rights*, *supra* note 2 at 87.

[33] By "privately owned", Penner need not mean anything more than "governed by BPrN".

[34] Penner, *Property Rights*, *supra* note 2 at 87–88.

[35] There will be a few other differences, too. For example, whereas previously A had a right against Z that Z not enter Blackacre, now Z will have a right against A that A not enter it.

[36] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 96, but cf 105–106.

"Various other powers of courts involving the 'shifting' of title from one person to another".[37]

Even so, it is not clear how it follows that I must know who owns Blackacre in order to know that I have a duty not to enter it. Suppose A senior is old and ailing and his only daughter, A junior, is the sole heir to Blackacre.[38] Say I am on a week-long backpacking wander in the general vicinity of its borders. One morning, I hear on my radio app that A senior is on his deathbed, with the family having gathered. That evening, as I finally approach the property, with my now dead phone in tow, I know that I either have a duty not to enter Blackacre that I owe to A senior or I have a duty not to enter Blackacre that I owe to A junior. Per Hohfeld's doctrine, these are distinct jural relations in which I might stand. I only stand in one of them and I do not know which one it is. But that is no obstacle to my inferring that I have a duty not to enter Blackacre.

We can also turn the point around, since the epistemic demands imposed by the multital analysis are presumably symmetrical.[39] Does A have to know *who I am* in order to know that he has a right against me that I not enter Blackacre? That seems absurd.

At the risk of overkill, we can reinforce these doubts by turning from property rights to rights to bodily integrity — the right against battery, say. As Table 1 displays, both are kinds of rights in *rem* and so both fall under the multital analysis. Suppose I am out, taking my anvil for a walk, when it suddenly enters my head that I should just toss the thing over the side of the bridge I am crossing. Being a little cautious, I peer over the side first, only to see that there are people passing underneath. Plainly I have a duty not to toss my anvil over the side. I even owe (an instance of) this duty to each person below. Yet the fact that I have no idea *who* any of these people are erects not the slightest impediment to my knowledge that I have a duty (or duties) not to toss the anvil.

Despite these criticisms, I shall accept that the multital analysis imposes the epistemic demands Penner alleges. I do so less as a matter of generosity and more in the interest of efficiently moving to consider how Hohfeld might deal with those demands. The criticisms tend to show, in the first instance, that the epistemic demands in question are wholly unwarranted, rather than that Hohfeld is not committed to making them. By accepting Penner's position that Hohfeld should be understood as making the demands, we can make progress on a reply without diving more deeply into Hohfeld.

V. Rescuing Hohfeld

As announced at the outset, my response to Penner's critique will be to argue, on Hohfeld's behalf, that his multital analysis can be amended to obviate the objection entirely. While not costless from Hohfeld's point of view, the amendment I shall propose also turns out to have two additional advantages. One is specific to the RM

---

[37] *Ibid* at 106.

[38] For good measure, we can add that I once made their acquaintances — after a fashion, but under the right descriptions — at a ribbon cutting ceremony in the local factory, where I work.

[39] I owe this observation to Cara Nine.

model of rights *in rem*, but its most important advantage applies to the RM and DM models alike. On balance, then, the case for adopting it is compelling. Indeed, I suggest that the second advantage is sufficient reason to adopt the amendment quite apart from the dialectic surrounding Penner's critique.

My amendment is quite simple. I propose to augment the RM model of rights *in rem* with an inference rule, which I shall describe in two steps. To begin with, consider the following rule:

> (H*) If X's claim-right against Y that Y φ is a property right, then X holds a claim-right against W that W φ, for any and all arbitrary W.[40]

Against this background, I still do not have to know many things in order to know that I have a duty not to enter Blackacre. Admittedly, I will have to know a few more things than I do in Penner's story. But what matters is not the precise number of things to be known, but rather that knowledge of them is easily acquired. Thus, what I have to know here is (H*) itself; the fact that Blackacre is the sort of thing that is typically "privately owned" in my society (or around here); and the fact that I do not own Blackacre myself.

So far, as should be obvious, this is a near duplicate of Penner's own epistemic requirements, save only that (H*) has been substituted for BPrN. However, whereas Penner could understand something's being privately owned very lightly, as meaning nothing more than "falls within the scope of BPrN", where BPrN is already a known quantity, we have to understand it a little more expansively. Specifically, we have to understand being privately owned as at least having the consequence that the thing has an owner with a claim-right against someone that they not trespass on it.[41]

On this basis, it follows, and I can therefore know, that the owner of Blackacre has a claim-right against me that I not trespass on it. It follows because I myself am a value for W, as I know full well. Crucially, it remains the case that the knowledge in question, even after this elaboration, is easily acquired. After all, it is perfectly general knowledge, and does not require any empirical investigation. Hence, once the multital analysis of rights *in rem* has been amended to become the RM model plus (H*), Penner's objection no longer applies to it.

Now one might quarrel with this conclusion in a couple of places. To begin with, while it follows — given the owner's correlative claim-right against me — that I have a duty not to trespass on Blackacre, it may be objected that I cannot know that I have this duty unless I also know the appropriate inference rule. In effect, I need to know Hohfeld's definition of a claim-right. Yet the desired conclusion was precisely that I know that I have a duty not to enter Blackacre. Since Hohfeld's definition is itself a piece of general knowledge, the simplest fix is just to add it to the short list of things I am required to know.

---

[40] (H*) is stated in simplified form. Strictly speaking, the consequent should read "X holds a claim-right against W *initially*" (cf *supra* note 19). Moreover, "W" should be understood as excluding those without moral personality and co-owners.

[41] Since a claim-right against trespass does not exhaust the meaning of private ownership, other consequences may have to be spelled out too. However, in this respect, Penner is in an equivalent position, since BPrN cannot serve as the only norm of property either (nor does Penner think it does).

Furthermore, and perhaps more seriously, it might also be objected that the problematic requirement to know who the owner of Blackacre is, as a condition either of knowing that they have a claim-right against me not to enter it or of knowing that I have a duty not to enter it that I owe to them, is still in force. For this requirement was supposed to be secured by Hohfeld's doctrine on the individuation of jural relations and (H*) does not displace that doctrine.

In reply, recall the reverse perspective from which we enquired earlier whether the owner of Blackacre has to know who I am, in order to know that they have a claim-right against me that I not enter it. (H*) clearly undermines any such requirement, since it licenses the owner — or perhaps, licenses them in conjunction with their background understanding of private ownership — to conclude that they hold this right against any arbitrary person. However, as long as the epistemic demands imposed by the multital analysis must be symmetrical, this fact equally serves to undermine any requirement on the correlative duty bearer to know who the right holder is. So the objection is mistaken.

Recall that I proposed to introduce my supplementary inference rule in two steps. That is because, unlike (H*), rights *in rem* are not restricted to property rights. For example, rights to bodily integrity are also rights *in rem*, as we have been saying and as Table 1 illustrates. The simplest way to accommodate rights to bodily integrity would be to revise (H*) as follows:

> (H**) If X's claim-right against Y that Y φ is a property right or a right to bodily integrity, then X holds a claim-right against W that W φ, for any and all arbitrary W.[42]

This formulation of the inference rule clearly expresses the fact that property rights are not the only rights that have the structure (H*) describes. In the present context, (H**) is therefore adequate to our purposes.

Ultimately, however, (H**) itself needs to be revised in some fashion, since there are more kinds of rights *in rem* than (H**) covers. On the standard interpretation of human rights, for example, all human rights are rights *in rem*. Roughly speaking, to arrive at the final form of the appropriate inference rule, we can follow one of two strategies. According to the first revision strategy, we should simply enumerate all the different kinds of rights *in rem* there are, rather than only two of them. In effect, this mimics the revision from (H*) to (H**) and yields a long disjunction in the antecedent. I shall call this the "long version" of the final inference rule.

Alternatively, one might revise (H**) more fundamentally instead, so that its antecedent reads "if X's claim-right against Y that Y φ *is a right in rem*", where "right *in rem*" is to be understood as any right with the same structure as a property right and where the "structure" of a property right is given by (H*).[43] I shall call this the "short version" of the final inference rule. Clearly, in order to wield the short

---

[42] As with (H*), my statement of (H**) continues to simplify by omitting to spell out that X's claim-right is held initially. In the case of rights to bodily integrity, there is no need to understand "W" as excluding co-owners.

[43] Arguably, this reflects the actual historical development of our understanding of the expression "right *in rem*".

version, one would have to understand which kinds of rights have the same structure as a property right. In effect, that is, one would have to know what the long version says. While each of these strategies has its advantages and disadvantages, there is no need to decide here which strategy is better on balance. I shall thus close out my defence of Hohfeld with reference to (H**).

From Hohfeld's point of view, the fact that (H**) effectively insulates his multital analysis from Penner's critique is a clear reason to adopt it. However, this defence does not come for free. In particular, a different element of Hohfeld's general analysis of rights, which has not been mentioned so far, is that every token jural relation is supposed to be logically independent of any other token jural relation. Hohfeldian jural relations, one might say, are atomic relations. This aspect of Hohfeld's programme informs his frequent criticisms of law professors and judges for incorrectly inferring the existence of one kind of right from that of a different kind of right. One of his favourite examples is the invalid inference from X's having a privilege against Y to φ to X's having a claim against Y that Y not interfere with X's φ-ing.[44] In fact, according to Hohfeld, the existence of each distinct right has to be established separately.

Evidently, (H**) contradicts the logical independence of individual claim-duty relations. Indeed, it explicitly licenses everyone to infer one claim-duty relation (*eg*, involving X and W) from another claim-duty relation (*eg*, involving X and Y). For die-hard Hohfeldians, this must be regarded as a cost of my proposal. Fortunately, a very good case could be made, if it came to it, that this cost is worth paying, given the various advantages (H**) secures for an account of rights *in rem*. However, I shall not mount that case here. Instead, I submit that this cost does not even need to be counterbalanced. On the contrary, it should effectively be set at zero, and therefore disregarded, because it is a cost that Hohfeld has already (and inevitably) paid in any case.

What I have in mind are Hohfeld's second-order jural relations — especially, his power–liability relation. For it belongs to the very nature of a jural power to affect one or more distinct jural relations. For example, if the promisee waives the promisor's duty to perform on the promise, this simultaneously extinguishes one claim-duty relation and creates another privilege-no-right relation, both of which are distinct from the original power-liability relation, all as between the promisor and promisee. Hence, the exercise of any power necessarily contradicts the logical independence of Hohfeldian jural relations from one another.[45]

Let me turn now to (H**)'s two extraneous advantages, that is, advantages it confers independently of the dialectic around Penner's critique. As I have said, the first advantage is specific to the RM model. Recall our discussion of atypical rights *in personam* at the end of Part III. There I argued that only the RM model was suitable for the job, since the DM model has a feature that does not fit rights *in personam*. But it turns out that this suitability is actually a double-edged sword.

---

[44] See, *eg*, Hohfeld's celebrated account of the shrimp salad fight, with its memorable flourish, "eat the salad, if you can" (Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1 at 41).

[45] Penner is well aware of this difficulty with Hohfeld's account of jural powers. See Penner, *Property Rights*, *supra* note 2 at ch 4.

Its downside is that nothing in the RM model — certainly, nothing about its structure — signals whether the right being modelled is a right *in rem* or a right *in personam*. Inspecting the figure for the RM model in Table 2, for example, leaves one completely in the dark on this score. Arguably, however, one *should* be able to tell which right is which. More strongly, one should be able to discern a relevant structural difference somewhere in a given individual claim-duty relation (*eg*, somewhere on the B line in the RM half of Table 2), depending on whether the right is *in rem* or *in personam*. As things stand, the RM model fails this test.

By contrast, (H**) only applies to rights *in rem*, and not to rights *in personam*. Accordingly, once it has been augmented by (H**), the RM model no longer applies indifferently and indistinguishably to rights *in rem* and rights *in personam* alike, but now only applies to rights *in rem*. It does not matter so much how exactly one imagines this new feature being represented in the model (or in Table 2). The mere fact that the RM plus (H**) model *has* the feature enables it to manifest a structural difference between rights *in rem* and rights *in personam*, and thereby to pass the test failed by the original RM model.

Finally, there is a crucial point that has been trailing our discussion, and casting a small shadow over it, ever since the two models of rights *in rem*, DM and RM, were introduced as options for Hohfeld's multital analysis. On my account of what distinguishes rights *in rem*, structurally, from rights *in personam*, the linchpin is the difference between everyone and everyone*. However, nothing in either model reflects this difference.

Despite having first been deployed to disarm Penner's critique, (H**) actually represents this very difference perfectly. It licenses us to add a new, duplicate claim-duty relation to a given multital aggregate (or to recognise one already there),[46] for any arbitrary person, W. This plainly includes anyone who has newly qualified for the status of "W", having just been born or attained to moral personality. In this way, (H**) captures the all important *dynamic* quality inherent in "everyone*". It follows that the difference between rights *in rem* and rights *in personam* manifested by the RM plus (H**) model is no less than the fundamental structural difference between them.

[46] If we hew to Hohfeld's conditions for individuating jural relations, this should read "near duplicate" claim-duty relation. In the text, I describe (H**)'s effect on the RM model. With the DM model, what (H**) licenses is the addition of a new [near] duplicate correlative *duty* to a given right *in rem*.