1996

Hegel's Slaves, Blackstone's Objects, and Hohfeld's Ghosts: A Comment on Thomas Russell's Imagery of Slave Auctions

Jeanne Schroeder
Benjamin N. Cardozo School of Law, schroedr@yu.edu

HEGEL'S SLAVES, BLACKSTONE'S OBJECTS, AND HOHFELD'S GHOSTS: A COMMENT ON THOMAS RUSSELL'S IMAGERY OF SLAVE AUCTIONS

*Jeanne L. Schroeder**

Thomas Russell's wonderful paper *A New Image of the Slave Auction*[1] is an example of how the best empirical work can result in conclusions that are so obviously "right" that they risk being mistaken as obvious. His paper serves as an important warning against a recurring problem in legal, as well as other scholarship: Picture thinking—in the sense of an unconscious (and as a result, unquestioning and uncritical) acceptance of familiar, traditional, comfortable imagery—so often blinds us.

As a commercial lawyer, I had always vaguely wondered about the traditional image of the slave auction which Professor Russell so vividly describes, but never really gave it much thought. But why should this be? Today, the legal device of the auction is not used primarily for the private sale of goods. Although they are used in the wholesale trade of certain industries, auctions are typically used in the administration of estates—whether that of the bankrupt or other debtor, or a deceased, or whatever. As such, they are usually held under the auspices of judges, sheriffs, marshals, and other government officials.

So why should I have assumed that either the nineteenth century generally, or the slave economy specifically, was so different? It should have been obvious that a significant percentage of slave auctions must have also been judiciously administered. And yet, it took Professor Russell's empirical work to make the obvious apparent.

Russell also points out a second aspect of American slavery that should also be obvious to any American commercial lawyer, let alone legal historian. Slaves—like any other valuable form of property—were frequently the objects of a wide variety of competing property interests of a number of persons. This is, of course,

* Professor of Law, Cardozo School of Law, Yeshiva University.

1 Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of the Law in Slave Sales and a Conceptual Reevaluation of the Nature of Slave Property*, 18 CARDOZO L. REV. 473 (1996) [hereinafter Russell, *A New Image of the Slave Auction*].

revealed by the empirical fact of judicially administered slave auctions.[2] Auctions occurred because slaves served as collateral for loans—they were subject to the equity interest of the "owner" and the security interest of the "lender." They occurred because property interests in slaves were divided into "estates" like realty, with, for example, competing life tenants and remaindermen. And yet, Russell tells us, most writers on slavery have concentrated on the imagery of the relation of a single slave to a single master. He particularly notes how odd it is for them to cling to what he describes as a typical "Blackstonian" notion of unitary property, in light of more modern "Hohfeldian" analysis.[3]

Since I am not an expert on slavery, I must defer to Russell's description of slavery property scholarship. Nevertheless, I have done substantial work on property theory and imagery,[4] and do have some thoughts about this phenomenon that might contribute to Russell's analysis. I suggest that the reason that writers analyze slavery in terms of the relationship between a single "master" and a single "slave" is not because they implicitly adopt an obsolete "Blackstonian" paradigm of property. Rather, I believe these writers refuse to analyze slavery as a property regime at all, precisely because they shrink from its necessary implications. They wish to recognize the subjectivity of the slave by calling slavery a relationship between one subject—a slave—with another subject—a master. But the awful truth of slavery as property is that the law refuses to recognize the slave's subjectivity—by definition if slavery is property, then the slave is a mere object, subjected to the relationships of others. This invokes precisely the image of the slave auction—now made even more accurate and explicit by Russell because we can now see that the auctioneer is wearing a black robe and the hammer is a gavel.

---

[2] *Id.* at 481-88.

[3] *Id.* at 502-04.

[4] My ideas are set forth in a forthcoming book and a number of articles. *See* JEANNE L. SCHROEDER, THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE (forthcoming 1997); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) [hereinafter Schroeder, *Bundle-O-Stix*]; Jeanne L. Schroeder, *The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis*, 16 CARDOZO L. REV. 805 (1995) [hereinafter Schroeder, *The Vestal and the Fasces*]; and Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolate Feminine Body*, 79 MINN. L. REV. 55 (1994) [hereinafter Schroeder, *Virgin Territory*]. In this Comment, I can only allude to my feminist theory which is based heavily on Lacanian psychoanalytic theory and Hegelian philosophy.

However, I disagree with Russell's suggestion that the analysis of slavery as a property regime could be furthered by adopting a supposedly more modern "Hohfeldian" paradigm.[5] The reason a Hohfeldian analysis may initially seem more palatable is that it also represses the reality of slavery, but Hohfeld does so in a way that is even more brutal than Blackstone. If Blackstonian law refuses to recognize the slave's subjectivity, Hohfeldian law goes further and refuses to recognize even her objectivity. Blackstone sees the slave, yet refuses to listen to her. Hohfeld refuses even to see her.

Let me explain.

First, one cannot blame the emphasis on unitary property rights in slavery scholarship on an uncritical acceptance of a traditional Blackstonian norm. Rather, the repression of the reality of multiple property rights in slaves is even more remarkable given the actual Blackstonian tradition.

Most of Blackstone's commentaries on property concern the explication of the various multiple estates in realty. I believe that the confusion that Blackstone thought that property was "unitary" flows largely from a change in terminology. Today, we often use the word "property" to mean the thing or *res* against which a property claim is asserted. In Blackstone's time, this use was novel, and the word "property" was primarily used to refer to that set of rights claimed in the object—not the object itself. That is, today one would say that Blackacre is her property, whereas in Blackstone's day, she would say that she had a property in Blackacre. Indeed, legally, she would not be the owner of Blackacre per se, but of an estate in Blackacre. Consequently, although each Blackstonian estate may have only one owner, in Blackstone's economy, Blackacre itself was usually subject to multiple claims of multiple estate owners.[6]

In other words, one would expect a scholar of eighteenth- and nineteenth-century law to take precisely the Blackstonian approach and not speak of ownership of a slave as a unitary thing, but rather recognize and speak of holding the equity, or the life estate, or the remainder, or whatever, in a slave. And yet they do not do so.

Moreover, despite well known mischaracterizations by Thomas Grey, Kenneth Vandevelde and others, the historical William Blackstone did not analyze property as a relation of a subject to an object—which would mean, in the case of slavery, a relation-

---

[5] Russell, *A New Image of the Slave Auction*, *supra* note 1, at 519-20.

[6] *See* Schroeder, *Bundle-O-Stix*, *supra* note 4, at 278-81.

ship between a master (as subject) and the slave (as object)—that can be contrasted with Hohfeld's analysis of property as a relation among subjects. Rather, Blackstone's famous definition of property has the identical starting point as Hohfeld's definition. To Blackstone, property is that "which one man claims and exercises . . . in total exclusion of the right of any other individual in the universe."[7] To Hohfeld, property consists of those "rights, actual and potential, residing in a *single* person . . . but availing *respectively* against persons constituting a very large and indefinite class of people."[8] That is, to both Blackstone and Hohfeld, property is a relationship among legal subjects—specifically, the right of one subject generally enforceable against the world. Where Blackstone departed from—and was much superior to—Hohfeld, is that Blackstone recognized that what distinguished property from other legal rights enforceable generally against the world (such as torts) was that property claims relate to dominion of a subject over an object—what he called an "external thing" or is often called in property law, a *res*.[9] I will return to this.

But if scholars have avoided Blackstone because they shrink from confronting the full implications of slavery as property, they should be expected also to eschew the even more extreme Hohfeldian property analysis. The Blackstonian lawyer at least confronts the slave as an object to which she does not have a relationship. The Hohfeldian lawyer never has to confront the existence of the slave at all because she disappears even as an object.

Once again, I need to explain. First and foremost, I want to emphasize, that Hohfeld's theory of property has never been adopted in any property law regime because it is incoherent and inadequate. This may seem surprising because we all know the cliché that the U.C.C. reflects the modern theory that property is a "bundle of sticks" and that this relates to Hohfeld's system of legal conceptions and jural correlatives. In fact, while Hohfeld's system of legal conceptions did heavily influence Karl Llewellyn and the other legal realists,[10] this system was only half of Hohfeld's project, and does not relate specifically to his property theory. In fact, Llewellyn expressly rejected the base proposition of Hohfeld's

---

7 2 WILLIAM BLACKSTONE, COMMENTARIES *471.

8 WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 72 (Walter W. Cook ed., 1919).

9 BLACKSTONE, *supra* note 7, at 471.

10 *See, e.g.*, KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 572 (1930) ("The Hohfeld approach is almost indispensable to clear statement of a narrow issue in its legal aspects.").

property theory—that property rights do not necessarily involve an object.[11]

Hohfeld's property analysis was a failed attempt to distinguish between *in rem* and *in personam* rights. Unfortunately, he concentrated so hard on the intersubjective aspect of property, that he denied its objective side. He incorrectly concluded from the truism that property—like all legal rights—cannot be a relationship between a subject and an object, but is always a relationship between or among subjects; he denied that property rights could be relationships among subjects with respect to an external object or *res*. This is because Hohfeld started with the naive, but common, assumption that only tangible, physical things can be "objects."[12] That is, he thought that the object of property relations could only be Blackacre itself, and not the estates in Blackacre. In Lacanian terminology, this is an Imaginary conflation of the Symbolic with the Real—a basic psychoanalytic tendency. Consequently, Hohfeld incorrectly thought that any requirement that there be an object of

---

11 For example, Llewelyn stated that:

> Property rights in non-existing goods are either impossible, or of no importance as long as the goods in question remain non-existent. The problem becomes a real one only when, following yesterday's apparent attempt to create property in non-existing goods, the goods today come into existence and become a subject of dispute.

Id. at 575. Indeed, Llewellyn mischaracterized Hohfeld's theory of property in such a way as to obscure his fundamental disagreement. In order to critique the common law theory of title, Llewellyn describes Hohfeld's approach as "a lump- designation for the conjunction in one person of a large number of particular legal relations *with respect to a particular thing*." *Id.* at 572 (emphasis added). As we shall see, the problem with Hohfeld's theory of property is that he expressly rejected the italicized words which Llewellyn ascribes to him in this passage.

This rejection can be found not only in specific provisions, but also in the very structure of the U.C.C. *See* Schroeder, *Bundle-O-Stix*, *supra* note 4 (discussing a feminist critique of the Hohfeldian bundle of sticks approach to property). *See also* Jeanne L. Schroeder, *Death and Transfiguration: The Myth that the U.C.C. Killed "Property"* 69 TEMP. L. REV. ___ (forthcoming 1996).

12 *See, e.g.*, HOHFELD, *supra* note 8, at 78 ("[Limiting *in rem* rights to rights to a thing] would exclude not only many rights *in rem*, or multital rights, relating to *persons*, but also those constituting elements of patent interests, copyright interests, etc."). Additionally, Hohfeld stated that:

> [I]t must now be reasonably clear that the attempt to conceive of a right *in rem* as a right *against a thing* should be abandoned as intrinsically unsound, as thoroughly discredited according to good usage, and, finally, as all too likely to confuse and mislead. It is desirable, next, to emphasize, in more specific and direct form, another important point which has already been incidently noticed: that a right *in rem* is not necessarily one *relating to*, or *concerning*, a thing, i.e. a tangible object. Such an assumption, although made by Leake and by many others who have given little or no attention to fundamental legal conceptions, is clearly erroneous.

See Id. at 85. *See also* Schroeder, *Bundle-O-Stix*, *supra* note 4, at 290-95.

property meant that one could not have property rights in intangibles.

He did not recognize that in traditional Western philosophy and jurisprudence, as well as property doctrine, an "object" is defined as anything that is not recognized as a subject. That is, an object or *res* is a legal, linguistic (or, in Lacanian terms, "*Symbolic*") construct, and not a natural, pre-legal (or, in Lacanian terms, "*Real*") thing. For example, when I eat an apple, my sensuous experience of holding, chewing, and digesting the apple does not make it the object of a property right—it only becomes an object or *res* through the application of law when I assert the right to possess, enjoy, and alienate the apple.

Hohfeld thought that the only way to reconcile the fact that the law recognizes intangible property rights with his assumptions that only tangible things could be objects, was to deny that property claims involved objects at all. Consequently, he needed a new way of distinguishing property from contract. He ended up proposing that the distinction between *in rem* and *in personam* be rejected entirely, to be replaced by what he called *multital* and *paucital* rights.[13] The fact that you have never heard of these terms proves how unsuccessful his schema was. The former are rights enforceable against the world generally, and the latter are enforceable against a specific individual. Obviously these former—generally enforceable rights—do describe property and are part of Blackstone's definition. But they also describe other legal rights including torts and (to give my personal favorite of Hohfeld's examples of an *in rem* or *multital* right) a father's rights in his daughter's virginity.[14] Hohfeld's analysis failed precisely because he could not account for traditional distinctions that are crucial for that legal and economic system known as capitalism.

And so it should be obvious how Hohfeld's system is even more inadequate to describe slavery. To Blackstone, slavery was the relationship between the various estate holders as subjects with respect to dominion over the slave as object. To Hohfeld, slavery is the relationship between the various estate holders as subjects—the slave herself is denied even her degraded status as an object. Hohfeldian slavery is the ultimate example of the slave owner's denial and repression of her guilt. She has not merely objectified the slave, she has totally obliterated all reference to the slave's

---

[13] HOHFELD, *supra* note 8, at 72. *See also* Schroeder, *Bundle-O-Stix*, *supra* note 4, at 295-99; Schroeder, *Virgin Territory*, *supra* note 4, at 69-70.

[14] HOHFELD, *supra* note 8, at 85.

existence. The slave has no objective existence in this system, but stands in as a ghostly place holder for the relationship between the slave owners. As I have said, Blackstone sees the slave, but does not listen; but Hohfeld refuses to even see her. And so, if the Blackstonian property paradigm of slavery breaks down because the slave refuses to cooperate with her silent objectification and speaks to the "master," thereby demonstrating her rightful status as a subject—what of the Hohfeldian property paradigm?

More importantly, both the Blackstonian and Hohfeldian approaches are inadequate because they devolve into positivism. They are facially neutral, ostensibly merely "describing" the institution of slavery as property without making any express judgement. This makes violence and injustice seem external to, rather than inherent in, the law of slavery. This is precisely the traditional imagery of the slave auction without the judge.

I would suggest that an analysis of the property aspect of slavery can more successfully be addressed through a Hegelian-Lacanian approach. I can hear the groans in the audience. Since I used the word "slavery" within the same sentence as the name "Hegel," you are probably afraid that I am about to dredge up Hegel's famous lord-bondsman dialectic from the Phenomenology. Don't worry.

Instead, I rely on Hegel's analysis of the property in *The Philosophy of Right*.[15] I believe that this approach is necessary because it not only properly analyzes slavery in terms of property, but also insists on confronting the violence—the essential wrong—of doing so. Hegel does not analyze property—as does Blackstone—as the neutral treatment of a slave as an object or—as does Hohfeld—as rights that do not even involve the slave—but as the violently wrongful deprivation of the slave's subjectivity.

Obviously, an exegesis of *The Philosophy of Right* is beyond a short comment. To put it simply, as my colleague Arthur Jacobson has put it, it is a *Bildungsroman* of the individual and society. That is, it is a demonstration of how the abstract individual posited by classical liberalism—Kant to be specific—by logical necessity develops into the complex, concrete, social individual located within society.

Hegel's is a philosophy of desperate eroticism. Human beings passionately want to attain subjectivity and actualize their freedom, but the only way to do so is by recognition by another subject. This

---

15 G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed. & H.B. Nisbet trans., 1991).

is one meaning of Jacques Lacan's famous rewriting of Hegel that "the desire of man is the desire of the Other."[16] The Hegelian person is a passionately rights-seeking creature. He is driven less to claim rights for himself, than to accord rights to the Other. He does this so that she (i.e., the Other) can become a true subject who can then, in turn, recognize him as a subject.

Paradoxically, although human freedom can only be actualized through human relationships, freedom also demands that human relations not be *immediate*, but be *mediated*. If one person were to try to use another human being to achieve his own subjectivity, he would be treating her as the means to his ends thereby making her the object of his desire. By so objectifying the Other, he is not recognizing her as a subject. Because her subjectivity can only be actualized by recognition, she never attains complete subjectivity. Consequently, he cannot achieve subjectivity because, even if the objectified Other could recognize him, it would not "count." It is necessary, therefore, for the two subjects to use an external "object" that can serve as the point of their mutual recognition in the formation of a common will.[17]

To Hegel, the first stage in the development of individuality is what he calls "abstract right."[18] This is the process by which the abstract Kantian individual becomes a legal subject capable of being recognized and interrelating with others. Abstract right consists of property and contract. Property serves as the initial, most negative, mediated relationship which enables abstract persons to recognize each other as subjects.

As I said, relations between subjects need to be mediated. Objects serve this mediating role. Property is the regime of possession, enjoyment, and alienation of objects. That is, it is a legal relationship between and among subjects with respect to an object—

---

16 JACQUES LACAN, ECRITS: A SELECTION 264 (Alan Sheridan trans., 1977). I explore the relationship between Hegel's theory of the role of property in the creation of subjectivity and Lacan's theory of sexuality in the creation of subjectivity extensively in Schroeder, *The Vestal and the Fasces*, *supra* note 4; and Schroeder, *Virgin Territory*, *supra* note 4.

17 Note, my choice of gender is intentional. In Lacanian theory of sexuation, the position of seeking subjectivity is the masculine, and the position of the object of desire is the feminine. An affirmative subjectivity is impossible in Lacan's depressing theory precisely because of the Hegelian paradox. By objectifying the feminine, the masculine always fails in his attempts in recognition. *See* Schroeder, *Virgin Territory*, *supra* note 4.

And so, in his most recent work, Lacanian philosopher Slavoj Zizek has turned Lacan on his head, and argues that it is the feminine, and not the masculine, that is the position of subjectivity. *See* SLAVOJ ZIZEK, THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY (1994).

18 I set forth this analysis in much greater detail in Schroeder, *Virgin Territory*, *supra* note 4; and Schroeder, *The Vestal and the Fasces*, *supra* note 4.

the Blackstonian definition. To Hegel, this is the most primitive and inadequate of all human relationships, but necessary as a basic building block of more full, adequate, and satisfying human relationships—such as morality and ethics. As such, it is an "abstract" right.

"Objects"—which can serve to mediate between subjects—are, therefore, defined as anything that is not capable of subjectivity. Consequently, anything, other than self-conscious free will itself, is theoretically eligible to be treated as an object for this purpose.

Anything other than self-consciousness. The one thing that cannot rightly serve as the object of property is that which is capable of self-consciousness—another person. This is because the teleology of property is the self-actualization of human freedom through the development of subjectivity. To treat another person as an object of property is to attempt to attain subjectivity by depriving another human being of her subjectivity. As such, it is not merely self-contradictory and self-defeating; it is an abstract wrong. It is an affront to the very nature of what it is to be a person. It is a wrong that pre-exists morality and ethics, so that no moral or ethical regime can exist, and no individual self-actualization can exist—if slavery exists.

In contradistinction to traditional liberal jurisprudence—as exemplified by Hohfeld, Hegel argued that property is not merely the creation of law. Rather, property and law—as Abstract Right—are mutually constituting. By this, he means that the moment of the recognition of property is the originary moment of law. Consequently, the wrong of slavery is not a wrong that is external to the law. It is original sin that infects the entirety of law from the moment of its conception. In this profound way, Hegel insists on always implicating the judge in the imagery of the slave auction.