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Religious Liberty and Public Accommodations: What Would Hohfeld Say?

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17.1 INTRODUCTION

Advances in civil rights ignite backlashes, and the triumph of same-sex marriage is no exception. *Obergefell*[1] begot *Elane Photography*,[2] *Sweet Cakes by Melissa*,[3] Timber Creek Bed and Breakfast,[4] *Liberty Ridge Farm*,[5] *Masterpiece Cakeshop*,[6] and Kim Davis.[7] Same-sex couples acquired the right to marry and to have those marriages respected by the state and federal governments. In response, some owners of public accommodations claim that their right to "religious liberty" gives them the right to deny same-sex couples access to goods and services such as wedding cakes, flowers, photography, wedding venues, inns, and hotels. These clashes involve claims of freedom on both sides – the freedom to marry, the freedom to exercise one's religion, the freedom to control one's own property, the freedom to make

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[1] *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (2015).

[2] *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013).

[3] Matter of Klein, dba Sweetcakes by Melissa, 2015 WL 4503460 (Or. Div. of Fin. & Corp. Sec. 2015); Michael McLaughlin, *Oregon Bakery Must Pay for Refusing to Make Wedding Cake for Lesbian Couple*, Huffpost Queer Voices (Feb. 2, 2016), http://www.huffingtonpost.com/2015/07/02/sweet-cakes-by-melissa-fined-same-sex-wedding_n_7718540.html.

[4] *Wathen* v. *Walder Vacuflo, Inc.*, Charge No. 2011 SP 2488, 2011 SP 2489 (Ill. Human Rights Comm'n 2015), http://www.aclu-il.org/wp-content/uploads/2015/09/Wathen-liability-determination.pdf; Vikki Ortiz Healy, *Ruling sides with same-sex couple turned away by bed-and-breakfast*, Chicago Tribune (Sept. 17, 2015), http://www.chicagotribune.com/news/local/politics/ct-lgbt-business-services-decision-met-20150917-story.html.

[5] *Gifford* v. *McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); Zack Ford, *New York Wedding Venue Loses Appeal to Refuse Serving Same-Sex Couples*, ThinkProgress (Jan. 15, 2016), http://thinkprogress.org/lgbt/2016/01/15/3739998/liberty-ridge-appeal/.

[6] Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n, 138 S.Ct. 1719 (2018) (a state can protect store customers from sexual orientation discrimination, but not if it shows hostility to religion). *See also* Klein, dba Sweetcakes by Melissa v. Or. Bureau of Labor & Indus., 2022 WSL 221046 (Or. Ct. App. 2022) (Oregon bakery violated state public accommodation law by refusing to make a wedding cake for a same-sex couple).

[7] Steve Benen, *Kentucky's Kim Davis jailed, held in contempt*, MSNBC (Sept. 3, 2015), http://www.msnbc.com/rachel-maddow-show/kentuckys-kim-davis-jailed-held-contempt.

contracts. They also involve a clash of rights – the right to marry, the right to exclude nonowners from one's property, the right *not* to make contracts, the right to enter the marketplace without exclusion because of invidious discrimination. What makes freedoms different from rights? The question turns out to matter quite a lot.

The problem is not only how to resolve these conflicts but also how to *conceptualize* them. When we talk about religious liberty, are we all talking about the same thing? That is where Wesley Hohfeld's analysis is helpful.[8] Hohfeld's vocabulary helps us see that some of the claims being made in this area unwittingly (or wittingly?) simplify complex choices.[9] In particular, we sometimes lump two separate claims together, assuming that protection of one type of legal entitlement entails protection of another. For example, a claim to "liberty" may include not only a claim to be free to do as one likes but also a right to control the behavior of other people. But the latter claim cannot be purely a matter of liberty; a right to control the behavior of another obviously *limits* the liberty (freedom of action) of the person whose behavior is being controlled. If liberty claims also entail duties on others, then liberty is being promoted by (selective) limits on liberty. Understanding this is crucial to deciding whether claims of religious liberty legitimately entail duties as well as freedoms.

Hohfeld did lawyers a great favor by insisting that we distinguish between entitlements of "privilege" and entitlements of "right."[10] Debates about the role of religious liberty in the context of public accommodations would benefit from a clear understanding of this distinction. Does "religious liberty" justify exemptions from the obligation to serve the public without discrimination? This normative question will be easier to address if we distinguish various meanings of "liberty." What would Hohfeld say about this?

17.2 CONCEPTUALIZATION

The issue of same-sex marriage is controversial and politically charged. To address it through analysis of concepts may seem to miss the point; the topic of conceptualization may seem old-fashioned and technical. It may even seem formalistic, reducing distributive and normative questions to matters of technical analysis that effectively immunize the status quo from consideration of whether it is just or unjust. Yet, analysis of concepts is helpful both analytically and normatively. It is particularly helpful in situations like this because both sides in the debate have been talking past each other. By framing concepts in particular ways, each side has assumed that their

[8] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld (1913)]; Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld (1917)].

[9] Hohfeld (1913), *supra* note 8, at 19 ("the tendency – and the fallacy – has been to treat the specific problem as if it were far less complex than it really is").

[10] *Id.* at 30–44.

position is stronger than it really is. They often assume or suggest that invocation of liberty is sufficient to justify placing duties on others. This rhetorical device allows them to negate competing claims without normative arguments. Getting the concepts right will reveal that each side's argument has several steps; normative persuasion is needed *at each step in the analysis*. Understanding this will enable each side to better support its position. It may even reveal surprising areas of agreement while clarifying where the disagreements actually lie.

The first conceptual problem is that both sides in this debate have sometimes conceptualized their claimed freedoms as *self-regarding acts*. If I want to marry another man, what business is that of yours? How does it affect you in any way? Conversely, if I want to exercise my religious liberty to deny support to same-sex couples, how does that interfere with your freedom to marry? Go ahead and get married; just leave me out of it. But if these claims are wrong – if liberties are not merely self-regarding but affect the interests of others – then failing to understand those effects undermines one's claim.

The second conceptual problem is that, even when they admit that their claims affect others, both sides in this debate have often assumed that legal rights are unitary, absolute within their spheres, and preemptive of competing claims. They treat rights as trumps. Reasoning in this way tends to insulate the claimant from a need to consider the claims of the other side. If a claim concerns oneself alone, there is no need to consider the harms experienced by the other side or to explain why those harms do not deserve legal protection. Conceptualizing rights as self-regarding and as trumps means that no reasons need be given for why one set of rights should prevail over the other. Considerations of justice and policy obviously enter the conversation but they are truncated and one-sided.

If a case is disputed by well-meaning people, that is a pretty clear indication that the legal claims at issue are not merely self-regarding. It may be the case that, after consideration, we decide that a harm does not deserve legal protection and that the conduct is therefore, *in that sense*, self-regarding. But we cannot reach that conclusion if we are blind to the effects the conduct has and the claims that others make that have been harmed. Nor can we persuade others that a legal entitlement does not affect them when they are standing before us explaining as clearly as they can how it *does* affect them. We need a normative argument about why one claim should yield to the other rather than a mere negation of the pain being expressed by the other side.

The same thing is true about the idea of rights as trumps. In hard cases, both parties may have legitimate liberties and legitimate rights. Legal entitlements are almost never absolute; often they can be appropriately exercised in one social context but not another. I am free to choose my friends as I wish and to invite whomever I like to my dinner party, but I may not choose customers to my restaurant on the basis of race. I am free to worship as I please in my synagogue, but I am not free to refuse to hire someone as an employee in my hotel because they are not

Jewish. Treating rights as relationships and as limited by the rights of others illuminates the full range of interests at stake rather than creating conceptual barriers to perceiving them. In contrast, assuming rights are trumps prompts us to stop listening to competing claims – claims we might well accept in a different social context. Legitimate justification requires acknowledging competing claims while limiting their appropriate application.

The third conceptual problem is that both sides frame their claims in *shifting terms* – sometimes they focus on freedom or liberty, sometimes they focus on rights. This matters because rights normally entail duties on others while liberties exist in the absence of duties. Read that sentence again: rights entail duties on others while liberties exist in the absence of duty. Rights are defined by the duties they impose on others; my right to bodily security means you have a duty not to punch me. Liberties are defined by an *absence* of duty; my freedom to act in self-defense means I have no duty not to hurt you if I punch you to stop you from punching me. Rights grant me the power to call on the state to control your conduct, limiting your freedom of action. Liberties grant me the freedom to act in certain ways and to be free from any claims by others that the state should limit my freedom of action; others have no right to stop me from exercising my liberty. Because of this difference, reasoning from liberties to rights jumps a chasm without a bridge. Champions of religious liberty, for example, seem to assume that the free exercise of religion and the freedom to control one's own land include the power to exclude others as one wishes, as well as the freedom to say and do whatever one likes on one's own land. Champions of same-sex marriage sometimes assume that the freedom to marry includes the right to act on that freedom without interference from others and that means immunity from suffering consequences for exercising the right to marry such as exclusion from the marketplace. One side or the other may be right as a normative matter, but arguments for freedoms are not sufficient to support imposing duties on others; *new* arguments are needed to explain why one side's liberties justify constraints on the liberty of others. Those arguments must be *normative* in nature; they cannot flow as a matter of deductive logic from the existence of the liberties. They must be based, as Hohfeld told us, on considerations of "justice and policy."[11]

Wesley Hohfeld taught us three major lessons and those lessons correspond to the three conceptual shortcuts I have identified. First, Hohfeld taught us to see all legal rights as "jural relations."[12] It had long been understood that rights and duties were correlative.[13] My right to bodily security means you have a duty not to assault me or to batter me. What had not been appreciated is the way that liberties and privileges are relationships. My freedom of speech may harm your reputation but, as long as I speak the truth, the first amendment (generally) protects my freedom to talk about

[11] Hohfeld (1913), *supra* note 8, at 36.

[12] *Id.* at 19.

[13] Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975 (1982).

you in a manner that may cause others to think badly of you. Hohfeld called those relationships "privilege/no-right" relations.[14] He dramatized the vulnerability that others suffer when you exercise your freedom of action. Understanding religious liberty as a relationship helps us understand the ways in which liberty claims affect the interests of others, and thus are not merely petitions to be "left alone."

Hohfeld argued, second, that rights are often not unitary trumps. The fact that one is an owner of property does not mean that one wins the case; if that were true, property casebooks like my own would be pretty short. Those books are long because the person conventionally deemed "the owner" often loses disputes about property rights. Hohfeld emphasized that a property owner has a *bundle of rights*. He did not argue that this bundle of rights could be disentangled however one wants or that any combination of rights would work as well as any other. He did argue that property rights *can be* and *often are* disentangled. Our legal system often allows owners to disentangle rights from the core bundle and sometimes the law requires owners to do so.[15] Property rights are thus complex rather than unitary. Finding that someone is an "owner" does not mean that that person wins the lawsuit. If a plausible claim can be made that a right belongs to someone other than the conventional "owner," then we need to consider who *should* own the entitlement in question. Hohfeld taught us that doing this was not an exercise of legal logic; rather, defining property rights requires consideration of "justice and policy."[16]

Third, Hohfeld emphasized like no other person ever had that liberties are sometimes not protected by corroborative rights and duties. My freedom to build a gas station on a corner in my town does not mean I have the right to stop you from building a competing gas station right across the street. My freedom is not necessarily protected by a legal rule placing a duty on you not to interfere with my exercise of my freedom. You have the same liberty as I to set up a business. My freedom to practice my religion does not mean that you are not free to attempt to convert me. The separability of liberties and duties means that we cannot reason from a liberty in one person to a duty on others without making arguments of justice and policy. The mere invocation of a legal right or liberty does not settle the matter. There may be liberties on both sides. To appreciate the significance of these three Hohfeldian insights, consider current debates about religious liberty and public accommodations.

[14] Hohfeld (1913), *supra* note 8, at 30, 32–44.

[15] Hohfeld (1917), *supra* note 8, at 747 ("It is important, in order to have an adequate analytical view of property, to see all these various elements in the aggregate. It is equally important, for many reasons, that the different classes of jural relations should not be loosely confused with one another. A's privileges, e.g., are strikingly independent of his rights or claims against any given person, and either might exist without the other.").

[16] Hohfeld (1913), *supra* note 8, at 36.

17.3 PROPERTY AS A BUNDLE OF RIGHTS

Two people enter a florist shop seeking flowers for their wedding ceremony. The shop owner sees that they are two men and refuses to sell them flowers because of her religious objections to the marriage of two men. They approach a hotel seeking to use its facilities as a venue for their wedding, the party afterwards, and a suite for their first night together as a married couple along with rooms for their guests. The hotel refuses to accommodate them, claiming religious liberty. What property rights are implicated in these conflicts?

One view is that only one of the parties has property rights: the owners of the shop or the hotel. They claim the shop or hotel as their property and that ownership claim entails a bundle of rights including the right to exclude nonowners, the freedom to build on the property and use it for business purposes, the power to sell goods or services, and immunity from being forced to enter a contract against the owner's will. On this view, owners have not only the right to exclude at will but the power to waive their right to exclude and to do so on a selective basis. Owners also own their own labor and under the thirteenth amendment have no duty to work for anyone else who claims their services against their will. Ownership rights so conceived correlate with a certain view of "freedom of contract" – the liberty to enter enforceable agreements and the liberty to refuse to enter such agreements.

We can call this the *ownership* or *absolutist* conception of property. It not only views "ownership" as a complete bundle of rights but views those rights as trumps to any competing claims by "nonowners." If this picture of property rights is accurate, owners are lords of their own castles. If you are in my house, you follow my rules. In this picture, store patrons have no property rights in the shop; they are "nonowners" who seek a right to use someone else's property and to compel someone else's labor. It is true that the legal system does sometimes grant nonowners rights of access to property owned by another. But if the ownership conception is accepted as the norm, such instances represent *intrusions* on property rights or *limitations* of them; property rights are being *sacrificed* to promote overriding social interests. Such cases represent takings of property from A and transfer of them to B. As such, they bear a heavy burden of justification.

Hohfeld both built and undermined this conception of property. He built it because he identified the individual rights that go along with "ownership." Rather than merely talking about "property rights," he disaggregated those rights into privileges, rights, powers, and immunities.[17] Privileges are freedoms to engage in activity. Rights entail duties on others to act so as to protect one's own interests. Powers are freedoms to alter legal rights held by oneself or others. Immunities are protections from loss or alteration of one's rights without one's consent. Further, Hohfeld led us to understand that owners have rights and privileges of many kinds. They have the freedom to enter their land, to build on it, and to use it for various

[17] Hohfeld (1913), *supra* note 8, at 30.

purposes. They have the right to exclude others, the right to stop neighbors from harming their property, and the right to quiet enjoyment. By identifying the component legal rights associated with ownership, Hohfeld turned property from a unitary conception of lordship or ownership to one of a complex bundle of entitlements.

Importantly, Hohfeld not only articulated the bundle conception; he undermined it. Ownership, according to Hohfeld, may entail a bundle of rights but only considerations of "justice and policy" can tell us what bundles of rights "owners" should have in different social contexts. In other words, the bundle of rights can be disaggregated – both by the owner and by the courts and legislatures. If a property owner possesses a bundle of rights, then it is logically possible for the legal system to assign some of those rights to one person and some of them to someone else. There may be reasons of "justice and policy" to bundle the rights together, *but there may also be reasons to unbundle them.*

If a conflict arises over a particular property claim (such as the right to buy flowers from a florist shop or to rent a hotel room the night of one's wedding), one cannot solve the conflict merely by asking "who is the owner?" If a claim can plausibly be made that a nonowner has not only the right to enter property of another but a power to force the store owner to enter a contractual relationship, then the land owner must respond to that claim with competing arguments of "justice and policy."[18] Merely stating that one is the "owner" is insufficient.

How can we tell whether a claim of access to another's land merits a response based on justice and policy rather than merely a recitation of "property rights" or "ownership"? That is both an easy and a hard question to answer. It is easy because the answer is that a claim is valid when a case is hard. It is a hard question to answer because there is no simple way to determine when a case is "hard." The only answer that works, according to Hohfeld, is one that is itself based on "justice and policy." If one is able to make a plausible claim that exclusion from another's land is unjust or has harmful social consequences, then, by definition, one has identified a hard case. A plausible claim is simply one that someone in our legal culture would take seriously. And that obviously changes over time as we can see from recent rulings finding that sexual orientation discrimination is a form of sex discrimination, a claim that would not have been accepted by most courts until recently.[19] According to

[18] Hohfeld (1913), *supra* note 8, at 35–38.

[19] *Videckis* v. *Pepperdine Univ.*, 2015 WL 8916764, at *5 (C.D. Cal. 2015); *Baldwin* v. *Foxx*, EEOC Appeal No. 0120133080, Agency No. 2012-24738-FAA-03, at *7 (2015), https://www.eeoc.gov/decisions/0120133080.pdf. *See e.g.*, *Boutillier* v. *Hartford Pub. Sch.*, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss a Title VII sex discrimination claim alleging employment discrimination on the basis of sexual orientation); *Hall* v. *BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. 2014) (denying an employer's motion to dismiss a Title VII sex discrimination claim challenging the employer's policy of providing health insurance coverage for employees' legally married opposite-sex – but not same-sex – spouses); *Terveer* v. *Billington*, 2014 WL 1280301 (D.D.C. 2014) (denying an employer's motion to dismiss a Title VII sex discrimination claim alleging sexual orientation discrimination based on sex role stereotyping); *Koren* v. *Ohio Bell Tel. Co.*, 2012 WL 3484825 (N.D. Ohio 2012) (denying an employer's motion to dismiss a Title VII sex discrimination claim alleging

Hohfeld, deciding such cases depends on "justice and policy" rather than the inherent logic of property rights or claims of "ownership" that are divorced from normative considerations.

Further, Hohfeld criticized the idea that all property is the same. Public accommodations, he noted, are under a historic legal obligation to serve the public:[20]

> Thus, for example, a travelling member of the public has the legal power, by making proper application and sufficient tender, to impose a duty on the innkeeper to receive him as a guest. For breach of the duty thus created an action would of course lie. It would therefore seem that the innkeeper is, to some extent, like one who had given an option to every travelling member of the public. He differs, as regards net legal effect, only because he can extinguish his present liabilities and the correlative powers of the travelling members of the public by going out of business. Yet, on the other hand, his liabilities are more onerous than that of an ordinary contractual offerer, for he cannot extinguish his liabilities by any simple performance akin to revocation of offer.[21]

Owners of private homes have the right to exclude nonowners, but owners who devote their property to public accommodation purposes have waived part of their right to exclude. More than that, patrons not only have the privilege to enter the public accommodation but a power to compel the owner to serve them by providing services or goods. *The bundle of rights associated with the typical home is different from the bundle of rights associated with a public accommodation.*

When we ask why a hotel claims the right to exclude a same-sex couple, the answer "because I'm the owner" is nonresponsive. From a property law standpoint – from a Hohfeldian standpoint – that answer only leads to another question: "The owner *of what*?" Answering that question requires a judgment about the bundle of rights that is appropriate in the social context at hand. Because public accommodation owners have duties to serve the public, invocation of "property rights" is insufficient – as is invocation of "religious liberty." There may be both religious liberties and property rights on both sides. Rather than asking why an owner should be forced to serve nonowners, we could just as easily ask why owners of public accommodation should be entitled to selectively ignore their obligations to serve the public.

Most people assume that innkeepers and common carriers have a duty to serve the public but that all other owners have the right to exclude anyone they wish unless civil rights statutes limit their powers. I have explained elsewhere that this "rule" was invented after the Civil War to promote racial discrimination.[22] Prior to that, any

sexual orientation discrimination based on sex role stereotyping and reasoning that sexual orientation discrimination "is a claim of discrimination because of sex.").

[20] Hohfeld (1913), *supra* note 8, at 52.

[21] *Id.*

[22] Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

owners who held themselves out as ready to serve the public had a moral (and legal) obligation to do so.[23] In 1982, New Jersey reverted to the traditional rule, giving all members of the public a right of reasonable access to all public accommodations of any sort.[24]

Recent debate has been confused on this point. Sometimes people assume that owners can exclude nonowners unless a statute limits that right; if that is true, then the absence of a statute prohibiting sexual orientation discrimination means that hotels may refuse service to same-sex couples. Sometimes, however, people assume that public accommodations like hotels do have a duty to serve the public – hence the need for a "religious liberty" bill granting owners the "freedom" to refuse service to same-sex couples. Hohfeld helps us analyze the problem by enabling us to isolate the particular entitlements we are fighting about. Do owners of public accommodations have the right to exclude same-sex couples and/or immunity from being required to sell them goods or services? Or, on the contrary, do such couples have the privilege to enter public accommodations and the power to demand service from the owner? The answer to these questions must come from considerations of "justice and policy," not a recitation of "property rights" nor naked claims of "ownership" or "liberty."

17.4 LIBERTIES AS RELATIONSHIPS

Before Hohfeld, it was clear that rights and duties entailed legal and social relationships. The owner's right to exclude means that nonowners have a duty to stay off the land unless the owner waives her right to exclude. Indeed, Hohfeld argued that the relationship between rights and duties was so tight that they were "correlatives" of each other. If we are interested in "jural relations," as Hohfeld saw it, then "rights" are nothing but the relational consequence of "duties." If I have a duty, then there are certain acts that I must do or not do *in relation to another person or persons*. The duty is not free-floating; it is a duty *toward the right-holder* who has the power either to enforce the duty or to waive her power to enforce it. A homeowner has the right to exclude me from her home; that means I have a duty to stay off her property unless she consents to my entry. And if I violate my duty, she may hale me into court to answer for the tort. This much is well-known.

What was not well-known or understood before Hohfeld is that legal liberties have a similar relational structure.[25] If I am legally free to paint my house purple, then my neighbor has no right to stop me from painting my house purple, no matter how much she hates the color. She has no power to go into court to get the state to stop me from exercising my liberty. If she does, the court will dismiss her complaint; she has

[23] *Id.* at 1303–48. *Cf.* Hohfeld (1913), *supra* note 8, at 52 (explaining Bruce Wyman's theory of "public callings" as owners who were "holding out" to the public as open for business).

[24] *Uston* v. *Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

[25] Hohfeld (1913), *supra* note 8, at 33 (arguing that privileges entail "relations").

"no right" to stop me from exercising my "privilege" to paint my house purple. The plaintiff in such a case may have no legally-protected interests *but she is, nonetheless, aggrieved.* To the extent my liberties have effects on others that they find objectionable, they are vulnerable to harm. More importantly, the harm is lawful. *It is not the case that legal liberties entail only self-regarding acts.* We cannot reason directly from a claimed harm to a legal right to prevent the harm; rather, we need a reason to believe that the arguments of justice and policy in favor of protecting people from the harm outweigh the arguments in favor of enabling the exercise of the liberty that may result in the harm.

Recent debates about "religious liberty" have ignored this fundamental point. Claims of religious liberty suggest that florists and innkeepers just want to be left alone to exercise their liberty. Let gay men get married; just don't shove it in my face. Go where you are wanted; leave me out of it. The converse is also true. We sometimes hear the argument that if you are a man who is against same-sex marriage, then, fine, just don't marry a man. Do what you want but leave me alone. But this way of thinking about the problem obscures basic realities.

First, both sides affirm liberties that the other side experiences as causing harm or an affront to human dignity. And both sides sometimes refuse to acknowledge the damage that the other side claims to suffer. But harm we have, or at least, the experience of harm. The fact that the free exercise clause allows pastors to tell gay kids sitting in the pews that they are destined for Hell does not mean that those kids do not suffer psychological harm from the exercise of this liberty. Nor can one escape the fact that the recognition of same-sex marriage by the state causes many people to experience loss and disruption. To the extent that one side or the other is entitled to exercise their liberties, others will be affected. And to the extent that they have no right to stop the protected activity, they are (in their own terms) vulnerable to harm.

Persuasion is more likely to occur if we make clear to others that we have heard their pain, that we can acknowledge the effects of the liberties we claim. At the same time, it is important to remember that *acknowledging* the experience of harm does not mean *legitimizing* it. One function of moral and legal reasoning is to explain why some harms are legally (and morally) cognizable while others are not. You may oppose interracial marriage and view it as contrary to God's plan. Our constitutional system allows you to affirm that view in writing and to preach it from the pulpit. But that does not mean that your view can be enshrined in law. We now understand that position to deny both equal protection of law and religious liberty. One cannot reason from the mere claim of harm to a claim to legal protection from that harm. *Hohfeld taught us that the very nature of a "privilege" or legal liberty is that others affected by it have "no right" to stop it.*

Hohfeld reminded us that liberties may exist on both sides. It is astonishing the extent to which it has been assumed that LGBTQ people have no religious beliefs, practices, or commitments. For many of them, the freedom to marry someone you

love is grounded precisely in religious commitments and values. That means that we face a clash of religious liberties. Public accommodation owners cannot assert religious liberty as a trump; *the patrons are asserting it as well.* To the extent that a person has a legal "liberty," others have "no rights." In the public accommodations context, neither side is actually being asked to be "left alone." Their claims affect others. Moreover, neither side is merely seeking "liberty." Each side hopes to impose duties on others which Hohfeld tells us limit the liberty of others. To adjudicate *that* conflict requires arguments of justice and policy to interpret the scope and meaning of religious liberty in this social context.

17.5 LIBERTIES WITHOUT RIGHTS

I have argued that religious liberty is often not self-regarding in nature. Exercises of such liberties may affect others. But the problem of public accommodations is of another order altogether. Religious liberty claims usually do not merely mean that one is free to oppose same-sex marriage or preach against it; they mean that owners are free to deny service to same-sex couples. Refusal of service by an owner of a public accommodation is *not* an exercise of liberty; it is an exercise of a Hohfeldian *right* and a Hohfeldian *immunity* – the right to exclude and immunity from being forced to deal with the customer against the owner's will. The right corresponds to a duty – a duty to stay off the property; the immunity corresponds to a "disability" – the disability to demand and receive service. That makes the claim of religious liberty even further from a self-regarding act than we may have thought. The religious liberty claimant seeks, not only the freedom to believe as she wishes and to live her life as she wishes, but *the right to limit the freedom of others.*

Hohfeld was especially critical of the idea that a legal liberty is invariably coupled with a legal right.[26] My privilege to open a gas station does not entail a right to stop you from exercising a similar privilege. My religious liberty does not mean that you do not have your own liberty, religious or nonreligious. Nor does it necessarily mean that I have a right to exclude you from a business I have opened to the general public. Whether my religious liberty should be coupled with a right to exclude is a question of "justice and policy" not legal logic.[27]

A claim of religious liberty does not merely concern the claimant alone if it is coupled with a right to deny service to others. The converse, of course, is also true. If public accommodations law requires owners to serve same-sex couples, then owners are liable to be forced to provide such services despite their religious objections. If

[26] Hohfeld (1913), *supra* note 8, at 34 (explaining how conflicting privileges may exist without corroborating rights). *See also* Hohfeld (1916), *supra* note 8, at 747 ("the property owner's rights, or claims, should be sharply differentiated from his privileges").

[27] Hohfeld (1913), *supra* note 8, at 36 ("a privilege or liberty . . . might very conceivably exist without any peculiar concomitant rights . . . as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy").

same-sex couples have a power to obtain goods and services, then owners of public accommodations are obligated to provide such services. The question, Hohfeld tells us, is not whether we are for or against religious liberty. The question is whether that liberty should be coupled with rights, powers, or immunities that place obligations or vulnerabilities on others. In the case of public accommodations, we have no choice but to place an obligation or vulnerability on someone. We are not in a situation where one side or the other is actually asking "just to be left alone." Either the patron has the power to compel the owner to provide service or the owner has the right to exclude the patron and immunity from contracting against his will. Either way, one side's liberty claim is coupled with a claim to limit the liberty of someone else.

Religious liberty so conceived requires normative justification. The owner's claim of religious liberty does not necessarily entail a right to exclude patrons who do not share the owner's religious beliefs and practices. The customer's religious liberty does not necessarily entail a power to force the owner to provide services without regard to sexual orientation or religion. Hohfeld emphasized that liberties (what he called "privileges") are distinct from "rights" (or claims) and that one could one have type of legal entitlement without the other. Determining which liberty (if any) should be accompanied by a right (such as a right to exclude or a right to enter) required considerations of "justice and policy" rather than deductive logic. Just as the sentence "because I'm the owner" is an insufficient reason to solve a hard case, the sentence "because I have religious liberty" is similarly indeterminate. There are religious liberties on both sides and, as Hohfeld emphasized, there are often good reasons to confer liberties uncoupled with rights of protection from interference.

17.6 JUSTICE AND POLICY

The real issue is not whether we are for or against "religious liberty," but whether same-sex couples have a right to enter the marketplace on the same terms as everyone else. That question, Hohfeld tells us, cannot be answered merely by reference to "property rights," or "ownership," or "religious liberty." Rather, it is a question of "justice and policy." If we think about the issue this way, it becomes clear that we have addressed it before.

When the civil rights laws were passed in the 1960s we made a collective democratic choice to make public accommodations, employment, and housing open to the public without regard to race or religion or national origin. Since then we have added other forms of prohibited discrimination, including discrimination directed against women, children, and persons with disabilities. In recent times, such protection has begun to be extended to LGBTQ persons. Whenever we have enacted and enforced civil rights statutes, rights of access to the marketplace have prevailed over any competing claims of religious liberty. We have done this for several reasons, all of which apply to same-sex couples.

First, there are religious liberty claims on both sides. In the 1960s, racial segregation was justified by biblical references and sincere religious beliefs.[28] Those who believed that blacks and whites should not eat in the same place or sleep on the same beds coexisted in a world with others whose religious beliefs told them the precise opposite – that we are all created in the image of God and that all human beings are created equal. We are not talking about a clash between religious liberty and equality; we are talking about a clash of religious liberties. The same is true in the context of same-sex marriage. The first amendment grants both sides the freedom to believe what they like about same-sex marriage and to promote it or oppose it, to sanctify it or to ban it, to attend marriage ceremonies or boycott them.

But the clash of religious liberties is not really the issue. In reality, we confront, *not* a clash of liberties, but a clash of *rights* and *powers*. Owners who want to refuse service to same-sex couples claim a right to exclude them from their stores and immunity from being required to provide them goods and services. Same-sex marriage adherents claim a right to enter the store and the power to purchase goods and services on the same terms as others. We answered this question in the context of race by ensuring that people can enter public accommodations without discrimination on the basis of race. We did that for very good reasons.

You are free to worship as you please and to preach against homosexuality in the pulpit, but that does not mean that you are equally free to do so if you are a waiter in a restaurant when talking to a customer. You are free to limit church members to those who profess your faith but you are not free to refuse to rent an apartment to someone of a different religion. Religious liberty is relative to *place*. If it were otherwise, then restaurant and hotel owners in the South that opposed racial integration would have been free to continue excluding African American customers after passage of the Civil Rights Act of 1964. If that were the case, we might still have segregation in the South in public accommodations.

After it abolished apartheid, South Africa confronted a situation where roughly ten percent of the people owned ninety percent of the land, and the division was a racial one. If owners were free to exclude nonowners for religious reasons, then apartheid would have continued through the mechanism of the law of private property.[29] Public accommodations, housing, and employment could still have been segregated with no law requiring segregation. To abolish apartheid, public accommodation laws were needed to ensure that anyone could obtain access to the

[28] Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, Wake Forest Univ. Legal Studies Paper No. 2748565. Available at SSRN: http://ssrn.com/abstract=2748565 or http://dx.doi.org/10.2139/ssrn.2748565 (Mar. 16, 2016); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 182–84 (2015). *See Newman* v. *Piggie Park Enter., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring), *aff'd and modified on other grounds*, 390 U.S. 400 (1968) (rejecting religious claims to exemption from public accommodations law).

[29] Joseph William Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States*, 12 S. AFR. J. PUB. L. 53 (1997).

market and to property without regard to race. That is why the Supreme Court has interpreted "the right to make contracts" and the "right to purchase property" in the Civil Rights Act of 1866 as imposing duties on public accommodations to provide goods and services without regard to race.[30]

We have already addressed the question of whether religious beliefs justify allowing owners of public accommodations to engage in invidious discrimination that helps perpetuate a caste society. The answer is no. The place for exercising such liberties is elsewhere – in the church, in the pulpit, and in other private organizations that do not serve the public.

The same is true for sexual orientation. Exclusion from a public accommodation is not a self-regarding act. One who is excluded from a place open to the general public suffers impacts of a serious and harmful nature. Not only must one go elsewhere for service, but one must also suffer the humiliation of being treated as a pariah, as a member of a subordinate caste, as unfit for human company or the associations of honest folk. Refusing service is not merely an exercise of "religious liberty"; it is an attack on the customer, marking her as inferior, tainted, evil. In our society, owners of public accommodations are not entitled to treat their customers this way, at least when they are distinguishing among customers based on qualities that have been historically associated with systemic disempowerment.

The problem cannot be solved by asking the customer to "just go someplace else."[31] If many owners share exclusionary instincts, and if one lives in a small, homogeneous town, the effect of exclusion is enormous. To obtain service – to be treated with dignity – one may have to leave town. Even if other places are available, religious exemptions would shape the social world in a manner that balkanizes it. For the excluded minority group, the world would be a checkerboard with free and unfree places. Venturing into the world would require a guide like the *Negro Travelers' Green Book* used by African Americans traveling in the South in the 1940s and 1950s with lists of places they would be welcome.[32] In such a world, those in the privileged class have full access to the world of the market. They do not need to plan their lives by determining which stores, restaurants, professional offices, or hotels will let them in. But for the despised minority, living in such a world requires defensive measures. As singer Audra McDonald tells us, religious exemptions mean that same-sex

[30] 42 U.S.C. §1981; *Runyon* v. *McCrary*, 427 U.S. 160 (1976); Alfred Mayer Co., 392 U.S. 409, 443 (1968).

[31] For an example of this view, see Andrew M. Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619 (2015).

[32] Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. Rev. 929, 935 (2015). *See* Kent Greenfield, *Hobby Lobby and the Return of the "Negro Travelers' GreenBook,"* AM. PROSPECT (Mar. 26, 2014), https://prospect.org/article/hobby-lobby-and-returnnegro-travelers-green-book, archived at http://perma.cc/LE6K-JZ2N; Randall Kennedy, *The Civil Rights Act's Unsung Victory*, Harper's Mag. (June 2014) at 35.

couples will have to "call ahead" to see if they are welcome – a vulnerability not faced by the privileged class.[33]

Access to the marketplace and to property ownership are central rights that enable us to exercise our freedoms. That is why we have passed civil rights laws that grant access to public accommodations, employment, housing, and government services without regard to factors that we have come to believe are irrelevant to those spheres of social and economic and political life. If one has religious objections to interracial marriage, and if one believes that one's soul is imperiled by renting a hotel room to such a couple, then don't go into the hotel business. If one believes that Jews are destined for hell and that they should not be encouraged in any way, and one believes that selling a cake for the wedding reception is equivalent to performing the ceremony, then don't go into the bakery business. And if one is religiously opposed to same-sex marriage, then you are free not to marry someone of the same sex or attend a same-sex wedding; you are free to preach against same-sex marriage, to exclude parishioners from your church that promote same-sex relationships, and to write books condemning same-sex marriage. But you are not free to open a business that holds itself out as open to the public and then refuses service to patrons who hold different religious beliefs.

Public accommodations are open to the public because we should not have to call ahead to see if we are welcome. Properties open to the public must serve customers regardless of their sexual orientation because a dollar in the hands of a gay man should be worth the same as a dollar in the hands of straight man.[34] Our system protects "religious liberty" but that means the religious liberty of the customer as well as the store owner. It does not mean that one has the right to open a business to the general public and then selectively deny service to those who do not share one's religious views or practices. If that were the case, then we should delete the word "religion" from the 1964 Public Accommodations Act.[35] But no one advocating for religious liberty has suggested we do this. A Christian who was refused service in a restaurant or hotel because of her beliefs would be likely to feel offended and demand service, and under current law would have a right to demand service. But if discrimination on the basis of religion is prohibited, then the prohibition must go both ways. A store owner cannot demand that she be given service regardless of her religion while claiming a religious right to deny service to customers because of the customers' religious practices.

Of course we could interpret religious liberty to include the right to discriminate on the basis of religion. But choosing between a right to exclude or a right to receive service cannot be decided by reference to abstract concepts like "religious liberty" or

[33] Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 4 Brigham-Kanner Prop. Conference J. 1 (2016); Singer, *supra* note 32.

[34] *Cf. Jones* v. *Alfred Mayer Co.*, 392 U.S. 409, 443 (1968) (Congress has the power "to assure that a dollar in the hands of Negro will purchase the same thing as a dollar in the hands of a white man").

[35] 42 U.S.C. §2000a.

"property rights." Rather, it requires an exercise in world-making, and that means normative judgment. As Hohfeld taught us, it requires considerations of "justice and policy." Will we continue to oppress LGBTQ people and deny them the right to be treated with dignity in daily life or will we extend equal concern and respect to all persons regardless of their sexual orientation or gender identity? Will we require same-sex couples to call ahead to see if they are welcome? Or will we grant them the same freedom of access to markets that others take for granted? Invocations of religious liberty divert our attention from conceptualizing the issue in this way and they can distract us from asking *whose* religious liberty we are protecting. Importantly, liberty claims obscure the conflict of rights that public accommodation law addresses. Hohfeld taught us to disentangle liberties and rights and to see the complexities under the surface of property rights and property law. He taught us to focus on what matters. For these things, we owe him our thanks.