

Rights at the Cutting Edge

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Introduction

This essay concerns the analytical jurisprudence of legal rights.¹ It is both a reflection upon that subject and a contribution to it. Since the structure of the essay is somewhat complicated, it is best to begin with a brief outline of what follows.

Part 1 reflects upon some of the philosophical issues that form the background to the debate concerning legal rights. One object of the discussion is to challenge conventional conceptions of the division between analytical jurisprudence on the one hand and normative jurisprudence on the other. Analyses of legal rights have always, I suggest, been bound up with broader interpretations of the form of moral association that finds expression in our laws. Jurisprudential discussion has tended to focus upon the *form* of rights rather than upon their *content*, but this focus is misunderstood if it is taken to reflect a division between conceptual analyses and substantive moral or political theories. Complex separations and dependencies between form and content themselves point to significant features of the modern political community, and have given rise to paradoxical tensions that become manifest within the debate concerning rights.

Part 2 offers a preliminary account of the classical 'Interest' and 'Will' Theories of rights. These theories were in essence and in origin theories of the grounds of legitimacy rather than austere analytical clarifications of a concept. They sought to exhibit the role of law in reconciling the subjectivity of interests and projects with the demands of collective governance. The Will Theory emphasised the systematic character of law and the boundary between private and public law. Rights were identified pre-eminently with private law, and were understood in terms of a Kantian theory of justice

¹ I am indebted to David Johnston for his comments on an earlier draft, and to Matthew Kramer for his comments on successive drafts. I am also indebted to RWM Dias, whose lucid expositions of Hohfeld first introduced me to the subject.

that separated the form of the will from its particular content. The Interest Theory, by contrast, emphasised the posited nature of law as a basis for the artificial demarcation of boundaries between conflicting interests. Both the Will Theory and the Interest Theory (in their classical versions) encountered severe problems. The Will Theory ran aground upon the emptiness and sterility of the Kantian theory of justice. The Interest Theory, on the other hand, found itself faced by unacceptable alternatives: either a collapse into naked instrumentalism, or a reduction of rights to the mere reflex of posited rules.

Parts 3 and 4 then turn to the Hohfeldian analysis of rights, an analysis which is fundamental to the whole essay. Part 3 aims to elucidate and defend certain features of that analysis, especially the separation between permissibility and inviolability, and to demonstrate the importance of that distinction in undermining the pretensions of Kantian jurisprudence, and thus of the classical Will Theory. Part 4 then pursues this theme further, mainly by reference to the Kantian theory of Hillel Steiner.

Part 5 addresses the classical and modern versions of the Interest Theory. In particular, I seek to demonstrate that the most influential modern versions of the Interest Theory present rights as playing a central part in the dynamic aspect of legal reasoning: that is, they treat rights as pivotal features of legal doctrine, providing reasons for the recognition of new remedies, duties, liabilities, and so forth. In making this move, however, they encounter a variety of difficult problems. They are, for example, forced into an unacknowledged abandonment of the idea that rights have peremptory force. Furthermore, they find it impossible coherently to elucidate the notion of the special 'weight' that is said (by such Interest Theorists) to attach to those interests that are accorded the status of a right. Consequently, the theory tends to collapse legal rights into markers of interests within a general process of balancing interests one against another. This erodes the integrity of legal doctrine and, with it, of the domains of liberty protected by such doctrine.

In Part 1 of this essay I point to the paradoxical tensions characterizing a modern political community and finding expression in the debate about the nature of rights. The very pluralism and diversity that leads us to emphasise the importance of rights also renders their existence problematic. In Part 6 we encounter a further twist to the problem, for Part 6 advocates, as the most satisfactory

analysis of the concept of 'a right', a modest version of Will Theory in something like the form proposed by H.L.A. Hart. This theory does not treat rights as central to legal reasoning or to the dynamic development of law (as did both the classical Will Theory and influential versions of the modern Interest Theory). For consideration of those alternative theories shows us that to place rights at the centre of legal reasoning is to threaten the determinacy of doctrinal argument and so the integrity of rights themselves. The modest version of the Will Theory treats rights as powers of waiver or enforcement over legal duties. In this way it reflects two features that might be considered important constituents of the integrity of rights: the separation of private from public law, and the centrality to private law of private rights of enforcement. One does not protect the integrity of rights by placing them at the centre of our legal thinking, for down that broad and obvious path lies the indeterminacy of the classical Will Theory and the naked balancing of interests that constitutes the modern Interest Theory. Protecting rights effectively is not the same thing as talking or thinking about rights, and the most effective protections may well involve reliance upon criteria that do not employ the concept of a right at all. Possessing a right should involve, however, having some real element of control or choice such as is provided by the option of enforcement: rights need not and should not be at the centre of our legal thinking, but they should be and can be at the cutting edge.

1 Background

Analysis and Interpretation.

On 10 November 1837 the 19-year-old Karl Marx wrote a letter to his father. Marx had completed one year as a student in the Law Faculty at Berlin, and he gave his father an account of his legal and philosophical studies during the year. In the course of this account he speaks of having written a treatise on the philosophy of law, discussing 'the development of the ideas in positive Roman law' and analysing 'the necessary structure' of those ideas. Marx goes on to explain how he came to regard this enterprise as absurdly misguided, in so far as it assumed that the form of a legal concept could be separated from its positive content:

The mistake lay in my belief that matter and form can and must develop separately from each other, and so I obtained not a real form, but something like a desk with drawers into which I then poured sand.²

The topic of the present essay might raise in the minds of many lawyers a reaction resembling that of the young Marx: for the analytical jurisprudence of rights seems, like Marx's juvenile treatise on the philosophy of law, to detach the form of rights from their content. We are invited to address the question of the general nature of rights without saying anything of substance about what our rights may authorize or require. We may plausibly be assured that the analytical question of what it is to possess a right must be logically prior to the question of what rights we possess; that the concept of a right must first be clarified before decisions can be made about its applicability. Yet we may be forgiven for suspecting that this exercise will result only in the construction of drawers into which we will later 'pour sand'.

Indeed, few debates in modern jurisprudence seem so arid as that concerning the formal analysis of legal rights. Even amongst those who have actively battled in the tournament, there is little agreement about the prizes that may be at stake, or about the wider issues that may turn upon the outcome. Anyone acquainted with the analytical jurisprudence of rights at a tolerably sophisticated level is likely to conclude that our more 'conceptual' intuitions about rights can be regimented in a great diversity of ways. Each regimentation comes, of course, at a price, and protagonists in the controversy sustain a sense of intellectual progress by drawing attention to the price that others must pay, while making light of the entry fee to their own system. Human ingenuity guarantees that the repertoire of available intellectual positions is never exhausted, and the kaleidoscopic turns of the discussion can certainly exert their fascination; but, in the absence of some more convincing account of what is at stake, many will turn their attention elsewhere.

Too casual a dismissal of such controversies can, however, be a mistake. Even if we were to regard their existence as but a curious fact in the anthropology of developed legal systems, it would nevertheless be a fact that demands explanation and which may point us

² Extracts from the letter are printed in Maureen Cain and Alan Hunt, *Marx and Engels on Law* (London: Academic Press, 1979), 16, and David McLellan, *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977), 7.

towards significant insights. Seemingly abstruse debates can sometimes be the expression of surprisingly deep tensions within the legal order. Thurman Arnold once defined jurisprudence as 'the shining but unfulfilled dream of a world governed by reason'.³ Pursuing that thought, we may expect to discover within such dreams much that is of significance for our collective self-understanding.

One does not know one's own character by introspection. One must first act, in the world of things and persons. By retrospective reflection upon the character of our actions, we may come to know ourselves. Similarly, the political and legal institutions and practices of modern communities did not spring into being as a simple expression of newly formed political ideals arrived at in abstraction from the flood of historical events. Rather, we may hypothesize that those institutions and practices became manifest before they were identified as distinctive; only then were they reflected upon as sources of insight into our own nature and values; only then did those values begin to take shape upon the intellectual landscape. Interpretations of the modern political community which emphasize the autonomous character of its citizens and the individualistic nature of their values are therefore of one piece with interpretations of the character of law that make such autonomy and individualism seem possible. The practices of modern law and legal argument admit of diverse interpretations, and these interpretations carry with them significant implications for the self-understanding of the liberal political community and for the role of law within that community. The reflective conclusion that our polity expresses values giving a central priority to law is often of a piece with a view as to how law can be possible within such a community. Consequently, varying understandings of the problem of law's status suggest distinctly different solutions to that problem.

It is at this point that two classical theories of rights come clearly into view: the 'Will' and 'Interest' Theories. For these two theories are best understood as proposing rival interpretations of the nature of modern law and of the relationship between the individual and the collectivity.

Such a characterization of a seemingly esoteric jurisprudential debate will strike many as surprising and implausible. They may

³ Thurman W Arnold, *The Symbols of Government*. Relevant extracts are collected in V Aubert (ed) *Sociology of Law* (London: Penguin, 1969), 46–51.

see little in the modern literature on the analytical jurisprudence of rights that suggests a concern with such fundamental issues. Contemporary forms of the contest between the Will and Interest Theories prove, however, to be but a pale and impoverished representation of the problems that originally gave shape to the rival positions. Those problems concerned the reconciliation of individual projects and entitlements with collective governance of the political community: the subjectivity of rights and the objectivity of law. Versions of the Will and Interest Theories can be reconstructed in a form that makes the centrality of such questions clear: I will describe such reconstructions as the 'classical' versions of the two theories, and will then seek to cast light upon the route whereby the classical versions metamorphosed into their more insipid contemporary descendants. This metamorphosis did not come about as a result of the common human tendency to continue seeking answers to a question long after we have forgotten our reasons for asking it. Rather, significance has appeared to seep away from this debate as a consequence of the intellectual and historical pressures to which the proposed solutions have been subject.

The factors which have led to this perceived loss of significance are no doubt quite varied; but one feature that calls for special attention is a subtle change in our conceptions of the proper task of philosophy, which seems to preclude philosophical reflection upon the established forms of legal and political community. For the very conception of our enterprise as an interpretation of contingent arrangements is obstructed by modern assumptions concerning the character of jurisprudence. It is frequently assumed that jurisprudence must *either* proffer analytic truths by way of conceptual clarification *or* must endeavour to ground categorical moral principles. Jurisprudence must (in short) be *either* analytical, *or* normative and foundational. Within the context of the first enterprise, we may seek a systematic description of practices and institutions. Within the context of the second enterprise we may *evaluate* those practices by reference to unconditioned moral principles. The stark terms of this dichotomy have tended to survive in spite of the doubts which have been cast upon the very notion of analytic truth⁴ and the ever-repeated failure to discover

⁴ WVO Quine, 'Two Dogmas of Empiricism' in *From a Logical Point of View* (Cambridge, Mass: Harvard, 1964). For criticism of Quine's position, and comparison with Wittgenstein's views, see Hans-Johan Glock, 'Necessity and Normativity' in

philosophically grounded moral principles. The survival is in large part explained by the belief that if philosophy cannot lay claim to a distinct field of inquiry (such as the analytically true, or the unconditioned foundation) it ceases to be an autonomous discipline.

Such stark alternatives were alien to older forms of legal philosophical thought. The major positions within the historic tradition of jurisprudence might well be thought of as reflections upon the form of moral association represented by law. Whether that association was understood in terms of Reason, of Will and Artifice, or of History,⁵ law was its visible expression and was important for that reason. When our common human nature was seen as God's handiwork, and as a source of fundamental value for us, it was inevitable that a key to that nature would be sought in the practices and institutions in which it found expression. Law was not simply a sphere for the application of moral insights derived from elsewhere, but a significant focus for philosophical reflection and a source of self-understanding. Indeed, since jurisprudential reflection *upon* law has never been clearly separable from the intelligent development of doctrinal ideas, we may go further. Borrowing the words of Alasdair Macintyre, we may say that the 'living tradition' of jurisprudence 'is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.'⁶

Consideration of the values internal to political communities and juridical practices has become harder to comprehend, partly as a result of Kant's moral philosophy. In presenting a view of morality as conditioned neither by practice nor by desire, Kant's philosophy seemed to have the effect of reducing human practices and forms of association to brute facts without intrinsic moral status.⁷ No longer seen as the expression of a normative human nature, nor as the outcome of a Divine Providence manifesting God's will, the observable features of human society were to be judged from the viewpoint of the categorical imperative. The idea that a form of human association

Hans Sluga and David Stern (eds) *The Cambridge Companion to Wittgenstein* (Cambridge: Cambridge University Press, 1996)

⁵ Michael Oakshott, *Hobbes on Civil Association* (Oxford: Blackwell, 1975).

⁶ Alasdair Macintyre, *After Virtue* (London: Duckworth, 1981), 207.

⁷ This has been the historical influence of Kant's emphasis upon the categorical nature of moral demands, but Kant's own position was more complex. The older approach received a muted echo in Kant's philosophy of history, and a late flowering in the thought of Hegel.

might serve as a source of moral insight is rendered problematic on this view, wherein moral examples are presented as secondary to, and wholly dependent upon, articulable moral principles.⁸

However, the older view has some surprisingly modern resonances. For, if we are not to fall into the errors of an extreme moral Protestantism which makes morality solely a matter of the private and individual will, we should acknowledge that morality embodies interests that can only be fulfilled in the context of shared social practices; and if we are to avoid a crude Hobbesianism that makes such practices a mere means to the satisfaction of one's private preferences, we must acknowledge that the interests so realized are our interests as moral beings, and not simply as seekers of private gratification. Our moral identities, therefore, must be bound up with constitutive forms of association, and reflection upon such forms of association must be an integral part of moral philosophy. If our interests as moral beings can be realised only in the practices of a political community, then the actual historical practices of such communities must contain at least *intimations* of moral reason, which the philosopher can seek to comprehend and elucidate.

Somewhat ironically, the detached deontology of Kantianism is itself occasionally presented as a response to the particular features of modern political communities. Thus, we find it argued that the notion of categorical obligation arose as an attempt to deal with the problem of pluralism in modern society: conditionality upon particular desires or forms of life will be inadequate in communities which exhibit diverse commitments and cultural practices.⁹ Whether or not such explanations are plausible, they do not enable us to overcome our sense that moral requirements cannot be grounded simply in 'the way we do things around here'. For we are heirs to a sense of detachment from all such contingent and local practices: a detachment which fuels the demand for categorical moral foundations.

The idea of morality as autonomous and empirically unconditioned suggests the need for foundations that are abstract and monistic, forming a unified and all-encompassing perspective upon the world. The varying features of our moral and juridical practices

⁸ See Kant, *Groundwork of the Metaphysics of Morals*, 2nd edn, (trans) HJ Paton, *The Moral Law* (London: Hutchinson, 1958), 73.

⁹ Charles Larmore, *The Morals of Modernity*, (Cambridge: Cambridge University Press, 1996), 12. See also Alasdair MacIntyre, *A Short History of Ethics* (London: MacMillan, 1967), ch 14.

are comprehended from such a viewpoint only by a process of subsumption and flattening out. The philosophical debate becomes a search for the aggregative or distributive goal which can most effectively subsume and explain the seemingly recalcitrant facts of practical history and experience.

Such tendencies towards monism and abstraction within political philosophy are, within jurisprudence, reinforced by more specific features of legal doctrinal analysis. For the model of doctrinal analysis which shaped the emergence of the legal treatise was one which emphasized the internal coherence of the law, coherence being understood as the capacity for subsumption under a limited range of highly general principles and categories. Pressures towards legal recognition of the diversity of human interests, however, forced the law to pursue an ever more complex agenda of goals and policies, many of which were mutually competitive. Consequently, it became difficult to view the legal order as the coherent expression of a single conception of justice structured by a set of ordered doctrinal principles. One response to this problem was, not to abandon the search for monistic systematization, but to seek for it at ever more abstract levels, thus encouraging the unhelpful perspectives adopted within philosophy.

I have elsewhere suggested that a model of doctrinal integrity founded on the idea of a domain's internal simplicity should be replaced by a model founded on the relative impermeability of the domain's boundary.¹⁰ This perspective proves to be an important one for our understanding of the debate on rights. For, while contemporary theories of rights may appear to lack any obvious depth of significance (thereby differing from their classical ancestors) the appearance is in some respects misleading. The question which lay at the heart of the classical debate was one concerning the integrity of rights, and this question continues to press upon us. What we find here is not a loss of significance but a loss of confidence in the availability of sweeping and unqualified solutions. Classical versions of the Will and Interest Theories were the expression of a robust confidence that the problem of reconciling private entitlements with collective governance could be solved in a fully satisfactory manner at a level of considerable generality. There are now

¹⁰ See Nigel Simmonds, 'The Possibility of Private Law', in John Tasioulas (ed), *Law, Values and Social Practices* (Aldershot: Dartmouth, 1997).

good reasons for doubting that confidence. Consequently, sweeping solutions are less likely to be successful than modest and piecemeal stratagems; categorical principles are less likely to be available than suggestive interpretations of actual, albeit contingent, arrangements; we will be unwise to claim that our account of rights is straightforwardly 'true', and better advised to suggest that it represents a way of understanding our practices that fosters those objectives that we take the practices to serve.

Form and Content

Marx's initial belief that the form of law might be studied independently of its content gave expression to some striking features of the post-feudal legal order (as we will see, the same might be said of his subsequent *rejection* of that idea). Indeed, the very notion that the law may be represented as a body of systematic principles independently of a description of the social relations to which the law applies is itself a manifestation of the dichotomies between form and content. If one were to open up a medieval law book such as Bracton, for example, one would find that an account of the law was bound up with an account of the political, social and economic relations of the polity. A modern law book dealing with a central area of private law (such as contract or tort) would by contrast reveal very little about the society to which the law applied. Such differences in the character of legal exposition reflect differing moral or political assumptions. For medieval legal thought, the institutions of law and government were established in hierarchical form as a source of discipline for sinful men and women. The political hierarchy was in continuum with a hierarchy stretching throughout God's creation. An exposition of the assemblage of rights, franchises, lordships and servitudes composing the social and political hierarchy was in itself an exposition of the law. For modern legal thought, by contrast, rights are not inherently or naturally hierarchical in character: rather, the assumption is that the diverse concrete rights of individuals may be derived from juridical principles which in some sense apply equally to everyone, defining a level of entitlement at which all rights are equal.

The emergence of systematic structures of legal rights, grounded in juridical equality, marked the separation between the modern liberal polity and the old society of feudalism. In shaking itself free

from immersion in the hierarchies of the social structure, and presenting itself as a body of principles defining equal rights, the legal order generated systematic bodies of doctrine of a type which had not previously existed. Every social relation, when presented in legal doctrinal terms, needed to be analysed in terms of highly general principles and relations. The *form* of law came to be an important focus for attention. Indeed, the priority given to form over content within the scheme of doctrinal legal thought led Lukacs to claim that 'the whole revolutionary period of the bourgeoisie was based on the assumption that the formal equality and universality of the law (and hence its rationality) was able at the same time to determine its content'.¹¹

In grounding itself on this assumption, modern legal thought gave rise to a body of juristic *theory*. The simple exposition of posited rules and decisions was subsumed under an enterprise of systematic integration whereby concrete provisions were treated, not as discrete, but as reflective of some central constellation of principles. At the same time, it was hoped that the determinacy of the law's content could be sustained without being infected by aggregative or distributive questions characteristic of the political realm. It might well be thought that the attempt to separate a body of relatively abstract legal concepts and distinctions from all questions about the purpose or justification of those concepts and distinctions would make the law seem 'like a mysterious language with a formal grammar but no real meaning of its own'.¹² Classically, however, the aspiration was to create a systematic body of doctrine structured by a handful of general concepts (such as the notions of property, fault, and the will) bearing its reasonableness and its groundedness in principle open upon its face. The most influential theory for the period when legal doctrinal systems were being systematized and consolidated was a theory of Kantian provenance. For it was believed that reason could determine a set of principles which represents the mutual compatibility of individual wills: in this way, each person's freedom might be reconciled with the freedom of everyone else, and the content of the necessary system of rules could be determined without privileging the will and preferences of any individual. It is on this plane of

¹¹ G Lukacs, *History and Class Consciousness*, (trans) Rodney Livingstone, (London: Merlin Press, 1971), 107.

¹² Jeremy Waldron in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), 10.

juristic theory that the debate concerning the nature of rights emerges into prominence, giving rise to just such discussions of the 'form' or 'necessary structure' of legal ideas as those which had been embarked upon by the youthful Marx.

The abstraction of juridical principles from the complex social relations to which they applied gave law an appearance of austerity and rigour. Yet at the same time, the emergence of such a distinct juridical realm ultimately involved a recognition that the social structure was not a natural landscape forming the unalterable horizon for human affairs, but was itself subject to the choices of the collectivity. In his essay 'On the Jewish Question',¹³ Marx was to highlight the connection between (on the one hand) the emergence of a public political state distinct from the proprietary and familial realms of civil society, and (on the other hand) the conceptualization of that civil society as a region of competition between independent actors, rather than as an organically united or divinely ordered sphere. The dissolution of civil society into independent actors was a recognition of an individual identity distinguishable from inherited social roles; while the emergence of the political state fostered recognition of the collective choices that sustained the framework of civil society. States may have evolved out of complex patterns of behaviour independently of any collective choice, but once they are in existence they transform the moral situation of their members by making possible collective choices which can alter the inherited outcomes of a customary order.¹⁴ This was to pose problems for theories that interpreted juridical thought in terms of a formalistic Kantian theory of justice, for such theories tended to founder upon the emptiness of their own formalism once the presupposition of some given social background was removed or called into question.

I have elsewhere described the problem to which this gave rise as involving two competing values, which I dub 'private project pursuit', and 'collective project pursuit'.¹⁵ On the one hand we value the capacity of individuals to formulate and pursue their own plans and

¹³ Karl Marx, 'On the Jewish Question', in *Karl Marx: Early Writings* (London: Penguin, 1975).

¹⁴ I am here seeking to describe the assumptions that structure our political values. The substantial reality of collective choice may be a different matter. See, for example, Claus Offe, *Modernity and the State* (Cambridge: Polity, 1996), who speaks of a 'widely shared sense that sovereignties have become nominal, power anonymous, and its locus empty' (p. ix).

¹⁵ Simmonds (n 10 above).

projects; but, on the other hand, we value our ability collectively, through the organs of our political community, to exercise control over the character of our social life. The value that we place on these capacities does not, of course, imply that we believe that there are no truths about how such capacities should be exercised, or about which choices should be made in the course of their exercise. The point is simply that we value the capacity to choose quite independently of the value we put upon the content of such choices. We do not regard the general character and profile of our society as a natural landscape over which we have no control; nor do we regard the course of our individual lives as being inflexibly determined by inherited social roles. Knowing that these things are alterable, we believe that it is our responsibility as moral agents to exercise choice about whether and how they might be altered.

Collective and private project pursuit conflict. A society which gave full scope to private project pursuit would abdicate collective control by allowing its overall character to be determined by the unpredictable outcome of millions of unco-ordinated individual choices; while a society which gave full scope to collective control would obliterate any room for private projects.¹⁶

It is through the institution of the rule of law that the political community seeks to achieve a stable way of recognizing and respecting the competition between values which is inherent in this situation. The notion of the rule of law, however, is far from transparent, and rival accounts of its requirements mirror in significant ways the dichotomies of the rights debate. On the one hand is a theory which emphasizes the separation between public and private law: public law is viewed as the instrument of collective choice, while private law is portrayed as an autonomous realm of reasoning which is independent of political deliberation. On the other hand is a theory which emphasizes a contrast between the legislative decision to enact rules and adjudicative judgments concerning the applicability of such rules once enacted: collective project pursuit is respected in our capacity to choose which general laws and systems of rights we will enact; while private project pursuit is respected by protecting

¹⁶ This is argued at greater length in 'The Possibility of Private Law' (n 10 above). Attempts to deny the reality of the competition between these values are legion. Most recently, Ronald Dworkin has argued that the distributive goal of 'equality of resources' represents a collective project that is fully compatible with private project pursuit. See Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), ch 8.

actions performed within the scope of such rights, even when those actions impede attainment of the collective goals. Advocates of the first view have tended to favour the classical Will Theory, with its emphasis upon the principled and systematic character of law, and have felt at ease with the gradual development of legal principles by judges and jurists; advocates of the latter theory have preferred the emphasis placed by the Interest Theory upon posited rules, and they have frequently favoured codification.

The general issue underlying a concern for the integrity of private rights, and the problematic relationship between 'rights' and 'law', tends to be nearer to the surface of debate in those countries that distinguish 'law' from 'rights' by the distinction between 'objective' and 'subjective' right: for this way of expressing the distinction makes it abundantly clear that we have here a question of the relationship between the projects or preferences of the individual and the impersonal demands of the collectivity.

Kantian conceptions of the rule of law represent law not as a simple aggregation of posited rules, but as a system guided by immanent values based on the autonomy of the will. Where law is developed by judges and jurists in the context of litigated disputes, and where systematic consistency in the doctrinal resolution of such disputes is a highly prized virtue, it is easy to assume that juridical evolution is guided by the ideal of a realm of jointly possible domains of autonomy. Moreover, while the German terminology of 'subjective' and 'objective' right may alert us to the competing values which underlie the debate about rights, that terminology is also inclined to suggest too facile a resolution of the conflict; for it is too easy to conclude that the concepts of 'subjective' and 'objective' right somehow refer to the same system of jointly possible liberties, but from different perspectives. Thus, in nineteenth-century German jurisprudence:

Law is... compared to an invisible line of demarcation between the provinces of the wills of different individuals. The domain appertaining to each represents the collection of his Rights, and in this way the German distinguishes between the two meanings of the word *Recht*. This province in which the will of the individual reigns represents *Recht* in the subjective sense; the line which surrounds the province, and erects a barrier against the intrusion of other wills, is *Recht* in the objective sense.¹⁷

¹⁷ John M Lightwood, *The Nature of Positive Law*, (London: Macmillan, 1883), 264 (summarizing the position of Savigny).

An exclusive focus upon the form of relationships, conceived in terms of the actors as bearers of *will*, was central to this theoretical resolution. Consider, for example, the following passage from the writings of the German jurist Puchta:

The Relationships of Right are thus relations of men to one another, and they may be appropriately called juridical or jural relations. But as man stands in the sphere of Right as a person, we may at once determine the conception of these relations more definitely: they are *Relations of Persons as such to one another*. Hence it is immediately apparent that the human relationships do not enter in their full extent into the sphere of Right, nor into the series of relations of Right. For the notion 'Person', rests upon an abstraction, and thus it does not embrace the whole being of man, but only includes directly the fact that he is a subject of will, while his other qualities are only indirectly taken into account, according to their nearer or more distant connection with it.¹⁸

Puchta here combines an assertion of the distinctiveness of law with a particular interpretation of that distinctiveness. The distinctiveness of law consists in its tendency to abstract from many of those circumstances of human situations that we would ordinarily consider relevant to their ethical evaluation. Thus, as Puchta goes on to explain, a sick man who borrows money to provide for his family is legally in the same position as a rich man who borrows in order to speculate. An 'effort of abstraction is required to view as equal and the same in right' these two different situations. The interpretation proposed is one based on what I shall call the 'classical' Will Theory: jural relations are relationships between persons conceived of as bearers of *will*. The act of abstraction involved in this focus upon the 'will' gives rise to a realm of 'jural relations' which are the jurist's special concern.

The Return of the Repressed

Radical critics of law have always exhibited hostility towards the abstraction and blinkered vision of legal categories, and have longed for a realm of direct and 'unmediated' social relations. Thus, the early Marx viewed communism as a realm free from the

¹⁸ *Outlines of the Science of Jurisprudence: translated and edited from the Juristic Encyclopaedias of Puchta, Friedländer, Falck and Ahrens* by W Hastie (Edinburgh: T and T Clark, 1887), 64 (emphasis in original).

rigidity of social roles and categorisations;¹⁹ and the mature Marx was to observe that 'a right can by its nature only consist in the application of an equal standard, but unequal individuals (and they would not be different individuals if they were not unequal) can only be measured by the same standard if they are looked at from the same aspect, if they are grasped from one *particular* side'.²⁰ Such dreams of immediacy and transparency have spawned a whole genre of political rhetoric that turns upon the contrast between 'abstract' rules and concrete particulars.

Those of a more reformist tendency have rejected as illusory the contrasts between abstraction and immediacy upon which the revolutionary critics rely, and have preferred to redress the one-sidedness of classical juridical thought by other measures: not by an abandonment of rules, but by an abandonment of the exclusive focus upon the 'will'. The general endeavour has been to incorporate into the content of the law some concern for material interests and for the contexts within which choices must be made. Thus it has been said that 'the overriding theme of contemporary law and legal thought... is the commitment to shape a free political and economic order by combining rights of choice with rules designed to ensure the effective enjoyment of these rights'.²¹ Sometimes by the introduction of new doctrines into established areas of law, and sometimes by the development of wholly new bodies of law, the legal order has been re-organized as 'a binary system of rights of choice and of arrangements withdrawn from the scope of choice the better to make the exercise of choice real and effective'.²²

Such doctrines and bodies of law departed from an austere focus upon the juridical person as a bearer of 'will', and endeavoured to accommodate a greater concern for the variable circumstances and interests of the citizen. At the same time, the experience of lawyers was beginning to demonstrate the truth of what the philosophers had realized much earlier: that the unadorned notion of the autonomous will offered no guidance in the construction, analysis, or application of legal doctrines, so that (behind the cover of an

¹⁹ See Marx and Engels, *The German Ideology*, CJ Arthur (ed) (London: Lawrence and Wishart, 1970), 54.

²⁰ Karl Marx, 'The Critique of the Gotha Programme' in *The First International and After*, David Fernbach (ed) (London: Penguin, 1974), 347.

²¹ Roberto Unger, *What Should Legal Analysis Become?* (London: Verso, 1996), 26.

²² *ibid.*, 27.

outwardly formal system) reference must constantly be made to circumstances that were officially excluded by the system of Right.

These developments, together with some others to be studied later in this essay, forced the abandonment of the classical Will Theory and its associated forms of juristic scholarship. In response to this situation, various versions of 'Interest Theory' gained in influence. According to these theories, legal rights were not protected spheres of freedom, but protected interests; and the system of legal doctrine was not an austere expression of the formal relations between mutually consistent wills, but a complex engagement with the material circumstances of life. The defeat of the classical Will Theory did not, however, entail straightforward triumph for its rival: for the Interest Theory itself had a tendency to split into distinct alternatives, each of which faced serious problems. Perhaps by virtue of its close historical connection with an emergent regulatory state, the Interest Theory tended to collapse the determination of existing legal rights into open-ended policy discussions concerning the purpose of this or that law, or the 'weight' to be attached to this or that interest. This clearly threatened the integrity of legal rights and their independence from the calculus of collective policy objectives. At the same time, the very notion of rights as protected forms of 'interest' appeared to make legal reasoning dependent upon an inquiry into contentious conceptions of well-being, in a manner seemingly inconsistent with the notion of a pluralistic liberal community. Meanwhile, fresh interpretations of the Will Theory were developed, abandoning the theory's commitment to a Kantian account of justice. At this stage, the debate as we are familiar with it was joined.

By now we should be in a position to see that this seemingly esoteric debate was and is generated by quite fundamental tensions within our form of political community. Autonomy and the good; political purposes and the integrity of laws; abstract freedoms and the material circumstances of choice: such dichotomies provide the basic dynamic of the analytical debate on rights. Once we appreciate that fact, we are in a position to attach new significance to Marx's youthful excursion into jurisprudence.

Having identified, as the mistake underlying his legal treatise, the 'belief that matter and form can and must develop separately from each other', Marx proposes an alternative approach deriving very

directly from his fascination with Hegel. The law must be regarded as 'the concrete expression of a living world of ideas', and 'the object itself must be studied in its development; arbitrary divisions must not be introduced, the rational character of the object itself must develop as something imbued with contradictions in itself and find its unity in itself.'²³

These remarks may perhaps seem to be more evocative than informative. They might well be equated with a familiar rhetorical contrast between the 'grey' of philosophical analysis on the one hand, and the living 'green' of richly articulated social practices on the other. The philosopher's love for arid deserts of the mind has long been an important feature of intellectual life, in jurisprudence no less than in other fields. The philosopher may be tempted to seek in abstract forms a deep metaphysical foundation for the juridical ordering of human conduct. Philosophers of law have frequently sought to honour law by grounding it in such foundations, free from historical contingency; yet what they treat as a foundation may in fact be (in Nietzsche's words) but 'the last smoke of evaporating reality'.²⁴

While it is no doubt correct to see the young Marx as concerned with the problematic relationship between form and content, it would be a mistake to construe the sudden reversal in his thinking (and consequent dismissal of his juvenile excursion into the philosophy of law) as a simple shift from one side to the other of a set of dichotomies. Such an interpretation would overlook something to which our reflections thus far should have alerted us: the way in which the separation of form from content might itself express both the 'rational character' of the juridical community, and its character as something 'imbued with contradictions in itself'. True to his new-found Hegelian enthusiasms without entirely realizing it, Marx had stumbled upon a complex dialectic between the self-understanding of a concrete historical community, and the concern for abstract form to which that understanding gave rise. His juvenile efforts in the philosophy of law, in focusing upon 'necessary structure' at the expense of positive content, were themselves unconsciously reflecting significant historical contingencies. His evolving thought was not concerned to reverse this order of priorities so much as to

²³ n 2 above.

²⁴ Nietzsche, 'Reason in Philosophy', ss 1 and 4, *Twilight of the Idols* (various editions).

exhibit the dichotomy's groundedness in a particular political understanding and form of social life.

For it is only in so far as the practices of a community are bearers of meaning that they can exhibit 'contradictions', rather than simply conflicts. The juridical community that was constituted by law's detachment from the hierarchies of the social structure was in part constituted by a set of theoretical conceptions, separating form from content; yet it had in turn to undertake the systematization of that content within the formal categories of doctrinal thought. In this way a basic tension was established between two theoretical approaches (of which the Will and Interest Theories are manifestations). One approach sought to maintain the rigour of the formal system as a basis for the integrity and peremptory force of rights; but it encountered severe difficulties in accommodating the law's necessary engagement with the complex and conflictual world of human interests. The other approach sought fully to engage with the reality of conflicting interests and the dependence of legal thought upon such unsystematized considerations; but it thereby sacrificed the special force of rights and threatened to collapse their integrity into the general calculus of interests.

Marx and Savigny

Marx had available to him a tradition of legal study that claimed to reflect upon the development of law as 'a living world of ideas': the Historical School of Jurisprudence, inspired by Savigny and sustained by Savigny's disciples. By considering that tradition, he could have been led to discern some of the complex relationships that obtain between formal abstraction in law and the varied particularities of historical formations. He might then have discovered that his juvenile attempt at juristic analysis could provide important clues to the political puzzles that were to occupy his attention for the rest of his life.

On one level, Marx was vigorously to reject the claims of the Historical School, saying that it merely 'legitimizes the infamy of today with the infamy of yesterday'.²⁵ Yet it is possible to argue that Marx's own tendency to immerse law in a background of relations

²⁵ Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Right' in *Karl Marx: Early Writings*, translated by Rodney Livingstone and Gregor Benton (London: Penguin, 1975) 245.

of production was itself an extension of one aspect of the Historical School's thought, namely that school's emphasis upon law as an expression of actual practice and observance, grounded in the spontaneous growth of custom.²⁶ Similarly, Marx's interest in the distinctive *form* of modern bourgeois law mirrored the Historical School's sense that the spontaneous evolution of law had reached a culmination in the systematic studies of the scholarly jurist. Both Marx and the Historical School found themselves wrestling with the problem of a seemingly autonomous body of law that nevertheless reflected, in that very appearance of autonomy, the existing social formation.

Savigny endeavoured to marry his historical concerns to an essentially formalistic Kantian jurisprudence which abstracted the form of the will from its content, and the form of social relations from their historical particularities. He thus sought to combine his claims about the historical and customary rootedness of law with a seemingly conflicting set of beliefs about the need for a professional cadre of scholarly jurists remote from everyday practice and politics, and entrusted with responsibility for the law's preservation as a living and evolving inheritance. Deep immersion in the history of law led Savigny to the conclusion that the classical Roman Law represented an ideal fulfilment of legal evolution, even for Germany. The German reception of Roman Law at the end of the Middle Ages represented, in his view, a rational necessity, as did the separation of technical juristic doctrines from the moral understandings and political aspirations of the populace generally. Law fulfilled its nature and destiny by becoming a system of doctrinal principles and categories the intellectual coherence of which reflected the abstract requirements of a realm within which a multiplicity of diverse individual freedoms were conjointly exercisable.²⁷

The complex relationships between formal abstraction and historical particularity that we find in the thought of Savigny are echoed within the thought of Marx. Thus, although Blandine Kriegel is in one sense right to see Marx as submerging the autonomy of

²⁶ See Blandine Kriegel, *The State and the Rule of Law*, translated by Marc A LePain and Jeffrey C Cohen (Princeton, New Jersey: Princeton University Press, 1995); James Q Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton, New Jersey: Princeton University Press, 1990), 207–8.

²⁷ For an insightful discussion, see Peter Stein, *Legal Evolution* (Cambridge: Cambridge University Press, 1980), 56–65.

law in the complex practices of civil society,²⁸ it is important to remember that Marx would see a very significant difference in this regard between modern bourgeois law, on the one hand, and the feudal legal order on the other. Whereas the body of feudal law directly reflected the hierarchical character of the social and economic structure, modern law takes on the more detached character of juridical equality. The development of law as a body of abstract principles in the hands of scholarly jurists reflects this new impression of the law's autonomy; but this very appearance is (according to Marx) itself but an expression of the relations of production under capitalism. Since capitalism extracts surplus value under the form of equality, capitalist law mirrors that general form. The workings of abstract equality within the details of legal thought propel doctrinal analysis onto a level of abstraction and of apparent autonomy from social and economic life.

Marx was quick to perceive and comprehend the historical watershed whereby juridical thinking appeared to shake itself free from the hierarchical complexities of the social structure.²⁹ In his view, the public, political realm of law and rights had emerged to present itself as an illusory heaven standing above and beyond the particular oppressions of production, distribution, and the family. Ultimately, Marx was to portray this development as driven by the internal logic of the capitalist mode of production, in particular the latter's 'mode of extraction of surplus value' under the form of equality. Thus, having first perceived the formalistic abstractions of juridical science as merely pointless and misconceived, Marx was later to see them as profoundly significant expressions in the development of 'the rational character of the object itself . . . as something imbued with contradictions'.

The works of both Savigny and Marx may, in their very different ways, serve to remind us that a concern for abstract form may itself be grounded in a desire to understand the significance of certain concrete historical formations. If we seek to grasp the peculiar character of modern political communities, and to elucidate the distinct problems of law within those communities, we must inevitably investigate the law's appearance of system and autonomy; and, from that point of view, we might well do worse than to focus upon

²⁸ n 26 above.

²⁹ See Karl Marx, 'On the Jewish Question' in *Karl Marx: Early Writings* (n 25 above).

questions of the form of law and of rights. Likewise, critics of formalism in law (from Ihering to the realists and beyond) need to reflect upon the extent to which the promotion of content at the expense of law's formal character may undermine necessary features of a liberal polity. Separations and dependencies between form and content may themselves be a clue to the political character of modernity.

It is in something like this spirit that the present essay seeks to reconstruct the debate concerning legal rights. For, rather than seeing this controversy as one concerning the setting forth of a concept's contours by means of careful excavation, we should think of it as an attempt to construct a coherent concept from the ragged materials of gradually evolving doctrinal forms. Reflection upon the debate is fruitful primarily in so far as it alerts us to the political tensions of which the debate is but an expression. At the same time, such reflection should make us sceptical of the possibility of any final resolution at the level of theory, and should incline us towards responses which are modest, makeshift, and accepting of the permanent dependence of legal doctrine upon the wider context of a political community articulated into distinct realms of practice and value.

2 The Fundamental Issues

The Classical Will and Interest Theories of Rights

We may reconstruct the Will and Interest Theories, in their most substantial and interesting forms, as interpretations of the moral significance of systems of legal rights. As we have already observed, the emergence of systematic structures of legal rights, grounded in juridical equality, marked the separation between the modern liberal polity and the old society of feudalism. In shaking itself free from immersion in the hierarchies of the social structure, and presenting itself as a body of principles defining equal rights, the legal order took on the appearance of an autonomous realm of concepts abstracted from the texture of everyday social life. The *form* of law thus came to be an important focus for attention.

Reflection upon the form of law was likely to highlight two aspects: law's positive character, and its systematic character.

These two aspects were accommodated in different ways by the Will and Interest Theories.

The Will Theory of rights was to place its primary emphasis upon law's systematic character, for this theory (finding its most powerful expression in Kant's *Metaphysics of Morals*) derived the legitimacy of law from a system of rights grounded in the form of the will. Kant equated the normativity of law with moral bindingness, and therefore argued that, even in a system of wholly posited laws one would still require a basic natural law that established the moral authority of the law-giver.³⁰ The possible scope of positive law was consequently determined by the extent of such moral authority; and, since law is enforced coercively, the extent of legitimate authority could be determined by reference to the conditions in which coercion might rightly be employed. In Kant's view, rights were the basis of any authorization to use coercion, and an adequate theory of the scope and content of rights would therefore trace the conditions for any possible system of positive laws.³¹

Coercion is in general wrong because it interferes with the individual's freedom to choose; but if freedom is used to hinder the freedom of others, one may coercively restrain that exercise of freedom and thereby act consistently with equal freedom. The system of rights therefore describes the possibility of universal reciprocal freedom. Rights concern the external relationship between actions (the extent to which my action may impede yours) and are therefore concerned with the *form* of the relationship between wills: rights do not concern the virtue or desirability of my objectives, but the extent to which my pursuit of those objectives may impede your pursuit of your objectives. Kant believed that it was possible to delineate principles which would flesh out this notion of equal freedom: 'Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.'³²

There were considerable resonances between this model of a system of rights founded upon equal freedom, and the post-feudal legal order (unsurprisingly, given the extent to which philosophical theories tend to arise from interpretations of the political community's

³⁰ Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge University Press, 1991), 51.

³¹ *ibid.*, 55.

³² *ibid.*, 56.

history and institutions). The tendency of the modern law to analyse every relation on a level of principle that abstracts from the social identities of the parties naturally suggested that the concrete rights of parties might be derivable from a realm of equal freedoms which provided the ultimate source of legitimacy; and the growing pervasiveness of contract as a basis for the analysis of such relations suggested that inequalities in concrete rights might well be explicable as resulting from the free exercise of the parties' will. Lawyerly concerns with the internal coherence of the system of legal rights implied the possibility of some ideal model of pure coherence immanent within the practices of doctrinal legal reasoning, and such a model seemed to be aptly provided by the Kantian system of rights reflecting the joint possibility of equal freedoms.

The Kantian Will Theory was to find its nemesis in a set of related intellectual discoveries. Within political philosophy, an increasing number of scholars were led to conclude that the Kantian theory of justice was empty: it was simply impossible to derive any real content from the bare idea of the joint possibility of free wills, or the notion of equal freedom. In order to give content to the system one must make further assumptions: one must assume the existence of a particular context of moral and political institutions, thereby making justice dependent upon contingent empirical facts and variable human arrangements; or one must measure the extent of freedom by reference to the value and importance of the particular freedoms involved, thereby making perfectionist ideals of 'the good' prior to questions of justice and right. The emptiness of the Kantian theory was most famously pointed out by Hegel,³³ but was recognized by others too. Thus Schopenhauer regarded the Kantian notion of '*Recht*' as trying to occupy a no-man's-land that excluded both ethical conceptions of the good and posited rules. Kant's theory 'tries to make jurisprudence separate from ethics, yet not to make the former dependent on positive legislation, i.e. on arbitrary obligation, but to allow the concept of right to exist by itself pure and *a priori*. . . . With Kant, therefore, the concept of law or right hovers between heaven and earth, and has no ground on which it can set its foot.'³⁴

³³ GWF Hegel, *The Philosophy of Right*, s 135; translated by TM Knox (Oxford: Oxford University Press, 1952) and HB Nisbet (Cambridge: Cambridge University Press, 1991).

³⁴ Arthur Schopenhauer, *The World as Will and Representation* (3rd edn, 1859), Vol 1, translated by EF Payne (New York: Dover, 1966), 528. See also Schopenhauer,

Within jurisprudence, the discovery of emptiness at the heart of Kant's theory of justice was reinforced by more technical developments in the analytical representation of rights. For it was found that, when held up for close analysis, the seemingly unified notion of 'a right' simply fell apart into a series of distinct concepts. This discovery exposed logical equivocations in passages of argument that might previously have seemed to be deductive in character, and thereby revealed that the classical view was sustained more by naïve assumptions about the compatibility of freedoms than by any inherent logic of the system of rights. Not only was the Kantian theory undermined within philosophy, but legal reasoning now lost the appearance of exemplifying the working out of a Kantian system of jointly possible freedoms.

The Will Theory of rights has come to be associated with much more limited and seemingly analytical theses than the claims put forward in the Kantian theory. Yet even those more limited theses may to some extent be founded on a desire to preserve an association between rights and the values of autonomy or liberty.³⁵ It is because the Kantian theory represents this association in the

On the Basis of Morality (1841), translated by EF Payne, (Oxford: Berghahn Books, 1995). This lack of content in the Kantian jurisprudence impels some towards a republican interpretation of Kant that emphasizes the autonomous *collective* choices of citizens, rather than the system of their individual wills. For Kant is not invariably understood as a theorist of natural rights grounded in reason: he is also construed as a theorist of collective self-determination. This expedient, however, simply reproduces the tension between collective and private project pursuit (and the consequent threat to the integrity of private rights) that the Kantian theory was thought to overcome. Thus Habermas, in his recent work on legal theory, expresses enthusiasm for the Kantian system of rights, while rejecting as empty the idea of a system based on the pure form of the will in priority to consensus reached through actual public discourse. He is, however, careful to note the tensions to which this gives rise. Republican readings of Kant have to face up to the fact that (in both Kant and Rousseau) 'there still is an unacknowledged *competition* between morally grounded *human rights* and the *principle of popular sovereignty*'. Habermas takes much trouble to demonstrate the way in which Kant subordinates the theme of popular sovereignty to a scheme of natural (or human) rights derived from his fundamental conception of justice, and suggests that 'Kant did not interpret the binding of popular sovereignty by human rights as a constraint, because he assumed that no one exercising her autonomy as a citizen *could* agree to laws infringing on her private autonomy as warranted by natural law'. Jürgen Habermas, *Between Facts and Norms*, translated by Williem Rehg (Cambridge: Polity, 1996), 94 and 101.

³⁵ Hart's version of the Will Theory is of a modest, analytical form. Yet Hart had earlier developed his analysis as one aspect of a broader Kantian theory of rights: see Hart 'Are There Any Natural Rights?' 64 *Philosophical Review* 175 (1955), reprinted in A Quinton, *Political Philosophy* (Oxford: Oxford University Press, 1967).

clearest and most ambitious way (and also because the Kantian theory exerted a profound influence upon legal thinking, particularly in continental Europe)³⁶ that I describe it as the 'classical form' of the Will Theory. Later, more modest versions will be presented as responses to the failures of the classical view.

Just as we may construct a classical version of the Will Theory, where that theory is not a matter of analytical explication so much as the basis for a theory of legitimacy, so we may do the same for the Interest Theory; and just as the classical Will Theory is both a political theory of legitimacy and an interpretation of the character of legal institutions, so the same may be said of this version of the Interest Theory. Where the Will Theory saw the key to law's character and legitimacy in its abstraction from the content of social relations, and its striving for system and coherence, so the Interest Theory focused upon a different aspect of law's form: its posited, source-based character.

The Will Theory emphasizes the mutual consistency of rights and the absence of conflict between them, since the rights are derived from the notion of a 'universal law of freedom' describing the conditions under which the autonomous choices of a multiplicity of individuals may be jointly possible. Positive law-making will be necessary to the realization of the conditions of freedom, for a variety of reasons (for example, to give specificity to the universal law of freedom, to establish conventions which may be prerequisites for its realization, and to ensure compliance); but such law-making is always guided by, and derives its legitimacy from, the underlying principles of reason that constitute the realm of freedom. Legal rules in general are regarded by the theory as only superficial manifestations of a system of rights which underlies and orders such rules.

The classical Interest Theory, by grounding rights in interests, emphasizes the absence of any set of ideal conditions under which all interests may be reconciled and rendered mutually consistent. Consequently, the theory urges the need for positive law-making if a reasonable ordering of interests is to be achieved. Here, a realm of mutually consistent interests is the product of artifice, not a dictate of reason. Lawyerly concerns with principle and with the

³⁶ 'By 1800 influential legal thinkers such as Hugo, Feuerbach, and Savigny had confessed their debt to Kant in one way or another.' Franz Wicacker, *A History of Private Law in Europe*, translated by Tony Weir, (Oxford: Clarendon Press, 1995), 282.

systematicity of the legal order are explained either as aspects of the consistent application of posited rules, or as aspects of the enterprise of incrementally adding to the system of rules to improve the demarcation and protection of otherwise clashing interests.³⁷

One might at first be tempted to say that the classical Interest Theory requires a rather strict and narrow account of law as a body of source-based posited rules. On such a view, the law's content can be ascertained by reference to a discrete body of posited rules, without any need to rely upon more open-ended inquiries into the appropriate justifications for the rules so enacted, or the proper extent of the interests so protected. For it is reasonable to assume that only laws possessed of a content identifiable independently of such open-ended questions will be capable of policing the bounds between interests that naturally conflict and compete. The reality is in fact somewhat less simple, and the Interest Theory's dependence upon such a form of legal positivism³⁸ is only one part of the whole picture. We will discover in due course that the classical Interest Theory is in general torn between two alternative lines of thought. On the one hand, the theory could emphasise the integrity and determinacy of posited rules as instruments for the regulation of conflicting interests. To adopt this line, however, is to problematize the sense that rights are important constituents of juridical thought: assertions about rights become merely peripheral observations about the point of the posited rules, playing no real part in adjudicative reasoning. On the other hand, one can emphasize the centrality of the right (or interest) in informing interpretations and applications of the rules. One then makes 'rights' very central to legal reasoning, but at the price of eroding the integrity of the posited rules. This erosion of posited rules leads in turn to a treatment of rights as interests that must be balanced against each other. The law ceases to provide clearly demarcated boundaries between conflicting interests, and legal reasoning becomes a more fluid medium within which interests are weighed and traded off against each other.

³⁷ Jeremy Bentham, *Theory of Legislation*, edited by CM Atkinson (Oxford: Oxford University Press, 1914), Vol 1, 198–9.

³⁸ The term 'legal positivism' is so riddled with ambiguities that it is perhaps best avoided altogether. Here and throughout this essay, however, the term is used to refer to a thesis about the criteria whereby the content of law may be ascertained. I (stipulatively) take 'legal positivism' to claim that the law's content can be inferred from a corpus of posited rules without reliance upon information extraneous to the

One characteristic trajectory for the Interest Theory is exemplified by the development of Ihering's thought. Ihering began his career as an orthodox follower of Savigny and the Will Theory. His great study *Geist des Römischen Rechts* was intended to be a work within this tradition, and he anticipated that it would be his life work. In the course of writing it, however, he hit upon the idea that rights might fruitfully be thought of as representing interests rather than (as the orthodox view then held) being grounded in the will. He proposed to develop this view further in the succeeding volume of the treatise. It is worth quoting his own reflections upon this critical stage in his career:

The concept of Interest made it necessary for me to consider Purpose, and 'right in the subjective sense' led me to 'right in the objective sense'. Thus the original object of my investigation was transformed into one of much greater extent, into the object of the present book, *viz.*, Law as a means to an end. Once this question came before me, I was no longer able to avoid it; it always emerged again in one form or another. It was the sphinx which imposed its question upon me, and I must solve its riddle if I would regain my scientific peace of mind.³⁹

The classical Interest Theory necessarily emphasizes positive law as a means of defining and policing the bounds between otherwise conflicting interests; this can in turn lead to a removal of the notion of 'rights' from the centre of legal thinking, in favour of a focus upon 'laws'. Rather than deriving its legitimacy from some rationally grounded scheme of rights, law now derives its legitimacy from its posited character, and from its consequent ability to surmount the problem of conflicts between interests. Law becomes, on this view, essentially instrumental; and when doctrinal thinking concerns itself with the coherent and systematic character of law, it cannot occupy an abstract realm of ideas concerned solely with the

body of rules, and not in the possession of all competent speakers of the relevant language. 'Positivism' in my sense is therefore undercut as much by dependence upon diffuse factual information (such as information about the attitudes or understandings of legislators or citizens) as by dependence upon evaluative judgment.

As a number of scholars have pointed out, such theses concerning the mode of ascertainment of law's content are quite distinct from other claims often thought to be the essential hallmark of 'legal positivism'. Thus, such theses are consistent with the claims that there are necessary connections between law and morality, that legal obligations are a species of moral obligation, and so forth.

³⁹ Rudolf von Ihering, *Law as a Means to an End*, translated by Isaac Husik, (Boston: Boston Book Company, 1913).

form of the will, but must reflect upon the complex world of real human objectives and concerns.⁴⁰

Private Law and the Integrity of Rights

I observed earlier that the modern analytical debate about rights strikes many scholars as inevitably inconclusive: our 'conceptual' intuitions about rights can be regimented in a variety of ways, and the (modern) Will and Interest Theories are but two ways of achieving such regimentation. Given the inconclusive nature of purely analytical considerations, the motivating factors behind the choice of one or other theory frequently lie elsewhere: in a sense that the preferred theory sits more comfortably with some favoured evaluative stance; or a belief that the distinctions highlighted by that theory are (from a moral, political, or juridical point of view) more important than those highlighted by its rival.

One issue which has struck many jurists as important, and which has been thought to favour the analysis offered by the Will Theory, concerns the distinctiveness of private law. Even when jurists have abandoned the prospect of reconstructing private law as an expression of the Kantian system of right, they have still tended to hope that private law can be preserved as a body of reasoning distinct from the collective goals pursued within public law. In some such preservation of doctrinal boundaries may lie the best chance of protecting the integrity of private rights. Modern versions of the Will Theory equate a right with the power of control (the power of enforcement or waiver) over a duty incumbent upon some other person. Where the operative force of a duty, or its enforcement, is made conditional upon an exercise of will by some person, the duty may be said to be correlative to a right possessed by the person whose will is thereby made decisive. In other cases, where the duty is not in any way conditional upon another's will, the duty has no correlative right. This seems to suggest that rights are primarily

⁴⁰ We might also consider the example of Roscoe Pound, whose notion of law as 'social engineering' is closely linked to his thesis that the notion of 'an interest' is logically prior to that of 'a right'. See Roscoe Pound, *Jurisprudence* (St Paul: West, 1959), Vol IV, 50 *et seq.* Morton Horwitz sees Pound's views as expressive of American law's abandonment of categorical principles in favour of looser tests involving the balancing of interests: see Morton Horwitz, *The Transformation of American Law, 1870–1960* (Oxford: Oxford University Press, 1992), 18.

characteristic of private law: they exist within public law only in those special contexts (such as the conferment of welfare benefits) where public law is employed to secure particular benefits for individuals. The concept of a 'right', on this account, is strongly linked to the value of individual choice, and to the primacy of private law in protecting such choices.

Advocates of the Will Theory are consequently inclined to regard Hohfeld's analysis of 'jural relations' (to which we shall turn in due course) as an analysis of the structure of private law. There are a number of reasons for taking this view. For example, it is interesting to note that one of the most striking features of Hohfeld's approach (his treatment of jural relations as obtaining between pairs of individuals) may well have been drawn from Savigny's own analyses of private law,⁴¹ and Savigny's jurisprudence (as Habermas has recently emphasized) ascribes an intrinsic value to private law as an expression of individual autonomy.⁴² The Hohfeldian analysis of legal concepts explicates those concepts in terms of bilateral relations between pairs of individuals, and private law is frequently regarded as structured by the bilateral form of private law adjudication. Private law deals not simply with 'wrongs', but with people who have been 'wronged'; the duties of private law are duties *owed* to specific individuals. When the same act constitutes both a civil and a criminal wrong, the civil (or private) aspect of the act is precisely its breach of a duty owed to a specific person; the criminal (or public) aspect of the act is its deviation from standards of conduct that are placed upon all persons as a general demand. Crimes constitute breaches of the general peace, or departures from general standards of propriety.

Hohfeld depicts claim-rights and duties (powers and liabilities, etc) as correlative, but this correlativity could be construed in a number of different ways. We might take Hohfeld to be proposing perfectly general definitions of 'duty' and 'claim-right' (etc) wherein the definition of each term entails its correlative. Or, alternatively, we might take him to be offering an analytical representation of some bounded sphere (such as private law) and claiming that the

⁴¹ Savigny, *System of Modern Roman Law*, Vol 2, translated by WH Rattigan (under the title *Jural Relations*) (London: Wildy and Sons, 1884), s 60: 'Every Jural Relation consists in the relation of one person to another person.'

⁴² Jurgen Habermas, *Between Facts and Norms*, translated by William Rehg, (Cambridge: Polity, 1996), 85.

correlativity obtains within that sphere. On this latter view, duties would entail claim-rights *within private law*, and Hohfeld's theory would not be proposing a general definition of duty so much as explicating a structure in virtue of which such entailments will obtain.

To construe the Hohfeldian analysis as applicable only within the limited sphere of private law may be thought to be a significant concession, and the necessity of making some such concession may therefore be considered an important weakness in the Will Theory. For, if the analysis applies only to private law, the entailments traced by Hohfeld can be regarded as flowing from the meaning of the Hohfeldian concepts only if those concepts are taken to be definitions of 'private claim-right', 'private duty', 'private power', and so forth. This impression will be reinforced if one reflects upon the way in which some of the other Hohfeldian correlatives do indeed seem to involve perfectly general relationships of mutual entailment, without any need to confine the concepts to a limited sphere of private law. Thus it is hard to imagine *any* plausible account of legal powers that would not portray them as correlative to liabilities; similarly, immunity seems to entail disability (and vice versa) not simply within some limited context, but without qualification and in virtue of the meaning of the words. When complex qualifications and epicycles are forced upon us by the Will Theory, is it not sensible to abandon that theory in favour of a simpler alternative?

The idea that a simpler alternative is available, however, may be a mistake. For the seemingly tight and general connections between power and liability (and between immunity and disability) cannot obtain between duty and claim-right, even for the Interest Theory. The Interest Theorist may well claim that all actual legal or moral duties concern acts that in some way affect the interests of others: but, even if this is true, it is not true in virtue of the meaning of the word 'duty'. There is nothing incoherent about the idea that we have certain duties that depend upon the intrinsic propriety of the act, rather than upon the way in which the act serves someone's interest. We may, for example, have duties to act with reverence for the 'sacred', and this may be so even if God is unconcerned with our acts of reverence (indeed, even if God, as a being possessing interests, does not exist). The Interest Theorist may well deny that there are any such duties; but, the idea of such a duty nevertheless appears

to be a perfectly coherent one. The connection between duty and interest is established either as a purely contingent feature concerning the content of legal or moral duties, or perhaps as a necessary truth flowing from some conception of 'law' or of 'morality'. Thus the Interest Theory, like the Will Theory, is unable to treat the correlativity of rights and duties as a simple consequence of the meaning of those words (except by stipulation in clear departure from ordinary meanings: and two can play at this game). Each theory must therefore treat Hohfeld's scheme as an analysis of the relationships obtaining within some bounded sphere: private law, in the case of the Will Theory; a legal or moral system that is grounded in interests, in the case of the Interest Theory. While the Interest Theory is able to ascribe far greater generality to the Hohfeldian scheme, the issue of principle remains the same for both theories. Naturally, the Will Theorist will not see the ascription of greater generality to Hohfeld's analysis as an asset, because the Will Theorist sees that analysis as important precisely in so far as it elucidates the distinctive conceptual structure flowing from the bilateral bonds of private law.

Positivist solutions to the problem of the integrity of rights attach no great significance to the boundary between public and private law. Instead, they rely upon a distinction between the legislative enactment of rules and the adjudicative application of rules. Such a distinction seems at first both sound and obvious. Yet it does not require a high degree of legal experience or jurisprudential sophistication to see that a reconciliation of the competing values which is based on this distinction alone may well be flawed. For the theory assumes some way of subsuming actions under rules without reopening the question of the (collective) purposes that the rules were meant to serve. Such a mode of adjudicative subsumption may or may not be available. When laws are enacted in a canonical verbal formulation, their possible meanings will be constrained by formal semantic rules which are independent of the legislative purpose; but formal semantic rules are rarely sufficient to determine univocal meanings in the absence of detailed contextual understandings; and such contextual understandings (in the case of law) will frequently be bound up with interpretations of the rule's purpose. The dependence of interpretation upon an appeal to purpose does not, of course, rob the rule (and rights conferred by it) of all integrity: the wording of a rule may be construed by reference to

its purpose without becoming equivalent to a simple injunction to pursue that purpose. Nevertheless, purposes are not discrete entities, but are capable of description at varying levels of abstraction. Such variability tends to open up considerable scope for dispute about the true significance of the posited rule. (In any case, it is questionable how far legal doctrine can plausibly be viewed as a set of canonically formulated rules.)

Even if each discrete rule can be given a precise meaning without reference to the rule's purpose, we will still have to face the problem of how to adjudicate upon conflicts between rights. In the absence of some doctrinal features or theoretical stratagems which might limit the frequency of such conflicts,⁴³ there is no reason why the conflicts should not be all-pervading. Within a Kantian theory, any such apparent conflicts would be handled by reference to the overall system of rights: the conflict would be shown to be apparent *only*. Within an interest-based theory, however, the resolution of such conflicts will necessitate recourse to the general balancing of interests that underlay the enactment of rules in the first place. It seems hard to avoid the conclusion that the decision will have to be shaped by considerations drawn from the collective project.

These worries take a more concrete, albeit contingent, form when we reflect that positive laws confer rights within the context of existing legal doctrines, and some familiar legal doctrines appear to introduce distributive or aggregative considerations (typical of collective projects) into the heart of adjudicative decisions upon the scope of private rights. Thus, the negligence test has been variously analysed as a cost/benefit test concerned with aggregate wealth, and an egalitarian test concerned with distributive equality.

The cumulative effect of all these arguments is to raise the following doubt: perhaps the scope of our rights can only be determined in adjudication by considering the impact of our action upon the distributive or aggregative goals of the collectivity. In that case, our rights would extend only up to the point where our actions ceased to make a net contribution to the collective project: our rights, when conceived as a safeguard for private project pursuit, would in fact be illusory.

⁴³ See Simmonds (n 10 above).

3 Hohfeld and the Fragmentation of Rights

Hohfeld's Intentions

Hohfeld is sometimes regarded as a forerunner of the American realist movement, and there are certainly features of his work that tend to support this view. His analysis had the effect of exposing equivocations in what might otherwise have seemed to be deductive passages of legal reasoning, and in this way he contributed to the realist's exposure of indeterminacies in legal doctrine. Moreover, his focus upon jural relations as obtaining between pairs of individuals sat very comfortably with the characteristic realist focus upon the cutting edge of the law in litigated disputes. Most important of all, Hohfeld's analysis had the effect of shattering the law's appearance of system and integration by fragmenting into a diversity of different jural relations the 'rights' which might otherwise have been proffered as focal points for the systematic reconstruction and presentation of the law.

This radical achievement, however, may conceivably have been quite contrary to Hohfeld's own intentions. For in many respects, his work seems to proceed from assumptions which are characteristic of somewhat traditional forms of legal scholarship rather than the realist assault upon those forms. We have grown accustomed to a style of legal writing that focuses on practical questions of application; we doubt the value of debates about the classification or analysis of this or that concept or doctrine when those debates are not immediately related to practical distinctions. From the belief that the intelligent interpretation and application of law can never be wholly separated from questions about the purpose of the law, we have inferred (perhaps erroneously) that general definitions and analyses of technical concepts are valueless if they are not located within some specific context of purposes and disputed applications. In this sense, and to that extent, we are heirs to the realist revolution. When we turn to Hohfeld's work, however, we seem to confront a style of legal scholarship that is now virtually extinct. Throughout his two most famous essays (published in 1913 and 1917)⁴⁴ Hohfeld discusses such doctrines and institutions as the

⁴⁴ Reprinted in book form as WN Hohfeld, *Fundamental Legal Conceptions*, edited by WW Cook, and with introductions by WW Cook and AL Corbin, (Westport, Connecticut: Greenwood Press, 1978).

trust, the escrow, or the sheriff's powers under a writ of execution, and subjects them to minute analysis. The assumption seems to be one that Hohfeld might comfortably have shared with Savigny's formalist heirs: legal concepts have an intellectual existence, and they may be held up for analysis in isolation from any questions about the purposes or policies served by such concepts. To the imaginary objection that such discussions are without practical value, Hohfeld insists that proper analysis is the prerequisite of correct application, and 'the deeper the analysis, the greater becomes one's perception of the unity and harmony in the law'.⁴⁵

One seemingly radical move that Hohfeld made was to focus debate upon the cutting edge of law where it is invoked in a dispute between two parties. As we will discover in due course, this led him to analyse the concept of 'jural relations' as obtaining between pairs of individuals, and to treat the concept of a legal right as operating on the level of specific legal remedies, acts, and causes of action. Modern critics of Hohfeld not infrequently criticize this aspect of his thinking, and propose a deeper level of rights from the perspective of which Hohfeld's claim-rights, powers, privileges, and immunities are merely protective instrumentalities rather than the fundamental anchor points for legal reasoning. In this way they seek to restore the sense that rights form a systematic and integrated structure, a sense that Hohfeld's analysis fundamentally undercuts. Yet even here, in this potentially radical move, Hohfeld may have been following an older tradition of formalistic legal scholarship. We noted above that, like Hohfeld, Savigny too analysed jural relations as obtaining between pairs of individuals, and asserted that 'a Right is never manifested more clearly than when, being denied or attacked, the judicial authority intervenes to recognise its existence and its extent.'⁴⁶

Indeed, such a focus upon disputes between pairs of individuals might well be seen as a consequence of the formalistic Kantian view that a right is an authorization to use coercion, and that the system of rights demarcates the legitimate bounds between potentially conflicting wills. It is interesting to observe, for example, that the present day Kantian formalist Ernest Weinrib places a heavy emphasis upon the bilateral relationship between wrong-doer and victim, or defendant and plaintiff, as the key to the nature of private

⁴⁵ *ibid.*, 64.

⁴⁶ Quoted in Lightwood (n 17 above), 265.

law.⁴⁷ If such an equation between Kantian formalism and the bilateral relationship is justified, the result is richly ironic: for it is precisely the centrality given by Hohfeld to the bilateral character of jural relations that leads to his dramatic (and perhaps unintentional) destruction of the Kantian notion of a right.

Hohfeld did not see his analysis of rights as in itself *resolving* any of the disputed classificatory questions which might interest the formalist scholar, but as providing the analytical tools which would (he thought) be an essential prerequisite of such resolution. The analysis presented in his two most famous essays is aimed at reducing 'jural relations' to the 'most basic conceptions' out of which all other legal concepts are constructed. Later essays were to deal with 'typical and important interests of a complex character'.⁴⁸ In fact, however, his analysis was to shatter the assumptions and aspirations of much traditional legal scholarship by exposing in legal reasoning gaps of a kind which could be bridged, not by analytical reflection, but only by political choice.

The Hohfeldian Analysis

Hohfeld tells us that it is an error to assume that all legal relations can be analysed in terms of rights and duties. The attempt so to analyse them leads to a 'chameleon-hued' use of the words 'right' and 'duty' whereby a single word is being employed to cover several distinct concepts. Hohfeld aims to isolate these distinct concepts, which he describes as 'the lowest common denominators of the law'.⁴⁹

Hohfeld regards these 'lowest common denominators' as *sui generis* and as therefore not susceptible to definition *per genus et differentiam*. Rather, their meaning is to be elucidated by exhibiting their place within a scheme of relationships, the significance of which lies in its connection with adjudication between disputing parties. Consequently, he regards the clarification of the concept of 'a right' as best achieved by careful distinctions between different 'jural relations', the latter being conceived as relationships obtaining between pairs of individuals.

⁴⁷ Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995).

⁴⁸ Hohfeld (n 44 above), 27.

⁴⁹ *ibid*, 64.

This focus upon jural relations between pairs of individuals gave Hohfeld's work a hard-nosed style and a focus on the remedial cutting edge of law that greatly appealed to the American realists who drew upon his work. For our purposes, however, its importance lay in the way that it exposed the diverse implications that were regularly drawn from assertions concerning the existence of legal rights. Sometimes, for example, the existence of a right was treated as entailing the existence of a duty incumbent upon some other party; on other occasions the existence of a right was treated as entailing the permissibility of an action performed by the right-holder; on yet other occasions a right might be thought to validate the purported exercise (by the right-holder) of a legal power, or to demonstrate the invalidity of some such purported exercise by someone other than the right-holder. It was not clear, however, how a single concept might have all of these very diverse entailments. Indeed, even quite a modest knowledge of the actual contents of existing legal doctrines was sufficient to demonstrate that the concept of 'a right' could not have all of these consequences. For examples abounded of situations where one might be committing no wrong in performing an act and yet others might be free to interfere (in certain ways) with one's performance; or one might be under a duty not to exercise a power, and yet the power if exercised (in breach of duty) would nevertheless be effective in altering legal rights; and so on. Since it was clear that the various supposed logical consequences of a right could come apart in this way, it was clear that they were not genuine logical consequences of a single concept of 'right'.

Two responses to this discovery were possible. One was that adopted by Hohfeld, and it consisted in the disaggregation of the general concept of 'a right' and its replacement by a set of distinct concepts, characterized by distinct entailments. The other was the response adopted by certain modern exponents of the Interest Theory of rights (notably Raz and MacCormick). Here the general concept of a right is retained, and the Hohfeldian disaggregation is resisted; but an attempt is made to accommodate the devastating effects of Hohfeld's main insight by weakening the connection between the concept of a right and the implications that possession of a right has for conduct (both the conduct of the right-holder and of other persons). Thus, on this view, possession of a right in one person does not *entail* the existence of any particular duties, powers,

permissions, or the like. Rather, a right is a very important interest which gives us a reason for imposing or recognizing such duties, permissions and powers where they are desirable to protect the relevant interest. The reason is said to be 'sufficient' for holding other persons to be subject to a duty, but only 'other things being equal': the interest will justify the duty only 'if not counteracted by conflicting considerations'.⁵⁰

There are various substantial objections to this version of the Interest Theory. For example, it renders the existence and content of legal rights quite uncertain,⁵¹ and (as we will see in due course) it robs rights of their peremptory character. What is important for present purposes, however, is to note the relatively *obvious* nature of the move made by the analysis,⁵² and the extent to which it misses the real force of Hohfeld's theory. Hohfeld's attempt to reduce jural relations to their 'lowest common denominators' seeks to disaggregate complex associations of ideas by showing that they are linked by pragmatic implication rather than by strict entailment. There is surely nothing very remarkable in the discovery that what has been thus carefully separated by analytical reflection can be recombined on the basis of looser forms of association.

These modern exponents of the Interest Theory have revealed no real flaws in the Hohfeldian analysis: they merely propose that a useful general concept of 'right' can be constructed above the cutting edge of remedial provision on which Hohfeld focuses. That suggestion is, as we shall see, questionable. It is worth reiterating

⁵⁰ See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 166 and 171.

⁵¹ If we find these uncertainties troubling, our fears will not be allayed when we learn that one major exponent of this anti-Hohfeldian view of legal rights is able to conclude that 'The right to political participation is a legal right in English law.' (Raz (n 50 above), 172) But fear not: all is not what it seems! The legal right to political participation does not mean that anyone can seek a remedy insisting upon political participation (unless 'political participation' simply means casting one's vote). All that the right means is that the interest in political participation is recognized in law as a sufficient reason for imposing an appropriate duty on someone if there are no countervailing considerations of greater weight. What exactly this conception of rights is thought to have added to our understanding, beyond considerable potential for obfuscation, remains unclear.

⁵² Thus, Roscoe Pound observed that '(I)t has long been understood that "a right" ... is a composite idea. It may mean the legally recognized and delimited human want or demand, or some one of the conceptions by which that recognized interest is given form in order to be secured by the legal order, or the complex of these conceptions plus the recognized and secured interest.' Roscoe Pound, *Jurisprudence* (St Paul: West, 1959), Vol IV, 53.

that, in spite of its generally anti-Hohfeldian posture, the Raz/MacCormick theory in effect concedes the impossibility of deducing specific duties (or permissions, powers, immunities, etc) from the general rights that the theory favours. For, on the Raz/MacCormick view, the interests that constitute such general rights are only non-conclusive reasons for imposing duties: they do not *entail* duties. Therefore, we can pass from the asserted right to the consequential duty only via a complex process of balancing various interests and considerations. It is difficult to see, on this analysis, how the assertion of a general right differs from the assertion of an important interest. At any rate, the analysis concedes the Hohfeldian point that such general rights cannot *entail* specific duties.

Critics of the Hohfeldian analysis have frequently objected to what they see as the cumbersome and artificial consequences of an analysis focused upon jural relations obtaining between pairs of individuals. For example, it seems that in Hohfeld's framework it would be incorrect to speak of me as having a right not to be assaulted: what I possess is a series of distinct rights against distinct individuals. Thus I have a right against you that you should not assault me; a right against your mother that she should not assault me; a similar right against the Bishop of Ely, and so on. This strikes many critics as introducing an unacceptable degree of complexity into the concept of a right. What is wrong with the idea that I have a general right not to be assaulted, and that the various duties are consequences of that right?

Criticisms such as this can have the unfortunate effect of lending undue credibility to the anti-Hohfeldian position of Interest Theorists such as Raz and MacCormick. For the general right not to be assaulted seems to be an instance of a fundamental interest (in not being assaulted) which provides the ground for duties borne by various individuals; and if this is so, why may we not go further and view this general interest as the basis for various legal consequences other than such duties (permissions, powers, immunities, and the like, aiming at protection of the fundamental interest)? We seem to be faced with a stark choice between accepting the cumbersome approach of Hohfeldian analysis, which excludes talk of general rights that are independent of any particular jural relation, and accepting the Raz/MacCormick Interest Theory.

The dilemma presented in such an argument is false. There is nothing in Hohfeld's analysis that would prevent us from talking

about a general right not to be assaulted, *provided* that such claims are understood only as summary statements about the existence of various more specific rights obtaining against particular individuals. What Hohfeld wishes to resist is the belief that such a claimed general right can entail conclusions about the duties incumbent upon all other individuals; and he is right to resist such a belief. From the fact that I have a right against you not to be assaulted, and a similar right against your mother (and a similar one against your brother, and so on) it does *not* follow that I have such a right against the Bishop of Ely (for example, the Bishop and I may have entered into a boxing match within which we consent to the possibility of blows which would otherwise count as an assault). Provided that the impossibility of any such direct inference is understood, there is no harm and no difficulty in referring to general rights (such as the right not to be assaulted) as a shorthand way of summarizing the content of a multiplicity of particular jural relations.⁵³

Other critics of Hohfeld have pointed to his departures from ordinary usage as a ground for rejecting or amending his analysis. In a sense, there is little point in seeking to defend Hohfeld from the accusation that he departs from ordinary usage: the same must be true of any conceptual regimentation of the discourse of legal rights. Departures from the Hohfeldian scheme that are aimed at securing closer conformity with ordinary usage not infrequently purchase such conformity at the price of increased complexity, thereby sacrificing one of the principal virtues of the analysis. Indeed, for some of Hohfeld's critics, increased complexity is the aim, rather than an unfortunate consequence, of their criticisms: for the general impetus behind many of the familiar criticisms is to suggest that 'rights' cannot be identified with the simple Hohfeldian elements of claim, power, liberty, or immunity, but must be analysed as complex assemblages of those elements, or as protected choices or interests

⁵³ It must be admitted, however, that Hohfeld is mistaken in his unqualified claim that all jural relations obtain between pairs of individuals. Since legal powers involve the ability to alter the legal position of some person X, each power must also entail the ability to alter the position of some person Y (X's legal position cannot be altered without Y's also being altered). In most private-law contexts, either X or Y will be the relevant power-holder, and it will consequently be correct to say that the relation obtains between a pair of individuals; but this will not be invariably so. See Carl Wellman, *A Theory of Rights* (Totowa, New Jersey: Rowman and Allanheld, 1985), 43.

providing the rationale for such assemblages. Many of these criticisms seem to be unsoundly based, in so far as they neglect the resources that Hohfeld's analysis offers for accommodating seemingly difficult counter-examples.

David Lyons, for example, has suggested that not all Hohfeldian immunities should be regarded as 'rights', his example being the inability to inherit property.⁵⁴ Lyons is surely correct that it would be anomalous to regard the inability to inherit as a 'right'. What he fails to see, however, is that such an inability cannot be straightforwardly identified with a Hohfeldian immunity. Since the ownership of property can be onerous, an immunity from inheriting *without one's consent* would indeed be an advantageous protection of one's interests or autonomy such that we might well describe it as a right. On being informed that, independently of my consent, I have become the owner of a massive Scottish estate and am now faced with responsibilities for its management and upkeep, I might well object that I had a right to refuse the property, such an assertion being a reference to an immunity. An immunity of this kind might be combined with a power to waive the immunity. An inability to inherit regardless of consent would then be an immunity combined with a disability (the absence of a power of waiver). Since the immunity in itself is advantageous, it is the presence of the disability that makes us (in some contexts) hesitate to describe the inability to inherit as a right.

What needs to be kept in mind here is the fact that an immunity accords *negative* recognition to the right-holder's choices, by ensuring that (in some relevant respect) the right-holder's jural relations cannot be changed merely by the say-so of some other person. Such negative recognition may or may not be conjoined with *positive* recognition in the form of a power of waiver. Where the immunity is not so linked to a power of waiver, it is combined with a disability. When we speak loosely of 'the inability to inherit', we may be focusing our attention upon *either* the immunity *or* the disability: indeed the formulation strongly suggests a focus upon the disability.

⁵⁴ David Lyons, *Rights, Welfare and Mill's Moral Theory* (New York: Oxford University Press, 1994), 25n. Hohfeld was inclined to regard only claim-rights as rights in a strict sense; but he also accepted a wider 'generic' sense of 'right' as applicable to liberties, powers, and immunities. We will see later that the modern Will Theory claims that the various Hohfeldian advantages are united by their (positive or negative) recognition of the right-holder's choices.

Since disabilities are not Hohfeldian entitlements, there is nothing in Hohfeld to conflict with our disinclination to describe that inability as a 'right'. It is always conceivable, however, that some appropriate set of circumstances might render a focus upon the immunity more pertinent than a focus upon the disability, and in such circumstances we will certainly find it appropriate to speak of 'a right'.

It is possible to defend Hohfeld's treatment of immunities as rights even in instances devoid of the obviously onerous implications of inheriting a Scottish estate. Hart suggests that 'even in the loosest usage, the expression "a right" is not used to refer to the fact that a man is thus immune from an *advantageous* change', and he cites as an example the City Council's inability to award me a pension.⁵⁵ Yet it is conceivable that one might wish to assert the existence of a right in such circumstances, and there would be no impropriety in doing so. Suppose, for example, that I have long been proud of my reckless disregard for the future, and have treated my lack of a pension as a symbol of that devil-may-care attitude. Having been granted a pension, I can of course choose not to draw upon it; but the very fact of my entitlement to draw upon it may be seen by some (and perhaps even by myself) as casting doubt upon the substantial reality of my much-vaunted recklessness. In such circumstances I might well wish to insist upon my right not to be granted a pension that I never sought or consented to. In fact, the *negative* recognition accorded to choice by the granting of an immunity is always of value to us in so far as we wish to control our own lives and the conditions within which they are conducted. A change may in itself be advantageous, but if it occurs without our consent it will (to that extent) encroach upon our desire for autonomous control. Generally, the advantageous aspect of the change will outweigh any encroachment, and the pervasive and unavoidable nature of the limits to our autonomy will render particular encroachments scarcely worthy of note. In such cases, assertion of one's immunity as a 'right' may seem odd or impertinent, but it need not for that reason be incorrect.

In common with many other theorists, L. W. Sumner has argued that individual Hohfeldian elements cannot be regarded as 'rights': rights must be conceived of as complex clusters of Hohfeldian elements. Somewhat more unusually, one of Sumner's suggestions

⁵⁵ HLA Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), 191.

to this effect consists in the claim that a Hohfeldian power cannot in itself be regarded as a right.⁵⁶ A key premise in Sumner's argument, however, is his assertion that the Hohfeldian power to alter some legal relation is compatible with having *no* power *not* to alter it.⁵⁷ From this premise, Sumner argues that a power to alter must, at a minimum, be combined with a power not to alter before the power can be regarded as a right. Sumner's basic premise is clearly mistaken. His justification for maintaining it consists in the claim that, from a logical point of view, powers are the second-order counterparts of liberties. A Hohfeldian liberty to do X is simply the absence of a duty not to do X: it is therefore a *unilateral* liberty (a *bilateral* liberty being the conjunction of two unilateral liberties).⁵⁸ Similarly, Sumner asserts, a Hohfeldian power must be the unilateral ability to alter a legal relation without the ability *not* to alter that relation: the bilateral ability to alter or not alter would be a conjunction of two Hohfeldian powers.

Sumner's argument seems question-begging. To establish that powers are, from the point of view of logic, the second-order counterpart of liberties, one must establish the symmetry of structure in the two concepts by reference to features that are attributed to those concepts on independent grounds. One cannot ascribe to the notion of a power features that are of dubious coherence or intelligibility by employing the thesis of logical symmetry as a basic assumption. Hohfeld defines a liberty to do X as the absence of a duty not to do X: the character of a liberty as unilateral rather than bilateral follows from that definition. But a power is defined as the ability to alter legal relations: there is nothing in this definition to entail a unilateral character for powers. Indeed, it is doubtful whether the notion of a power to alter without any power not to alter makes any sense. For the law to confer on me a power is for the law to attach importance to my behaviour. This is so even if my behaviour is constrained by legal duty or by material circumstance. If I have no power *not* to alter a legal relation, my behaviour has no effect in bringing about any alteration: in short, if I have no power not to alter, I have no

⁵⁶ LW Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), 35–6.

⁵⁷ *ibid.*, 29.

⁵⁸ The distinction between unilateral and bilateral liberties was made by Hart, *Essays on Bentham* (n 55 above), 166–7.

power to alter. Unlike liberties, therefore, powers are essentially bilateral.

Many of Hohfeld's critics have failed to acknowledge the fact that his analysis is concerned to deny the existence of certain presumed logical entailments between legal propositions: he is not concerned to deny the existence of pragmatic implications resembling those presumed entailments. Take, for example, the Hohfeldian notion of 'liberty' or 'privilege'. As should be clear to any reader of Hohfeld, the existence of a liberty does not entail the presence of a duty on others not to interfere with actions exercising the liberty. The liberty entails the absence of a duty on the holder of the liberty, but not the presence of a duty on anyone else. It is perfectly true that when people assert a 'right' to act in this or that way, they are often concerned to resist some threatened interference from others. This feature of rights has even been invoked in support of the claim that all rights are authorizations to invoke or deploy coercion, in accordance with a Kantian theory of equal freedom.⁵⁹ Yet there is no necessity for Hohfeld to deny this feature of our moral and legal discourse if he is to maintain his concept of 'liberty' or 'privilege' as entailing no duties for other persons.

The assertion of a 'right' to speak freely (for example) must, on Hohfeld's analysis, be a liberty, since it relates to the right-holder's own actions (claim-rights relate to the actions of persons other than the right-holder). Being a liberty, the right to speak freely does not in itself entail any duties incumbent upon anyone else. The asserted right may nevertheless pragmatically *imply* the existence of such duties which constrain the ability of others to interfere with the right-holder's free speech, in the sense that the assertion might in some contexts lack a practical point if such duties did not exist. This will not invariably be so: if you complain that I failed in my duty by speaking freely, my assertion of a liberty has a practical point even in the absence of any such implication. But such an implication will frequently be present, and will frequently be justified. As Hart has pointed out,⁶⁰ general duties such as the duty not to assault have the effect of providing a 'perimeter of protection' to actions performed in the exercise of Hohfeldian liberties. The existence of such laws is the general background assumed by assertions of liberties, where

⁵⁹ Hart, 'Are There Any Natural Rights?' (n 35 above).

⁶⁰ Hart, *Essays on Bentham* n 58 above), ch 7.

those liberties are asserted with the intention of resisting interference. Hohfeld says nothing which denies the existence of such pragmatic implications, and his analysis provides a most enlightening basis for their explanation.

A failure to appreciate the dependence of such implications upon particular contexts can easily lead theorists astray. Thus it is sometimes argued that individual Hohfeldian elements (such as liberties) cannot be regarded as rights: only a complex assemblage of such elements can constitute a right. Such arguments tend to appeal to semantic intuitions about the proper use of the word 'right'. Our intuitions concerning the appropriateness of an assertion of right, however, are always dependent upon the pragmatic context in which the assertion is made. When presented with an example in which a Hohfeldian liberty (for example) is asserted as 'a right', we may feel the assertion to be inappropriate. This perceived inappropriateness, however, may simply reflect our puzzlement as to the practical *point* of the assertion in the context described. Consider, for instance, the following example offered by Carl Wellman:

A contestant in a foot-race has a legal liberty, and presumably a moral liberty also, to run faster than the other entrants and thus to win the race. But it would be an abuse of language to say that he has a right to win the race because if another crosses the finish line first, the loser cannot complain that his right to win the race has been violated.⁶¹

Wellman's example will be persuasive only for those who have already decided to reject Hohfeld on other grounds. There is no abuse of language in saying that the contestant had a right to win the foot-race. What *is* true is that the circumstances in which such an assertion will seem appropriate are likely to be quite unusual. Jack's claim that he enjoys a Hohfeldian liberty to win will lack any practical point if it is not made to resist a claim (made by some Jill) that he is under a duty not to win. The invocation of a Hohfeldian liberty will normally have a practical point only when it is made in resistance to such a claim of duty. When given an example in which Jill has made no claim concerning Jack's duties, but Jack has nevertheless claimed a 'right', we naturally assume that Jack's assertion must be intended to ground some prescriptions concerning the conduct of others; since a bare liberty could ground no such prescriptions, we conclude that (if Jack possesses only such a liberty) it

⁶¹ Carl Wellman, *An Approach to Rights* (Dordrecht: Kluwer, 1997), 3.

is inappropriate for him to claim a 'right'. Yet we need only think of a context where Jack is resisting the assertion that he had a duty not to win (let us suppose that he is involved in a contractual dispute with his sponsor) and we see quite clearly that the provision of a pragmatic point for the assertion of a bare liberty dissipates our sense of inappropriateness.

MacCormick versus Hohfeld

Neil MacCormick has put forward a critique of the Hohfeldian analysis that goes well beyond simple appeals to semantic intuition. MacCormick is concerned to oppose Hohfeld's commitment to the analysis of legal concepts in terms of jural relations between pairs of individuals. A legal right, in MacCormick's view, is not (or, at least, need not be) correlative to a duty incumbent upon some other individual. Legal rights provide reasons for imposing duties, rather than being the simple correlative of the duty. More precisely, a law conferring a right is 'best understood in terms of a standard intention to confer some form of benefit . . . upon the members of a class severally rather than collectively'. Such benefits are to be 'secured to individuals in that the law provides normative protection for individuals in their enjoyment of them'. The relevant 'normative protection' may include 'any or all of the various modes identified by Hohfeld and others'. Thus, a right may be protected by duties, disabilities, or liabilities placed upon others, as well as by liberties enjoyed by the right-holder himself.⁶²

By way of example, we are introduced to section 5(1) of the Trade Union and Labour Relations Act 1974, from which MacCormick quotes the following passage:

... (E)very worker shall have the right not to be — (a) excluded from membership (b) expelled from membership, of a trade union . . . by way of arbitrary or unreasonable discrimination.

MacCormick tells us that this provision confers upon the worker protections falling into three different Hohfeldian categories: '(a) people at large are put under a duty not to injure any worker by getting him excluded or expelled from a trade union, (b) every

⁶² DN MacCormick, 'Rights in Legislation' in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Oxford: Clarendon Press, 1977). The quotations are from pages 203–5.

worker is in law free to apply for membership of a union of his choice, and (c) any act of purported exclusion of a worker from his union lacks legal effect if it is to be judged to be "by way of arbitrary or unreasonable discrimination".⁶³ 'Thus,' MacCormick concludes, 'using the terminology (in my view indispensable) of "rights" the legislature can in short and simple words achieve complex legal protections for the several members of a given class.'⁶⁴

MacCormick's analysis appears to conflict with that of Hohfeld in several respects. In the first place, the analysis claims that a single right can give rise to a variety of different legal protections and to a host of diverse jural relations: this contrasts very obviously with Hohfeld's approach which sees each right as one side of a single bilateral jural relationship. Secondly, the right provides a reason or justification for providing some set of legal protections as may be deemed appropriate in the circumstances, whereas Hohfeld would see rights and legal protections as standing in relationships of mutual entailment. (MacCormick sometimes speaks of the legal protections as 'entailed' by the right, but this cannot represent his considered view, since it would contradict his claim that the right may give rise to a variable set of protections.) Thirdly, legal rights for MacCormick play a fundamental role in the dynamics of legal reasoning, since they provide a justification for the development of appropriate forms of legal protection; Hohfeld, by contrast, neither asserts nor denies the possibility of rights playing such a role in legal thought.

Suppose that a Hohfeldian is presented with the passage that MacCormick quotes from section 5(1). If that passage is taken in isolation, the Hohfeldian judge would have to conclude that it is ambiguous. It may confer claim-rights against union officials, or it may confer claim-rights against all persons; it may be employing the term 'right' in the sense of 'immunity', so that it would be correlative not to a duty on union officials but to a disability; it may (given an appropriate background of legal doctrine and other assumptions) confer a claim-right with regard to exclusions, and an immunity with regard to expulsions; and so on. MacCormick's view, by contrast, seems to be that the provision exhibits no ambiguity at all:

⁶³ *ibid*, 206. I have discussed MacCormick's other example (s 2 of the Succession (Scotland) Act 1964) in my book *Central Issues in Jurisprudence* (London: Sweet and Maxwell, 1986), 134-5.

⁶⁴ *ibid*, 206.

the judge could infer any or all of these protections from the right, as appropriate. Presumably his idea is that the right introduces a legal reason for creating such forms of protection, but that reason has to be balanced against countervailing considerations, so that the protections that finally result are the outcome of this calculus of conflicting reasons.

If this interpretation of MacCormick is correct, it provides an insidious account of doctrinal reasoning which converts adjudication into an instrumental process of balancing interests. For the 'short and simple words' of the provision do not in fact *entail* any particular set of duties or disabilities: they merely (on this analysis) identify a very important interest, and leave it open to the court to decide how it is to be protected. This does not seem to resemble much of the legal doctrinal argument with which we are familiar. Nor is it an accurate representation of the rights conferred by the Trade Union and Labour Relations Act 1974.

On being presented with the passage from section 5(1) that MacCormick quotes, most lawyers would (I think) *either* regard it as ambiguous, and therefore go on to seek clarification of its meaning from its wider context, *or* they would suspect it of being a merely preliminary statement of aim, and would go on to seek the real substance of the matter elsewhere. Since the distinction between these two approaches would not be evident or important to practical people, the upshot is the same in both cases: they would read on. They would then discover that section 5(1) is clearly not intended to be read in isolation. For example, one 'ambiguity' that might be discerned in section 5(1) concerns the identity of the party against whom the right lies: is it a right holding against trade unions only, or does it hold (as MacCormick informs us) against 'people at large' who may secure the expulsion or exclusion of a worker from a union? A preliminary answer is found in sections 5(3) and 5(4) which make it clear that the statutory remedy lies against the union. It is simply not true that the 'short and simple words' quoted by MacCormick 'achieve complex legal protections': such legal protections as are created by section 5 are created by the section as a whole.

There are many different ways in which a section having the same effects as section 5 could have been drafted. It is precisely because the legal effect of the statute is separable from its style of drafting that it is unwise to build a legal theory upon such styles of drafting;

and it is particularly unwise when the theory appears to have the dramatic implications of MacCormick's account.

Consider once again the three forms of legal protection that (according to MacCormick) are conferred by section 5(1):

That confers protection of at least... three kinds; it being presumed that membership of a union is beneficial to any worker in normal circumstances (a) people at large are put under a duty not to injure any worker by getting him excluded or expelled from a trade union, (b) every worker is in law free to apply for membership of a union of his choice, and (c) any act of purported expulsion of a worker from his union lacks legal effect if it is judged to be 'by way of arbitrary or unreasonable discrimination'.

But how many of these rights actually were conferred by section 5 (let alone by the sub-section that MacCormick quotes)? Certainly the liberty to apply for membership of a union was not so conferred: that liberty is simply the consequence of there being no duty not to apply for membership, and it pre-existed the Act. Nor is the duty placed on people at large (not to injure workers by getting them excluded or expelled) a consequence of section 5. If there is such a duty, it is presumably a result of the position at common law, whereby securing the expulsion of a member from a union might amount to the tort of inducing a breach of contract.⁶⁵ Indeed, section 5(5) of the Act is careful to preserve such rights at common law.

Even if MacCormick were correct to say that section 5(1) had all of those complex consequences in law, it would not have had those consequences simply in virtue of the wording of the sub-section alone. When we take the sub-section in isolation, it is impossible to tell whether it confers a claim-right against union officials who exclude or expel, or a claim-right against any person who brings about an exclusion or expulsion. Likewise, one cannot tell whether the provision imposes upon the union a disability preventing them from expelling members in the prohibited manner, or simply a duty not to expel members. Perhaps labour lawyers in 1974 were able to reach confident conclusions about the legal effect of the provision; but, if that was so, their judgment was guided by a great many considerations other than the wording of this sub-section. The

⁶⁵ See also the judgment of Lord Denning in *Enderby Town Football Club v Football Association* [1971] 1 All ER 215. In that case Lord Denning asserted a judicial power to control the activities of unions on various grounds, which would include protecting the 'right to work' against discriminatory expulsion by a union.

sub-section needed to be read in the context of the section and of the legislative scheme as a whole, and the legislation needed to be applied within the context of a rich and complex body of common law principles. If this is indeed an instance of 'complex legal protections' being achieved by the 'short and simple' terminology of 'rights', the achievement seems to be in large part a function of the doctrinal background against which that short and simple word operated.

Suppose that I am correct thus far. Nevertheless, does not MacCormick still retain a damning point against the Hohfeldian view? For, when the Hohfeldian judge has attached a definite meaning to section 5(1) and decided (for example) that it confers a claim-right against union officials, is he not then prevented from inferring other consequences (in the form of different Hohfeldian relationships) from the same right? Does not MacCormick therefore have a sound objection to Hohfeld's regimentation of rights into distinct categories and atomic relationships, in so far as that regimentation obscures the way in which a single entitlement may provide good reason for the recognition of numerous different forms of protection in law?

There is a short answer to this argument, but before I come to it a brief reminder of a point made earlier is desirable. Remember that we must distinguish superficial issues about forms of drafting from deeper theoretical issues concerning forms of analysis. A draftsman might well find it convenient to draft a section in which a general 'right' is proclaimed at the outset and various forms of 'protection' for that right are established in subsequent provisions. Hohfeld would not deny the fact of such provisions, nor need he deny their desirability (in appropriate cases) on grounds of verbal economy and simplicity. What he would insist upon is that an accurate analytical representation of the *effect* of such enactments should respect and employ the distinctions established by his analysis. Now to the short answer.

The short answer is as follows. Nothing that Hohfeld says involves a denial of the claim that the existence in law of one sort of right may provide a reason for creating a different sort of right. Hohfeld is simply not concerned with relationships of this type. His concern is with relationships of entailment, and he would no doubt point out that (even for MacCormick) these different rights (or forms of protection) do not *entail* each other.

The short answer, however, simply leads to a reformulated objection. Is it not wrong of Hohfeld to concentrate to the exclusion of all else upon relationships of entailment? Does this approach not obscure much that is distinctive and valuable in the discourse of rights and in the character of legal reasoning with rights?

The answer here, if not so short, can at least be equally firm: and it is 'no'. MacCormick's analysis is intended to accommodate the tendency of legal doctrine to develop organically or dynamically, in response to reasons which are in some sense 'internal' to the law.⁶⁶ The endeavour to build a theory of this complex phenomenon on the back of an analysis of 'rights' is, however, a mistake. For it is far from clear that the forms of doctrinal argument whereby legal systems develop are best understood in terms of 'rights'. Much of the law develops by the analogical extension and application of concepts such as 'possession', 'consideration', 'remoteness', 'foreseeability', 'intention', 'causation', 'good faith', and so forth. The law is far more of an arcane science than the legal theoretician may suspect or be willing to acknowledge.

Take, for example, the question of whether third parties (that is, parties other than the worker and the union) are under a duty not to take action designed to secure the exclusion or expulsion of a worker from a union. It is far from obvious that this question would be approached by identifying the right conferred by section 5(1), treating that right as a general reason for establishing appropriate forms of legal protection, and then seeing whether there are any countervailing considerations which argue against the establishment of this particular form of protection. On the contrary, it is likely that the court would be much less concerned with the general balancing of interests, and much more immersed in the technicalities of legal doctrine. Having established that no duty is imposed on third parties by the statute, one would then have to consider whether conduct aimed at securing the exclusion or expulsion of a worker might fall within the scope of some existing tort. The factors relevant to that question might be quite unrelated to the scope of the worker's interest supposedly recognised by section 5(1). For example, the tort of inducing a breach of contract could be relevant only if the union's conduct amounted to a breach of contract. This might

⁶⁶ For a similar attempt, see Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), chs 10 and 11.

well be true of an expulsion from the union, but not of an exclusion (since one who has never been a member of the union has no contract with the union). The court might therefore reach the conclusion that third parties were under certain duties with regard to expulsions but not with regard to exclusions, thereby drawing a distinction unrelated to the interest that (in MacCormick's view) should provide the guiding star for legal development.

This is not, of course, to suggest that the categories of tort law are forever closed: in time specific torts such as inducement of breach of contract might be replaced by a more general tort of interfering with business or employment without lawful excuse. Such developments occur, however, by a process of analogical extension: frequently the recognition of a new basis for liability consists in the retrospective reflection that such a basis provides the best explanation for a series of existing precedents, no one of which was decided as an act of conscious innovation. The realization that some important interest of workers in union membership underlay many of the decisions might well play a part in this process of extension, and might fuel recognition of a more general remedy; but the picture of this process presented within MacCormick's analysis is misleadingly simple.

The complex and arcane character of legal doctrinal argument, and its frequent remoteness from any obvious connection with the 'interests' protected or 'policies' served by the law, has long been a target for the criticism of academic theorists. They have frequently urged upon the courts a more open and explicit concern with the goals and consequences of the law, and have attacked conventional legal arguments as subordinating policy goals to opaque doctrinal distinctions.⁶⁷ MacCormick's advocacy of a concept of 'right' that would, as he puts it, draw attention to 'the intended aim and object' of the law shares some of the impetus of these proposals. The danger inherent in all such proposals is equally familiar: that by converting legal doctrinal questions into questions concerning the balancing of interests or the advancement of desirable social goals, they will convert legal argument into an arm of the state's distributive or aggregative agenda, and will in that way erode the integrity of those domains of liberty that are protected by rights.

⁶⁷ See, for example, the views of Atiyah, discussed in Nigel Simmonds, *The Decline of Juridical Reason* (Manchester: Manchester University Press, 1984), 77–8.

The issues raised here are complex and it might well be considered a mistake to presuppose some response to them in constructing our analysis of rights. Nor is such a conflation of issues in any way necessary. Even if courts do take the existence of one legal right as a reason for conferring other forms of protection upon the interest protected by that right, this need not be in consequence of the logical features of the concept of 'a right'. In some cases, it could be in consequence of specific features of legal doctrine: for example, the tort of inducing a breach of contract may mean that X's contractual rights against Y give rise to certain non-contractual rights against Z. On the most general plane, the creation of new rights in response to existing rights could result from the courts' concern for the justice and internal coherence of the law. To propose an analysis of these features of doctrine as one aspect of an analysis of rights is to invite confusion. When the analysis proposed is the modern type of 'Interest' Theory developed by MacCormick, it is also to invite a collapse of doctrinal argument into the open-ended balancing of interests and pursuit of policy goals.

Liberty in the Jural Realm

We owe to H. L. A. Hart the observation that a Hohfeldian liberty may appropriately be described as 'a right' only in virtue of its connection with the 'perimeter of protection' afforded by the general prohibitions on assault and other gross forms of interference. Thus, Hart pointed out that it would be odd to say 'that a class of helots whom free citizens were allowed to treat as they wished or interfere with at will, yet had rights to do those acts which they were not forbidden by law to do'.⁶⁸

A number of difficulties are posed by Hart's example of the helots. In the first place, we might wonder whether the helots can appropriately be spoken of as standing within jural relationships at all. The applicability of legal concepts seems to presuppose an interest in determining the exact limits and requirements of the law as applied to individual instances. Such an interest might stem from a belief in the general moral duty to obey the law, or from a concern to predict the possibility of official interference with conduct (sanctions). Our reasons for hesitating to apply the concept of

⁶⁸ Hart, *Essays on Bentham* (n 58 above), 173.

a right to the helots may therefore stem from a belief that they fall outside the scope of any probable interest in the applicability of law.

It is of course possible to imagine circumstances in which there might be a concern to establish the content and applicability of prohibitions relating to the helots: if, for example, we think of each breach of prohibition by a helot as the occasion for the incidence of a duty (to punish) incumbent upon some dutiful official. It is important to note, however, that here the helot's contravention of a prohibition functions precisely as the *occasion* for the performance of someone else's duty: it is analogous to the situation where a fall in temperature activates a duty on the part of some officials to make payments to pensioners. So long as the helots receive no protection whatever from the law, there is unlikely to be any well-grounded interest in applying the law to their conduct as a basis for the guidance of that conduct (as opposed to the guidance of the conduct of others, such as sanction-applying officials). For what reason could one have for guiding one's conduct by the law in a context where even law-abiding conduct is not protected? By avoiding any breaches of duty, a helot might reduce though not eliminate the risk of being subjected to interference by officials; but (since even their lawful conduct is unprotected) their compliance with duty might also, in some cases, *increase* the risk of their being penalized by other citizens (citizens annoyed by the helots compliance with their duty of Sunday morning bell-ringing, for example). Given the absence of any protection for their lawful conduct, a general policy of being guided by the legal rule would probably be inferior to a strategy of guidance by *ad hoc* prediction of the likelihood of interference. If the applicability of legal concepts such as 'right' and 'duty' depends upon an 'internal' point of view that seeks to regulate conduct by reference to the rules, we may be tempted to conclude that such concepts are simply inapplicable to the helots, since the helots themselves would have no such perspective on the rules. It can make sense to talk of the rights and duties of those members of a populace who simply obey rather than accept the laws; but, in the case of the helots, we have people who would not orientate their conduct by law at all, their compliance with law being purely contingent upon the *ad hoc* balancing of different threats. From the viewpoint of others (such as the officials) the helots' conduct would function merely as the *occasion* for the incidence of duty rather than being a focus for rule-based appeals

independently of the duties of others. It is in this sense that the helots may be said to stand outside of jural relations entirely.

Hart's example of the helots was aimed at Bentham, who (according to Hart) was inclined to refer to liberties as 'rights' even when they were devoid of any perimeter of protection. We might, however, regard Hart's analysis as suggesting an elucidation of Hohfeld rather than a criticism. For it must be remembered that Hohfeldian liberty exists and has its being within a system of jural relations. It should therefore not be confused with such extra-legal phenomena of liberty as obtain in a state of nature. Hohfeldian liberty is not a residual pocket of dry land left by the incoming tide of legal regulation, for the existence of the general prohibitions on assault and trespass provide a 'perimeter of protection' for liberty that effectively transforms its pre-legal nature into a specifically juridical phenomenon.⁶⁹ The inclusion of general prohibitions upon assault and trespass is, perhaps, not a logically necessary feature of legal systems: but it may well be a feature that is grounded in certain *natural* necessities, and that is in that sense non-contingent.⁷⁰

In this way, Hohfeld's analysis can lead us to see the transforming effects of juridical ordering, and to challenge the popular forms of rhetoric that portray 'liberty' within the juridical realm as the mere abstention of the law. Given the existence of a legal system, what the law permits it also enables and empowers, and the collectivity bears responsibility for the consequences of such enabling just as much as for the consequences of prohibition. Indeed, this is only one respect in which Hohfeld's analysis can generate insights of extensive significance. Some of Hohfeld's brief remarks on property, for example, spawned important insights into the coercive aspects of the supposedly 'free' private realm.⁷¹ By contrast with the simple dichotomy between 'freedom' and 'unfreedom' that has characterized so much modern political philosophy, these analyses contribute to the realization that action is located within a complex field of consequences wherein choice is never excluded, but is equally never

⁶⁹ I have followed the general modern practice of substituting the term 'liberty' for Hohfeld's term 'privilege'. It is worth observing, however, that Hohfeld's terminology does have the significant advantage of marking out the concept as a specifically juridical one, not to be confused with the mere absence of legal regulation.

⁷⁰ HLA Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961), ch 9.

⁷¹ Hohfeld, *Fundamental Legal Conceptions* (n 44 above), 97.

without cost: freedom as the pure absence of constraint is revealed to be a chimera.⁷²

Claim-rights and Liberties

Traditional legal scholarship has tended to assume that rights render actions both permissible and inviolable. On this view, if an action is performed within the scope of a right it is clearly not a legal wrong, and is in that sense permissible; but such an action should also be protected from interference, and is in that sense inviolable. To interfere with a permissible action, it is assumed, is to interfere with the rights of another; it is therefore to do wrong, to violate one's duty, to do that which one has no right to do. In this way, the notion of rights as rendering actions both permissible and inviolable divides the juridical universe (at least of private law) into the two categories of actions which exercise rights, and actions which violate rights. This naturally suggests a picture of mutually compatible liberties, with law as the demarcation of the boundary between such liberties, and legal wrong as the violation of a boundary.

This general scheme of assumptions depends upon a concept of legal rights as spheres of permissibility and inviolability: as notional spaces within which one is free to act as one pleases. Such a concept of right appeared to provide an important focal point for the systematization of law, for various prohibitions on action could be interrelated by their varying relationships to notional spheres of entitlement. A further inference was also tempting for traditional legal scholars: that the various spheres of individual entitlement might themselves be systematically interrelated by means of the formal conditions for jointly possible freedoms. Thus, seemingly natural and harmonious assumptions combined to form a scheme of thought that found its most articulate expression in the jurisprudence of Kant. The Kantian conception of justice as a universal law of freedom appeared to be the immanent significance of doctrinal systematicity.

Such a claim may seem absurdly exaggerated when applied to the pragmatic and anti-theoretical common law. Common law judges,

⁷² A rich and fertile seam of philosophical thought challenges the contrast between freedom and constraint. For two accessible modern examples see: Frithjof Bergmann, *On Being Free* (Indiana: Notre Dame, 1977); Stanley Fish, *Doing What Comes Naturally* (Oxford: Clarendon Press, 1989).

we might say, knew little about Kant and cared less (we will discover in a moment that there were exceptions to this general proposition). But assumptions about the mutual compatibility of freedoms could find expression in doctrinal argument without any need for an underpinning theory: indeed, such assumptions may be especially effective and determinative when they are simply a part of the taken-for-granted common sense of practical men.⁷³ When we pass to the level of more explicit attempts at doctrinal systematization, the picture changes. For here we should not forget the enormous prestige, even in the common law world, of the German tradition of legal scholarship which had been founded by Savigny and was fundamentally informed by Kantian assumptions. As Mathias Reimann notes:

The Germans' historical and systematic works had gradually composed a complex and logical legal order which looked to many common-law scholars in their chaotic wilderness like the Garden of Eden. Nothing comparable existed in the common-law world, and for many it seemed obvious that the course of the Germans should be followed.⁷⁴

We can see the assumption of joint permissibility and inviolability at work in the judgment of Lord Lindley in *Quinn v Leatham*,⁷⁵ a case discussed by Hohfeld. We can also see here how Hohfeld's analysis exposes gaps in the judge's reasoning which would not otherwise be visible.

Quinn had tried to force Leatham, a butcher, to sack his non-union employees and employ only union members. In pursuit of this objective, Quinn threatened a strike at the shop of one of Leatham's customers unless the customer would stop doing business with Leatham. Leatham sued Quinn. In a passage quoted by Hohfeld, Lord Lindley set out a line of reasoning that may be represented thus:

- (i) Leatham had a right to earn his living in his own way;
- (ii) this right included the right to deal with other persons who were willing to deal with him;

⁷³ Undefended assumptions about the mutual compatibility of freedoms may, for example, have played an important part in the thinking of prominent liberals such as JS Mill. See Richard Bellamy, *Liberalism and Modern Society* (Cambridge: Polity, 1992), ch 1.

⁷⁴ Mathias Reimann, 'The Common Law and German Legal Science' in Robert W Gordon (ed) *The Legacy of Oliver Wendell Holmes, Jr.* (Edinburgh: Edinburgh University Press, 1992), 92.

⁷⁵ [1901] AC 495.

- (iii) therefore, everyone was under a duty not to prevent the exercise of that right;
- (iv) Quinn had violated that duty.

On the assumption that rights entail both permissibility and inviolability, this argument appears to be sound. If Lord Lindley has accurately identified Leatham's rights, it follows that Quinn has failed in his duty.

Hohfeld's analysis of rights, however, has the effect of splitting the notion of permissibility from the notion of inviolability, and the analysis thereby exposes an equivocation in Lord Lindley's argument. In Hohfeldian terms, the 'right' identified at step (i) would be a liberty or privilege. This entails the absence of a duty on Leatham not to earn his living in his own way: in other words, it denotes permissibility. But Leatham's liberty entails no duties for anyone else: one cannot deduce the existence of a duty from the existence of a liberty. Only claim-rights entail duties, and Lord Lindley's argument does nothing to demonstrate the existence of a claim-right in Leatham.

One might, of course, seek to restore the deductive character⁷⁶ of Lord Lindley's argument by claiming that the 'right' identified at step (i) is a claim-right, and therefore does entail a duty for some other person. But such an interpretation would face the following two difficulties. In the first place, Hohfeldian claim-rights do not relate to the actions of the right-holder, but to the actions of the duty-bearer. It therefore makes no sense to suggest that Leatham had a claim-right to earn his living in his own way. One would have to reconstrue the content of the right as, for example, a right not to be interfered with in the course of earning his living in his own way. This leads us to the second difficulty, which is that the proposition set out at (i) forms an uncontroversial starting point for legal reasoning *only* if it is construed as asserting a liberty. If it is construed as asserting the existence of a claim-right, it could not have constituted a sound doctrinal basis for the judge's reasoning. This is particularly so once the right is reconstrued along the lines suggested above (to fit the point that claim-rights relate to the actions of others): for such a highly general right not to be interfered with would have sweeping, unforeseeable, and quite possibly unacceptable implications.

⁷⁶ I am here ignoring more general doubts about the possibility of deductive arguments in normative contexts.

Lord Lindley assumes that a right entails both permissibility and inviolability. Quinn had violated a duty *not* because his conduct fell within the bounds of some already well-defined legal prohibition, but because it interfered with the lawful activities of another: the division between permissible activities and impermissible interferences is the critical distinction at work here. Since the assumptions that inform this argument are those characteristic of a broadly Kantian view of rights, it is therefore interesting to note that Lord Lindley had studied in Bonn and was familiar with the prestigious traditions of German jurisprudence that were so strongly influenced by Kant and the classical Will Theory. As a young barrister, Lord Lindley had translated the general part of Thibaut's *System des Pandekten Rechts*,⁷⁷ a work which shared the view of rights characteristic of the classical Will Theory. His translation of Thibaut makes it clear that rights combine the features of permissibility and inviolability (in the sense of protection by a correlative duty):

[E]verything done in exercise of a right is juridically speaking lawful... Every right is as such accompanied by a power of compelling the performance of or forbearance from some positive act.⁷⁸

Lord Lindley's assumed view of rights is undermined by the Hohfeldian analysis. Yet why should we accept the Hohfeldian analysis? As I observed earlier, our formal intuitions about the concept of 'a right' can be regimented in a variety of ways, and the Hohfeldian system is only one such. Each systematic analysis of rights departs at certain points from our ordinary understandings (this being the price of systematization) and one cannot plausibly claim that decisive considerations favour Hohfeld's view as against the alternatives. So why should we not sustain Lord Lindley's argument by rejecting Hohfeld and retaining the joinder of permissibility and inviolability?

⁷⁷ Nathaniel Lindley, *An Introduction to the Study of Jurisprudence*, (being a translation of the general part of Thibaut's *System Des Pandekten Rechts*) (London: Maxwell, 1855). Pollock dedicated the first edition of his treatise on contract to Lord Lindley, saying that Lindley had taught him 'to turn from the formless confusion of textbooks and the dry bones of students' manuals to the immortal work of Savigny' (quoted in Cheshire, Fifoot, and Furmston, *The Law of Contract*, 13th edn (London: Butterworths, 1996), 18). I am grateful to Gareth Jones for letting me see his essay on Lord Lindley written for the forthcoming *New Dictionary of National Biography*.

⁷⁸ Lindley (n 77 above), 52-3.

The answer to this very reasonable question must be as follows. Lord Lindley's argument might be construed in two different ways. He might be read as assuming that permissibility entails inviolability. The starting point of his argument would then be a claim about the permissibility of Leatham's actions, and that premise would lead directly to conclusions about Quinn's duties. We will call this the 'straight entailment' reading.

Alternatively, the argument might be construed as claiming that *rights* entail both permissibility and inviolability, although permissibility does not itself entail inviolability. On this construction, a claim about the permissibility of Leatham's action would lead to a conclusion about Quinn's duty only via an interim judgement concerning Leatham's entitlements. In other words, the argument would begin with a claim about permissibility and, from that premise (in conjunction with certain other premises) would infer that Leatham possessed a right (of the non-Hohfeldian type that entails both permissibility and inviolability); from the claim that Leatham possessed such a right, certain conclusions could be reached about Quinn's duty. We will call this the 'entitlement' reading of the argument.

Hohfeld has demonstrated (if any demonstration were needed) that the permissibility of an action does not entail its inviolability and therefore does not entail any conclusions about the impermissibility of other actions. Such a demonstration is wholly independent of any views that we or Hohfeld may have about the concept of 'a right'. Simple permissibility does not in itself entail inviolability. So, on the simple entailment reading, Lord Lindley's argument fails.

But what of the entitlement reading? If Lord Lindley is correct in his apparent assumption that rights entail both permissibility and inviolability, then he is justified in inferring Quinn's duty from Leatham's right. But is he equally justified in inferring Leatham's right from the permissibility of his actions? For the only uncontroversial premise from which Lord Lindley can proceed is one concerning the permissibility of Leatham's actions; and if 'right' signifies more than a Hohfeldian liberty (if it entails both permissibility and inviolability) then the existence of a right cannot be inferred simply from the existence of a permissibility. The problematic step exposed by Hohfeld's analysis is (on this reading) the step from 'permissibility' to 'right'.

We must conclude, therefore, that one does not evade Hohfeld's exposure of indeterminacies in doctrinal argument simply by

clinging to a non-Hohfeldian conception of 'rights'. Such a move does not eliminate the gap in the reasoning, but merely relocates it: instead of having to bridge a gap between the right to act (a Hohfeldian liberty) and the duty not to interfere, we have to bridge a gap between the permissibility of an action and a complex entitlement to perform the action.

Bridging the Gap by Diluting Entitlements

The mere fact that the steps in Lord Lindley's argument are not deductive on their face does not mean that appropriate premises could not be supplied that would render them deductive; but the Hohfeldian analysis would tend to suggest that such premises will not be propositions concerning the content and applicability of existing rights. Rather, relevant premises will have to provide arguments of justice or social policy that give us a reason for creating or conferring new forms of entitlement. In the case of *Quinn v Leathem*, for example, Lord Lindley needed to decide whether Leathem's acknowledged liberty (or 'privilege') should be protected by a claim-right against conduct of the kind in which Quinn had engaged. Hohfeld's point is simply that the claim-right is not entailed by the liberty: but he does not deny that considerations of justice or policy may give us a reason for conferring such a claim-right.

The anti-Hohfeldian may be unimpressed by this analysis, however. For it may be argued that existing features of the law can point to the existence of a (non-Hohfeldian) entitlement which justifies the imposition of a duty upon Quinn. The judgment that Quinn bears a duty, and Leathem a claim-right, may itself be grounded in considerations of existing legal entitlement.

An argument to this effect might begin by proposing a conception of rights wherein a right is not the correlative of an existing duty, but a reason for imposing a duty. The most popular versions of this position identify rights with important individual interests that are sufficiently weighty to provide good reason for the imposition of a duty on some other person, or for the institution of some other normative protection for the interest. The various legal concepts composing Hohfeldian jural relations are treated on this view as instrumentalities which can be deployed to protect true 'rights', the latter lying on the deeper level of justification rather than on the cutting edge of legal remedies.

The next step in the argument would be to identify some important interest corresponding to Leathem's interest in pursuing his living in his own way. Such an interest would have to be sufficiently weighty to provide a reason, in principle and in the abstract, for imposing a duty on others. The interest would be shown to be a legal right by demonstrating that it already provided the justification for a number of existing legal provisions: for example, for the liberties enjoyed by Leathem in pursuing his trade, the powers possessed by him in that regard, and so forth. Having in this way established that the interest amounted to a legally recognised right, one would have a legal reason for imposing an appropriate duty on Quinn.

It is tempting to imagine that such a conception could be employed to bridge the gap in Lord Lindley's argument. The argument reconstructed would now begin (as before) from Leathem's general liberty to pursue his trade. From that starting point, we would move to the identification of an interest in pursuing such trade, and to the observation that that interest is recognised in law to the extent of being protected by various existing rules: Leathem's power to contract; his liberty to operate a butcher's shop in the relevant location without being guilty of a nuisance; and so forth. We now seem to have bridged the gap between 'liberty' and 'entitlement'; it only remains for us to make the next step, from Leathem's 'entitlement' to Quinn's duty.

Unfortunately for the anti-Hohfeldian, this gap is not so easy to bridge. For the view currently being considered proposes that rights are reasons for imposing duties only in general and in the abstract. The existence of such a right possessed by Leathem does not itself entail that a duty should be imposed upon Quinn: only that such a duty should be imposed if there are no weighty competing considerations. Consequently, if we are to pass from the judgment that Leathem has a right to the conclusion that Quinn has a duty, we must pass through a complex process of identifying, evaluating and weighing the many diverse and competing considerations that will inevitably obtain in any concrete situation.

I mentioned earlier the possibility of reading Lord Lindley's judgment in two different ways. It might be read as assuming that permissibility entails inviolability (liberties entail duties); or, alternatively, it might be read as assuming that *entitlements* entail both permissibility and inviolability, although permissibility

in itself does not entail inviolability. On the first reading, the argument is exposed as deficient by Hohfeld's analysis, which clearly exposes the gap between permissibility and inviolability. But on the second reading, the argument is equally deficient: the difference is simply that here the gap has been relocated. On the second reading the problematic step has been shifted to Lord Lindley's assumption that an entitlement (entailing permissibility and inviolability) can be inferred from a mere permissibility. Once the Hohfeldian analysis has exposed this gap in rights-based reasoning we may, by devising various alternative conceptions of 'right', shift it around: but we cannot eliminate it. Like an attempt to patch up a gap in the fabric of a spider's web, our efforts to carry out repairs will simply cause the rift to appear in a different location.

We can now see that the currently fashionable Interest Theory of rights⁷⁹ is less successful than its widespread popularity might lead us to believe. For, even if we are prepared to accept the rather loose and uncertain way in which legal rights are identified on this theory, we will find that the troubling rift in our rights-based reasoning still persists. Now the rift appears as a gap between the judgment that someone has a right (a weighty interest which, other things being equal, might justify the imposition of a duty) and the conclusion that someone else ought to be placed under a duty. To bridge the gap, in any concrete set of circumstances, we must engage in a complex process of balancing many diverse and conflicting interests. Talk of 'a right' has simply served to identify one of the interests involved in that process.

Somewhat earlier, we considered a Kantian conception of rights that linked the notions of permissibility and inviolability. We saw how Hohfeld's analysis effects a separation of these two facets that the Kantian has joined together. We have now seen how a non-Kantian, but equally non-Hohfeldian, view of rights as weighty interests tries to provide a suitable bridge between permissibility and inviolability: permissibility does not *entail* inviolability, but may possibly constitute legal recognition of the importance of the interest, and the interest may in turn provide a reason for imposing a duty (thus conferring inviolability).

⁷⁹ By the phrase 'currently fashionable' I mean to distinguish the type of Interest Theory proffered by Raz and MacCormick from the (currently unfashionable, but more defensible) type of Interest Theory developed by Kramer.

One attraction of the Kantian view lies in the strong connection that it asserts between rights and the authorization to use coercion.⁸⁰ This grounds the initial connection made by Kant between rights and the value of freedom: since rights are distinctive in their power to authorize coercion, it is appropriate to think of them as based upon a value that is distinctively at stake when coercion is deployed. But the initial connection between rights and coercion reflects our sense that rights are in some sense peremptory: that if I have a *right* that you should perform a certain act, your performance of that act is not a matter for calculation or debate, but may be demanded 'as of right'.

In the currently fashionable Interest Theory of rights, however, the 'peremptory' character of rights is lost. My 'right' to speak freely, for example, is (according to that theory) neither the correlative of anyone else's duty nor coincident with a liberty possessed by myself. The right establishes only that I have an interest in speaking freely which would justify the imposition of a duty on someone else 'other things being equal'. To pass from the judgment that I have a right to the conclusion that someone else has a duty we must enter into a complex calculus in which competing interests are weighed and alternative ways of protecting my interest are considered. The assertion that I have a right is no longer a peremptory demand: it merely draws attention to an interest of which account must be taken.

4 Hohfeld and the Kantians

The Integrity of Rights Revisited

We noted above that the competing values of collective and private project pursuit seek a stable coexistence within the framework of the rule of law. By guaranteeing a realm of private rights that exhibit a degree of integrity from the aggregative and distributive concerns of the public realm, it is hoped that proper recognition and scope can be given to each of the competing values. Yet, as I pointed out, the notion of the rule of law can be interpreted in a diversity of different ways, and these differences to some extent mirror the dichotomies of the rights debate.

⁸⁰ Kant, *Metaphysics of Morals* (n 30 above).

Where the Interest Theory relied upon the separation of legislative and adjudicative decisions, the classical Will Theory of rights tended to emphasize the contrast between public and private law. The former was seen as a body of instrumental rules serving collective goals, while the latter was seen as an autonomous body of principles structured and informed by reasoned reflection upon the requirements of jointly possible domains of autonomy. Private law (on this view) demarcates the boundaries between different individual domains, and its content is dictated in large part by the rational requirements of such a demarcation.

Whatever his own understandings and intentions, Hohfeld has been seen as a contributor to, or a forerunner of, the American realist movement. That rich and varied movement had a great diversity of different aspects and concerns,⁸¹ and it would be absurd to seek to reduce it to some single theme. Yet if there is one theme in particular that later jurists have tended to associate with realism, it is the attack upon the idea of law's determinacy: the attack, in short, upon the positivist idea that legislation and adjudication can be sharply or clearly separated. Realists were anxious to point out the huge scope for pliability of interpretation made available by any system of legal rules, and the extensive indeterminacies which permeate every body of legal doctrine. Nor could their analyses be reasonably dismissed as exhibiting an undue concern with the 'problems of the penumbra' at the expense of the core of settled meaning that gives content to every legal provision.⁸² For the realists would have been quick to point out that even the 'core of settled meaning' rested upon shared values and shared understandings of the point or purpose of the rule, rather than upon some ordinary acontextual meaning of the words composing the rule: even decisions within the core of settled meaning involve (as Alexy observes) a 'negative value judgement'.⁸³

⁸¹ Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995).

⁸² Hart, *The Concept of Law* (n 70 above), ch 7.

⁸³ Robert Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon Press, 1989), 8. Hart, at pp 7–8 of his book *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), retracts his earlier view that the indeterminacy of legal rules is always a linguistic matter: 'In fact, as I came later to see . . . the question whether a rule applies or does not apply to some particular situation of fact is not the same as the question whether according to the settled conventions of language this is determined or left open by the words of that rule. For a legal system often has other resources besides the words used in the formulations of rules which serve to determine

When read against the background of the realist assault upon positivist determinacy in law, Hohfeld's analysis is important for its exposure of social policy judgments within the framework of what might superficially appear to be deductive exercises in rule-application. Lord Lindley cannot validly infer Quinn's duty from Leatham's liberty; therefore Lord Lindley's judgment must contain the suppressed premise that Leatham's liberty *ought* to be protected by a claim-right and correlative duty.

Yet to view Hohfeld's contribution in this light is to underestimate its importance. If we assume that Hohfeld is important for his exposure of indeterminacies in legal reasoning, we might reasonably be led to ask how he has done more than point to a number of isolated errors. Why is it assumed that Hohfeld's discussion of *Quinn v Leatham* and other cases is more than a catalogue of judicial errors or oversights or failures to set out reasoning in full? Why is it assumed that Hohfeld has made some *general* point about legal indeterminacy?

Hohfeld's discussion of *Quinn v Leatham* reveals Lord Lindley's apparent assumption that rights entail both permissibility and inviolability; but this revelation has some *general* importance only if such assumptions can be regarded as pervasive in conventional legal thinking. What reason do we have for believing that Lord Lindley's assumptions are or were widely shared?

So long as we take *positivism* to be the intellectual system that primarily merits our scrutiny, an answer to this question will not be readily available. For there is no particular reason for thinking that assumptions of conjoint permissibility and inviolability (or permissibility and empowerment, etc: depending on which set of Hohfeldian relations we address) will be pervasive within positivist legal thought. Positivism makes no particular claims about the *systematic* character of law's content, and is therefore inherently unlikely to be committed to any such assumptions. If we are to find these views at work in doctrinal thinking, they will be within a system of thought that emphasizes the systematic character of law's content, rather than the positivist character of its sources. In other words, we must shift our attention from positivism to Kantianism.

their content or meaning in particular cases. Thus . . . the obvious or agreed purpose of a rule . . . may serve to show that words in the context of a legal rule may have a meaning different from that which they have in other contexts.'

We saw above how nineteenth-century German jurisprudence was fundamentally shaped by a broadly Kantian theory of rights. This theory, as John Lightwood explained, viewed law as 'an invisible line of demarcation between the provinces of different individuals', so that within each such province 'the will of the individual reigns'.⁸⁴ Kant's *Metaphysics of Morals* had claimed to trace the 'immutable principles for any giving of positive law' by finding the limits of legitimate coercion in 'the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom'.⁸⁵ Accordingly, the notion of an ideal realm of equal freedom was to provide a guiding model for legal scholarship, since law could claim to be fully legitimate only in so far as it expressed and embodied the ideal.

If the systematic analysis and exposition of legal doctrine was to be guided by a theory of this type, diverse and fragmentary legal rights would need to be assembled into domains of liberty within which the individual's will was supreme. To the extent that this was possible, the existence of one specific entitlement would imply the existence of a number of others. An established duty on Y correlative to a (Hohfeldian) claim-right in X might suggest that X also possessed a complex of associated liberties, powers, and immunities. To speak less anachronistically by avoiding Hohfeld's terminology, a right was assumed to amount to a domain of freedom protected by a complex array of permissibilities, powers, and correlative duties: the rationale of such a complex assemblage being the attempt to make the right-holder's will supreme within a certain province of concerns.

Within this type of jurisprudential thought, the theory of rights and the associated Kantian theory of justice formed a system of ideas that mediated the application of concrete legal provisions and lent them greater determinacy than they might otherwise have possessed. Discrete legal rules could not only be interpreted against the background of a broader theory of justice, but could also be fitted into a wider and integrated system within which they might acquire an importance not confined to the strict bounds of their own wording and immediate objectives.

Whether consciously or not, it is this broader system of ideas which informs the judgment of Lord Lindley in *Quinn v Leatham*

⁸⁴ John Lightwood, *Nature of Positive Law* (n 17 above).

⁸⁵ Kant, *Metaphysics of Morals* (n 30 above), 55–6.

and which was to be fundamentally undercut by the Hohfeldian analysis. For, as we have seen, Hohfeld's apparatus of concepts and distinctions makes it transparently clear that connections between permissibility and inviolability, or between permissibility and empowerment, or between empowerment and immunity, are not grounded in the logic of entitlement at all. A substantive political theory such as the Kantian theory of justice may propose that we ought to ascribe complex sets of Hohfeldian advantages to individuals in order to protect the supremacy, within some sphere, of the individual will. Such a substantive proposal, however, must rest upon an appeal to its own merits, and cannot appear to receive support from an inherent logic of entitlement.

Hohfeld versus Steiner

At this point in our reflections, it will be enlightening to examine the Kantian theory of justice developed by Hillel Steiner. For Steiner's theory has undergone at least one metamorphosis, consequent upon his attempt to fit the theory to a Hohfeldian analysis of rights. In an early version, Steiner based his argument four-square upon the assumption that rights render actions both permissible and inviolable. Perceiving that Hohfeld had exposed this assumption as fallacious, Steiner attempts, in his recent book *An Essay on Rights*,⁸⁶ to revise the argument in a way that takes account of Hohfeld's insights but nevertheless preserves the substantive conclusions of the theory. We will see that this attempt fails precisely because it fails to acknowledge that the gaps in rights-based reasoning exposed by Hohfeld's analysis cannot be easily bridged: if one is to pass from judgments about permissibility to conclusions about inviolability (for example) one must step outside the channels of rights-based reasoning.

Steiner's version of a Kantian theory of justice is particularly interesting for our purposes because it proceeds from a set of analytical claims about the general nature of rights. In a sense, this is in line with Kant's own procedure, for Kant begins from the basic analytical claim that rights constitute authorizations to employ coercion;⁸⁷ he infers from this that rights are based upon the

⁸⁶ (Oxford: Blackwell, 1994).

⁸⁷ Kant, *Metaphysics of Morals* (n 30 above), 57.

value of equal freedom, that they concern only the form of the will (and the relationship between the wills of different individuals) and not its content; etc. Yet Steiner's approach is in some respects more demanding than that of Kant. For Kant's analytical claims about rights do not go beyond a set of very broad intuitions that could be interpreted in a diversity of ways. This results in a theory of equal freedom that has long been accused of being a mere empty formalism without real content. Steiner's theory, by contrast, seeks to ground a relatively determinate set of guidelines for principles of justice; and it proceeds not by loose connections between general intuitions, but by claims about logical possibility and contradiction.

Steiner argues that we should approach the discussion of justice by reflecting upon 'the elementary particles of justice', the elementary particles being 'rights'. By understanding more about the formal characteristics of rights, we can learn about the content of possible principles of justice. The connection is made by means of the notion of 'compossibility'. The logical characteristics of rights determine which *sets* of rights are logically possible (which rights are 'compossible'); and, since principles of justice establish sets of rights, the analysis of rights constrains the content of possible principles of justice. Steiner believes that this search for compossible rights enables us to reject many proposed principles of justice and perhaps to identify one theory of justice as unique in its consistency with the established analytical features of rights.

Steiner's basic thesis is that principles of justice which are capable of generating conflicts between rights lead to logical contradictions; the rights conferred by such principles are not 'compossible', and the principles are therefore unacceptable. Systems of rights can be free from conflict only when it is not possible for the actions authorized by the rights to conflict; and conflict between actions is *impossible* only when those actions share no physical or spatial components. Compossible rights, Steiner concludes, must take the form of entitlements to the exclusive use of objects and spaces: genuine rights, in short, are exclusive property rights.

The key step in this argument (or at least the step upon which I wish to focus) is the claim that conflicts between rights generate logical contradictions. In the context of the present essay there are very good reasons for isolating this claim for special attention. Steiner has had two separate stabs at sustaining the argument, and his shifts in position seem to be responses to a growing appreciation

of the importance for his theory of Hohfeld's analysis. By reflecting upon the problems that Hohfeld causes for Steiner's theory we can learn a good deal about the blow that Hohfeldian analysis dealt to forms of legal scholarship that rested upon fundamentally Kantian assumptions about rights. We have seen how legal scholars influenced by Savigny, and even common law judges such as Lord Lindley, tended to assume that the legal order (or at least private law) could be reconstructed as a series of domains of liberty. Each such domain was thought to consist of permissible actions that were also inviolable, in the sense that interference with action within the domain would be a wrongful breach of duty. The conception of justice underpinning these assumptions, and informing doctrinal analyses, was that of a realm of non-conflicting entitlements, where action could be divided into the permissible exercise of entitlements, and the impermissible interference with such exercise. Steiner's theory seeks to sustain a broadly similar picture by arguing that a conception of justice as conferring inviolable, non-conflicting, domains of liberty is the only acceptable one, since all other theories fail the test of compossibility.

Steiner hopes to show that conflicts between rights would involve logical contradictions, and that genuine or valid rights therefore cannot conflict. Consequently, the only logically possible systems of rights are systems which make conflict between rights impossible. While this general argument has remained constant throughout his work, however, he has shifted his position on the precise nature of conflict between rights.

In the earlier version of his argument, Steiner assumed that rights entail both permissibility and inviolability: the possessor of a right may exercise it, and no one else may permissibly interfere with that exercise. Conflict between rights on this model would involve Agent *A* having a right to perform action *X*, while Agent *B* has a right to perform action *Y*, the two actions (*X* and *Y*) not being jointly performable. In such circumstances action *X* would be *permissible* as an exercise of *A*'s right, but would also be *impermissible* as an interference with the exercise of *B*'s right. It is logically contradictory to assert that an action is both permissible and impermissible;⁸⁸ therefore a set of rights that can generate conflict between

⁸⁸ Setting on one side special contexts where I might be evaluating the permissibility of the action from the viewpoint of different normative systems.

rights leads to logical contradiction; therefore such a set of rights is impossible.

The problem with this early version of the argument was the way in which it ignored Hohfeld's assault upon the assumption of joint permissibility and inviolability as a necessary characteristic of rights. In the hypothetical example where *A* has a right to do *X*, and *B* has a right to do *Y*, Hohfeld would say that the 'rights' in question are liberties,⁸⁹ since they relate to the right-holder's own actions (whereas claim-rights relate to the actions of someone else). As liberties, they can certainly conflict in the sense of authorizing actions where the performance of either action will impede or prevent the performance of the other. Nothing in the notion of a liberty, however, guarantees freedom from such interference: for that the exercise of the liberty would have to be protected by some appropriate claim-right. There is no action here which is both permissible and impermissible, and there is therefore no logical contradiction.

In the later version of his argument, presented in his book *An Essay on Rights*, Steiner revises his claims to take more adequate account of Hohfeld's analysis. The objective is the same: to demonstrate that conflicts between rights will lead to logical contradictions, so that systems of rights that do not exclude the possibility of such conflicts can be rejected as logically impossible. The assumption of joint permissibility and inviolability as a characteristic of rights is, however, abandoned.

Hohfeld's analysis makes it clear that a liberty entails nothing about duties incumbent upon other people; but Hohfeld would not seek to deny the point made by Hart to the effect that liberties frequently find a perimeter of protection in claim-rights protecting one from such interferences as assault and trespass. Even though I may possess only a liberty of free-speech (since others are under no duty not to interfere with my speaking freely), I may be effectively protected from interference by the fact that preventing me from speaking would necessitate an assault upon my person or a trespass upon my property, and I *do* possess claim-rights against assault and trespass. Hohfeld would merely seek to point out that the effectiveness of such a perimeter of protection is a purely contingent matter: it is not *entailed* by the concept of a right.⁹⁰

⁸⁹ Hohfeld, of course, would use the term 'privilege'.

⁹⁰ It is worth reiterating a point made earlier. Hohfeld would be profoundly unimpressed by the observation, made repeatedly by his modern critics, to the

Duly armed with Hart's notion of the perimeter of protection which may surround Hohfeldian liberties, Steiner makes a distinction between what he calls 'vested' and 'naked' liberties. The distinction turns upon whether or not it is possible to permissibly interfere with the exercise of the liberty in question. The distinction is, Steiner tells us, one of degree when applied to *types* of action: my liberty to wear a hat may be more or less well protected by my claim-right not to be assaulted, depending on the circumstances. But the distinction is one of *kind* when applied to act-tokens: either it is possible for you, here and now, permissibly to stop me from donning my hat, or it is not. Vested liberties are those liberties which, by virtue of the efficacy in the circumstances of the relevant perimeter of protection, cannot permissibly be interfered with; while naked liberties are, by contrast, exposed to the cold wind of permissible interference.

Steiner now focuses the key steps of his argument upon the concept of a 'naked liberty'. Suppose that the performance of a certain duty (undertaken, for example, by contract) requires me to exercise a naked liberty.⁹¹ Since the liberty is *naked*, my exercise of it may be permissibly obstructed by others. In such a situation, I may be able to perform one duty (the duty undertaken by contract, for example) only by violating another duty (such violation may be necessary if I am to resist the interference with my liberty). Steiner equates this conflict of duties with a conflict of rights, and argues that a compossible system of rights would be one in which such

effect that an assertion of a right to perform an action ordinarily suggests the wrongfulness of interference with the action. Certainly it does, and the notion of a 'perimeter of protection' for liberties explains why that might often be the pragmatic implication of such an assertion. But there is a difference between what will, in many contexts, be pragmatically implied and what is logically entailed by the asserted entitlement. The difference is made transparent by those contexts where my assertion of a right to perform an action is simply intended to resist a charge of wrongdoing, but does not assert a claim-right against interference because it is clear that no such claim-right exists (eg 'I have a right to make a profit').

⁹¹ Since duty excludes liberty, this may seem to be an odd way of speaking; but it is simply a way of highlighting the absence of a claim-right not to be interfered with in one's performance of the duty-act. Imposition of a duty to do *X* deprives me of the liberty not to do *X*. If, prior to the duty, I enjoyed a bilateral liberty (that is, a liberty either to do *X* or not to do *X*), imposition of the duty will leave me with a unilateral liberty to do *X*. It is in this sense that we can speak of a duty to exercise a bare liberty. Kramer is right to emphasise, however, (as against theorists such as LW Sumner) that imposition of a duty does not itself entail the existence of a liberty to perform the duty-act.

conflicts are impossible. The relevant type of conflict arises when the performance of a duty depends upon a naked liberty. Consequently, a conflict-free system of rights would be one that provides an impenetrable perimeter of protection to liberties. Steiner concludes that only a system of property rights could provide such an impenetrable perimeter of protection for liberty.

There are two problems with this argument. The first, which I have explained elsewhere but will only briefly outline here,⁹² concerns Steiner's equation of conflict of duties with logical contradiction. In the earlier version of his argument, where rights were assumed to confer both permissibility and inviolability, conflict of rights did indeed generate logical contradiction, since it led to a situation where an action could be said to be both permissible and impermissible. The proposition that a certain action is impermissible does indeed contradict the proposition that the action is permissible, since an assertion of permissibility seems to be a simple denial of impermissibility, and vice versa. But the later version of the argument leads, not to conjoint permissibility and impermissibility of an individual action, but to a conflict of duties. Here it is far from clear that there is a logical contradiction. '*A* has a duty to do *X*' does not seem to contradict '*A* has a duty to do *Y*', even on the assumption that *X* and *Y* are incompatible. *A* may have a duty both to do *X* and not to do *X*, and the assertion of such conflicting duties is not contradictory. The contradictory of '*A* has a duty to do *X*' is *not* '*A* has a duty not to do *X*' but '*It is not the case that A has a duty to do X*'. Whether *A*'s duty not to do *X* entails the absence of a duty to do *X* is precisely the point at issue, and would require further theoretical argument of a kind that is not provided by Steiner.

The second problem with Steiner's argument concerns his assumption that situations where my performance of a duty is permissibly obstructed involve conflicts of duty. As I have pointed out elsewhere, this is not necessarily so. Once again it is Hohfeld's distinction between claim-rights and liberties that plays the key part in the demonstration. The permissibility of interference with my action does not entail the impermissibility of interfering with the interference. Those who can permissibly interfere with my action possess a liberty to interfere; but the possession of such a liberty

⁹² Nigel Simmonds, 'The Analytical Foundations of Justice', 54 Cambridge LJ 306 (1995).

does not entail the possession of a claim-right not to be interfered with. Thus, when a lawful demonstration prevents me from performing my duty to deliver certain flowers to a wedding (in Steiner's example), the mere fact of a permissible interference with my performance does not entail a conflict of duty. In thinking that such a conflict of duty is indeed a consequence, Steiner is assuming that I can perform my duty (to deliver the flowers) only by violating some claim-rights of the demonstrators; but the permissibility of their demonstration does not entail the wrongfulness of my interference with their action. Therefore, no conflict of duty need be involved.

Of course, the demonstrators will possess claim-rights against assault and trespass, and so forth, and their liberty will enjoy a perimeter of protection in consequence. Perhaps I can get my delivery of flowers to the wedding only by using tear-gas on the demonstrators, or by ramming them with my delivery van. Conflicts of duty will therefore be a common and frequent consequence of situations where duty-acts may permissibly be interfered with. Steiner's argument, however, seeks to lead us to a theory of justice via a series of claims about compossibility. Alternative schemes of rights are to be eliminated not as counter-intuitive or unattractive, but as self-contradictory. He therefore cannot be justified in treating certain rights (such as the rights which provide a perimeter of protection for liberty) as already in place prior to the commencement of the argument. The existence of such rights cannot be invoked to support an otherwise invalid step in the argument, because all such rights are to be derived from the theory itself.

Many aspects of Steiner's analysis are Kantian in inspiration. This is true of his conception of rights as authorizing coercion, and (in the early version of his theory) as entailing both permissibility and inviolability; it is true of his vision of justice as a realm of jointly possible freedoms; and of his desire to ground his theory in purely *formal* considerations of the nature of liberty and of the will, in abstraction from its content. Ultimately, however, the Kantian resemblances carry with them certain Kantian vulnerabilities. Steiner is in the end vulnerable to precisely the objection that Hegel made against Kant: that he can only derive content from the essentially formal character of his theory by taking for granted many of our concrete juridical institutions and features of our existing moral life.

The Essential Modernity of Hohfeld

The failure of Steiner's argument serves to demonstrate that a conception of justice as a system of non-conflicting domains of liberty cannot be derived from intellectually austere claims about the formal properties of rights. The logic of rights seemed to dictate such a patterning of entitlements only on the assumption that rights entail both permissibility and inviolability. Once that assumption is abandoned in response to Hohfeld's analysis it can be seen that nothing in the logic of rights guarantees their orderly arrangement around a conflict-free system of jointly exercisable liberties.

This is not, of course, to say that such a Kantian theory of justice might not be developed independently of claims about the formal properties of rights. Nor have we said anything to demonstrate that doctrinal scholars might not find it possible to systematize the multiplicity of entitlements in terms of such an ordering of domains of liberty.

This gives rise to the following thought. Perhaps a basic working premise of legal doctrinal scholarship might be the assumption that the law seeks to protect domains of liberty. In this way, the permissibility of an action might raise a presumption that interference with the action is wrong. The perimeter of protection surrounding liberties might be reinforced in appropriate ways when such reinforcement seemed necessary to protect the exercise of liberty against new forms of interference. Perhaps some such presumption underpinned Lord Lindley's judgment in *Quinn v. Leatham*, for example. Rather than assuming (in anti-Hohfeldian fashion) that rights entail both permissibility and inviolability, Lord Lindley may have been acting upon a theory of doctrinal system that invited him to add to the perimeter of protection surrounding Leatham's liberties when those liberties had proved vulnerable to the interferences of Quinn. Such a theory might treat Leatham's existing legal liberties as providing a non-conclusive reason for extending their protection, such reason needing to be balanced against other conflicting considerations. The *justifiability* of such a theory might of course be debatable, although its attractions for an age caught up in libertarian rhetoric should be obvious. What concerns us at present, however, is not its justifiability but its *coherence*.

Is it true that the position is coherent? We are invited to think of Lord Lindley recognizing that the permissibility of Leatham's

action does not entail the inviolability of that action, but then going on to consider whether the action's permissibility might not give him good reason to *render* it (in this specific respect) inviolable. In that case, we may ask, why does Lord Lindley's reasoning not begin from Quinn's liberty rather than from Leathem's? For are not Quinn and Leathem symmetrically placed? Each has a project that they wish to pursue: Quinn hopes to eliminate the employment of non-union labour at Leathem's workplace, and to achieve this objective by organizing industrial action at the premises of those who deal with Leathem; while Leathem hopes to continue trading as a butcher with a non-union workforce. What we have here, on the face of it, are two conflicting liberties which must necessarily interfere with each other.

Perhaps, someone might say, the symmetry is broken once we assume that Leathem's liberty to deal with whomever he wished was a permissibility already established in law prior to the decision in *Quinn v Leathem*, whereas the permissibility of Quinn's action in seeking to persuade others to stop dealing with Leathem (by threatening a strike at their premises) was not. At this point it is difficult to avoid being drawn into complex debates concerning the nature of permissions in law. Can we, for example, assume that everything that is not prohibited is permitted? Did the permissibility of Leathem's conduct simply consist in the absence of an appropriate prohibition? If so, were not Quinn's actions also permissible in the same sense, prior to Lord Lindley's decision? Or can we coherently say that on the matter of Quinn's conduct there was a 'gap' in the law, with the conduct being neither prohibited nor permitted? Alternatively, could we say that Leathem's conduct was permitted in a stronger sense than that captured by the mere absence of a prohibition?⁹³

A more familiar line of argument would urge that Quinn's conduct is coercive (involving a threatened withdrawal of labour) and therefore constitutes an encroachment upon liberty in a way that Leathem's conduct does not. Certainly the fact that Quinn's coercion was aimed in the first place against third parties, and only indirectly against its real object (Leathem) should not be decisive against this argument. But the matter is considerably complicated by the embeddedness of the parties' actions and projects within a

⁹³ Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), 85–97.

legal situation that is already structured by the coercive apparatus of legal entitlements. Quinn's threat to organize strikes is after all only a matter of persuading people not to work: we need to invoke the existence of contracts and legal obligations before this begins to look troublingly coercive. Similarly, Leathem's freedom to employ whomever he wishes seems unproblematically independent of any basis in coercion only so long as we ignore his exclusive control over certain physical resources, an exclusivity guaranteed and made realizable by the coercive power of the state.

Arguments such as these would involve us in complexities going far beyond the scope of this essay. Suffice it to say that, even if one can in some way break the apparent symmetry in the positions of Quinn and Leathem, it is unlikely that any such manoeuvre would carry conviction on the fundamental point at issue. Even if we can somehow disentangle the parties' actions from the structuring framework of coercive laws, and uphold a clear distinction between the liberties of Quinn and of Leathem, we will still be forced to confront the fact that the concept of liberty alone, detached from the content of particular liberties, provides us with insufficient guidance.

For example, let us take it as established that Quinn's actions 'interfere' with Leathem in a sense in which Leathem's actions do not 'interfere' with Quinn. It is nevertheless unlikely that Lord Lindley would have felt bound to protect Leathem's liberty of trade against every possible interference. Suppose, for example, that a trade association prohibited members from dealing with Leathem on pain of financial penalty. Would Lord Lindley have protected Leathem from the action of the trade association? In fact the question is probably incapable of an answer until we know something about the objectives being pursued by the trade association: operation of a cartel (for example) or enforcement of trading standards intended to protect the public. It is of course true that such a legal judgment would be mediated and structured by doctrinal categories: it would not be a matter of balancing conflicting liberties at large. For example, the trade association's power to fine members would be based on a contract, and contracts in restraint of trade are void, while contracts to maintain standards of care and hygiene for the public are valid and enforceable. Nevertheless, such doctrines are the accumulated expression of earlier adjudications in which precisely such evaluative issues had to be more directly addressed.

What we have here is a simple illustration of a point that was mentioned earlier: notions of 'equal freedom' are in themselves empty, until given content by a series of judgements about 'the good'. We cannot adjudicate upon the conflict between Leathem and Quinn by appealing to 'the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom'.⁹⁴ In every conflict of will upon which we must adjudicate there will be gains and losses of freedom whatever decision we give. These gains and losses cannot be measured and balanced otherwise than by a judgment concerning the *importance* of the freedoms in question. There is no metric for the extent of freedom apart from such questions of importance. Thus, talk of 'maximizing' or 'equalizing' freedom can possess real substance only when some criteria of importance are taken for granted. Such criteria may be of an individualistic or of a communitarian character, but in either case they are likely to embody a conception of excellence that goes beyond the question of the *form* of the will,⁹⁵ and enters into an evaluation of its *content*.

Steiner's theory, as we established, needs to assume the existence of certain rights (rights to bodily integrity, for example) before it can treat the existence of naked liberties as creating the potential for conflicts between duties. Within the confines of his argument, Steiner has no warrant for making this assumption. Nevertheless, the mere acceptance of certain moral institutions as an unquestioned background for judgment is one way in which a Kantian theory of equal freedom can appear to take on real content. Of course, such tacit acceptance cannot be made explicit, for it conflicts fundamentally with the Kantian aspiration to find a categorical foundation for justice and to subject all existing institutions to radical critique. But a taken-for-granted background of institutions can nevertheless lend to the Kantian theory of justice an appearance of real content that it does not deserve.

Such a taken-for-granted background probably explains how a Kantian account of justice concerned solely with the *form* of the will could exert such a powerful influence upon the doctrinal systematization of nineteenth-century German jurisprudence. Lukacs' comment (quoted earlier) about the bourgeois belief that the form

⁹⁴ Kant, *Metaphysics of Morals* (n 30 above), 56.

⁹⁵ 'All that is in question is the *form* in the relation of choice' Kant, *ibid*, 56.

of law could determine its content must therefore be glossed by reference to Marx's observation that bourgeois thought took the structures of civil society as a natural basis, in need of no further grounding.⁹⁶ The jurisprudence of equal freedom amounted to a flattering mirror which gave back to the enraptured gaze of the jurist a convincing representation of society's existing features, but under the rubrics of 'equality' and 'freedom'. Ironically, however, the appearance of real substance attaching to the theory was dissolved, along with all other apparent solidities, by the very market society whose liberties the theory sought to protect.

A traditional agricultural society may give rise to relatively few conflicts between rights that are not already regulated by established customary rules, easements, or the like. There will be little scope or necessity for innovative judicial decisions defining the precise boundaries of conflicting liberties. The rise of industry, however, generates a host of new ways in which the actions of one person may impact upon the activities of another; while new forms of corporate capital and labour organization give rise to modes of association and inter-relation that cannot always conveniently be subsumed under traditional legal categories. As greater pressure is put upon the traditional fabric of the law, the sense of stable horizons against which an abstract conception of justice might operate is increasingly rendered problematic. As Marx observed:

All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind.⁹⁷

When forced repeatedly to confront new ways in which the conduct of one could adversely affect the interests and liberties of others, the courts became increasingly conscious of the fact that remedies for such adverse impact could not and should not invariably be made available. It became obvious that there were numerous situations where one person could harm another and yet no legal remedy should be provided. Indeed, the most obvious form of

⁹⁶ Marx, 'On the Jewish Question' in *Karl Marx: Early Writings* (London: Penguin, 1975), 234.

⁹⁷ Marx and Engels, 'Manifesto of the Communist Party' in Karl Marx, *The Revolutions of 1848*, edited by David Fernbach, (London: Penguin, 1973), 70.

such harm arose directly out of the operation of a fluid and expanding market economy: businesses compete, and it is inherent in such competition that some businesses will drive others to the wall. It became obvious that a multiplicity of entirely permissible actions might nevertheless interfere with other equally permissible actions. Clearly, the new-found prevalence of *damnum absque injuria* could not easily be reconciled with a theory of rights that linked permissibility to inviolability.⁹⁸

The classical Will Theory of rights was not simply or primarily an analytical exposition of the formal features of the concept of 'a right'. It was but one facet of a broader theory of justice and of legitimacy. Proceeding from the claim that rights authorize coercion to the conclusion that rights protect the autonomous will in abstraction from its particular content, the Will Theory purported to trace the limits and conditions of fully legitimate law-making: 'the immutable principles for any giving of positive law'.⁹⁹ Within such a theory, the assertion of a right amounted to an assertion of both permissibility and inviolability, for it was the conjunction of permissibility and inviolability that linked rights to the justification of coercion.

We have seen how Hohfeld's analysis breaks the association of permissibility and inviolability as necessary features of the concept of a right, and undercuts theories such as that offered by Hillel Steiner which seek to ground a Kantian theory of justice in the conceptual claims about the logic of rights. Yet we saw also that this demonstration would not prevent someone from employing a Kantian position as a background theory for the systematization of legal doctrine. The fact that the theory could not be derived from the logic of rights would not be fatal to its truth; the absence of a necessary connection between entitlement, permissibility and inviolability would not invalidate moral principles licensing a defeasible inference from one to the other. Such a background theory might mediate between the raw materials of law and the juristic conclusions drawn from those materials, inviting particular forms of systematization and inference, and grounding such forms in a wider theory of justice.

The *value* of such a juristic theory, however, was eroded by the very liberties that the theory sought to exalt. The increasing fluidity

⁹⁸ See Joseph Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld', (1982) *Wisconsin L Rev* 975.

⁹⁹ Kant, *Metaphysics of Morals* (n 30 above), 55.

of civil society produced ever new forms of harmful activity that were not regulated by the existing customs and property rights of a traditional agricultural society. At the same time, the emergence of new laws to confront such evolving practices fed an increasing awareness of the alterable character of civil society. Basic social and economic structures were no longer regarded as a natural horizon against the background of which law, politics and adjudication might be conducted. The law came increasingly to be used as an instrument for the restructuring and regulation of these mutable practices.

Perhaps Marx was justified in claiming that bourgeois political thought took the structures of civil society for granted as a natural foundation. We have already seen how formalistic libertarian theories of justice derived much of their content from some such assumed background. Certainly it is the case that an increasing awareness of the alterable character of these structures, and the consequent rise of the notion of 'social justice', seemed to dissolve the discourse of justice and rights in a pliable rhetoric of conflicting claims. Law came increasingly to be used as an instrument for the pursuit of diverse competing or even conflicting social policies.

Various facets of this development contributed to the growing instability of forms of doctrinal thought that had been founded upon the classical Will Theory. The loss of taken-for-granted backgrounds began to expose the hollowness and vacuity of doctrinal rationalizations framed in terms of a theory of equal freedom, while the consequent decline in private law's appearance of intellectual integrity seemed to erase the distinction between private and public law, and to present private law as but another arm of governmental policy. Meanwhile, the great diversity of policies pursued by the law made any possibility of a systematic integration of public and private law seem a mere pipe-dream. In such a context it is in the highest degree unlikely that legal scholars or judges will find it possible to reconstruct the law in terms of a set of liberties constituted by permissible actions and enjoying some degree of inviolability. The guiding image of such doctrinal reconstructions had for a long time been the realm of compossible freedoms described by Kantian jurisprudence, but the emergence of new forms of commercial and industrial activity combined with the new scope and diversity of law-making to render that image implausible. Lawyers were increasingly aware of the pervasive conflicts that existed between

individual interests, even when those interests were recognized in law and received some degree of protection. Doctrinal arguments seeking to articulate substantive principles of justice gave way to crude balancing tests, inviting a straightforward comparison of conflicting interests;¹⁰⁰ or the law crystallized into rules that bore only a blunt and oblique relationship to considerations of justice.¹⁰¹

Hohfeld's account of rights is very well-suited to this complex and conflict-ridden situation. By breaking the analytical connection between permissibility, inviolability, empowerment, and immunity, Hohfeld demonstrates with great clarity that common associations between these different facets are grounded, not in the formal structure of the concept of a right, but in purely contingent features. The law may or may not protect certain liberties with claim-rights, or combine powers with liberties to exercise them. Some combinations may be frequent, but all are in principle possible. Since the modern law is too complex and fragmentary to admit of being reconstructed in terms of a Kantian (or perhaps any other) theory of justice, so the concepts in which its content is reported must be capable of accommodating that complex and fragmented nature. Associations between permissibility and inviolability that flowed from (and in turn supported) the Kantian Will Theory must be rejected on the analytical plane if the realities of the modern legal order are to be adequately confronted.

Hohfeld's analysis reflects a concentration upon the remedial cutting-edge of the law, and a relative lack of concern with the deeper doctrinal structures that might be invoked to order and rationalize the array of rules and remedies. This admirably suited a situation where there was ample room for scepticism about the very possibility of deep organizing principles. To insist upon preserving a traditional conception of doctrinal legal thought in a context where the necessary internal coherence of the law has been eroded, is to propel doctrinal analysis into abstraction, since coherence must of necessity be sought at increasingly abstract levels if the apparent conflicts at ground level are to be transcended. Ultimately the meretricious expedient of an infinitely pliable notion of 'equality' is likely to come to hand: a development that not only renders the content of law increasingly uncertain, but also contributes to the

¹⁰⁰ Horwitz, *Transformation of American Law* (n 40 above).

¹⁰¹ Nigel Simmonds 'Bluntness and Bricolage' in Hyman Gross and Ross Harrison (eds), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992).

rise of an empty and pernicious rhetoric in which 'rights' are constantly, and without constraint, asserted in the name of 'equality'. Hohfeld's insistence on a more cool and precise language, in which correlative duties must be assigned, and permissibilities must be distinguished from inviolabilities, seems a voice of sanity and reason in this context.

5 The Interest Theory of Rights

Positivism and Instrumentalism

Having examined the collapse of the classical Will Theory, we are now well placed to examine the Interest Theory of rights. As we have seen, the classical Will Theory depended in a general way upon a Kantian theory of justice as a realm of equal freedom. The theory sought to abstract the form of the will from its content, and thus to achieve an ordering of legal doctrine in terms of the value of liberty alone, without regard to the interests that liberty might serve to promote. The theory collapsed partly as a result of the erosion of taken-for-granted base-lines which could be used to give content to an otherwise empty formalism: the realm of equal juridical freedoms was revealed to be nothing more than a flattering mirror in which society might find its own features reflected. New forms of economic activity combined with new bodies of legislative regulation to expose, across an extensive range, the *conflicts* of interest and liberty which characterize social life.

As we observed earlier in this essay, the classical Will and Interest Theories of rights could be viewed as interpretations of the form of moral association that finds expression in our law. Each theory both embodies an account of the central problematic for liberal political communities, and suggests the basis for a solution. At a certain level of abstraction, the theories conceive of the central problem in the same way: as concerning the relationship between the general choices and standards of the polity, as expressed in law, and the particular projects and concerns of individuals, as protected by rights. The Will Theory, however, sees this as a problem of rendering diverse individual liberties compatible, and of protecting spheres of individual freedom from the distributive and aggregative projects of the state. It seeks a solution in the separation between public and

private law, and the attempt to develop principles of private law that reflect the form of mutually compossible wills in abstraction from their content. The Interest Theory, by contrast, rejects the possibility of a formalistic theory of justice that abstracts from questions of substantive interest and value; it accepts the inevitability and pervasiveness of conflicts between interests; and, rather than pinning its hopes upon the organic development of a rationalistic private law, the theory emphasizes the capacity of positive law to choose and to demarcate the boundaries between conflicting interests.

Some immediate problems face this version of the Interest Theory. Consider, for example, Ihering's famous conversion from being a doctrinal scholar in the tradition of Savigny to being an impassioned advocate of legal instrumentalism and opponent of what he now came to think of as pointless doctrinal hair-splitting. The conversion came about, it will be recalled, in consequence of Ihering's realization that legal rights might be thought of as representing 'interests' rather than protected spheres of autonomy or 'will'. This forced Ihering to transfer his focus of inquiry from 'subjective rights' to 'objective right' and ultimately to the notion of positive law as an instrument of purpose.

If, however, all legal questions are to be subordinated to the purposes served by the law, what scope remains for the integrity of private rights? Whether rights are conceived as areas of autonomy or as individual interests, there is a considerable difference between guaranteeing the integrity of such rights, and simply allotting a place to the relevant liberties or interests in a set of collective goals informing all legal interpretations. The Interest Theory of rights has a natural tendency to convert 'rights' into interests even when it does not simply equate rights with interests. If rights are interests protected by law (by, for example, the imposition of duties on others, or the conferment of liberties, powers, or immunities on the right-holder) then their scope and integrity depends upon the forms of legal interpretation that we employ. A 'purposive' mode of interpretation will threaten the integrity of such rights, in so far as an Interest Theorist will view the law's purpose in terms of some aggregative or distributive project.¹⁰² The extent of one's rights will

¹⁰² A more modern type of Interest Theory claims to overcome these problems by treating rights in a more 'individuated' manner. But, as we will see later, such theories

be determined by the impact that one's actions have upon the collective goals.

The Interest Theory will find it possible to avoid a collapse into naked instrumentalism, where rights enjoy no genuine integrity, only if a non-purposive mode of interpretation and adjudication can be adopted. To make this possible, legal rules must have a degree of 'semantic autonomy'¹⁰³ and it must be possible to identify the relevant right-holders without dependence upon an appeal to purposes supposedly served by the rule. Unfortunately, while depending in this way upon the availability of a positivist theory of law and of legal interpretation, the Interest Theory of rights has found it necessary to violate the requirements of such positivism.

The problem arises as soon as we ask for the criteria by which we infer the existence of certain rights from the given fact of this or that positive legal rule. The Interest Theory claims that positive laws seek to protect interests, by imposing duties or in other ways. Focusing for the moment on duty-imposing laws, we might begin our search by looking for those persons who would be benefited by the performance of the relevant duty. This criterion of simple benefit, however, proves far too inclusive and too arbitrary in its operation. Suppose, for example, that *A* owes *B* money, who in turn owes money to *C*. *A*'s performance of his duty to pay *B* will indeed benefit *C*, by providing *C*'s debtor with assets that could be used to pay *C*'s debt. Yet we would be loath to conclude that *C* has a right against *A*. On such a criterion of simple benefit, rights would certainly proliferate: each duty might give rise to a host of rights, receding into infinity (for might not *C*'s mother be more likely to receive a generous Christmas present from her son if he is likely to be paid by his debtor?).

To avoid this limitless proliferation of rights, Interest Theorists have tended to go in one of two directions. On the one hand, they have abandoned the positivism required by their theory, and have suggested that rights correspond only to those interests which it was the *purpose* of the duty to protect. By inviting an inquiry into the rule's purpose in order to identify the right conferred by the rule, the theory then falls into the problems of instrumentalism discussed

are quite unable to explain the nature of the special overriding weight that they claim to assign to rights.

¹⁰³ See Frederick Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991).

above. One must now establish the identity and scope of legal rights by reference to the purposes served by the rule.

On the other hand, Interest Theorists may be tempted by the identification of rights with those interests the encroachment upon which would be sufficient¹⁰⁴ to establish a breach of the duty. This preserves the positivism of the theory, but at the price of disconnecting the theory from its wider significance. The classical Interest Theory invites us to imagine a world of conflicting interests in which the law-maker intervenes by introducing positive rules. These rules aim to protect some interests by limiting the pursuit of others. The precise mode of protection afforded is, of course, dependent upon a host of detailed and entirely pragmatic considerations. The content of a duty may therefore have a purely contingent connection with the interests that the duty is intended to protect. Bodily integrity, for example, may be protected by a law against carrying offensive weapons; the integrity of the home may be protected by a prohibition on possession of skeleton keys or jemmies. But it will not be possible to identify these interests in bodily or domestic integrity simply by reference to the conditions necessary or sufficient for a breach of the duty. Under this dispensation, a very large number of rights will fall into the residual category of rights possessed by the state¹⁰⁵ and the theory will be remote from any informative or enlightening clarification of the bases of legitimacy. A theory originally aimed at important intellectual objectives will have been converted into a regimentation of linguistic usage; such regimentation seems to be of doubtful value if disconnected from wider goals.

One final response remains available to the classical Interest Theory. For it might be alleged that the criticisms formulated so far have simply confused two different issues: the interpretation of the requirements of a legal prescription, on the one hand, and judgments concerning the existence and location of rights conferred by such a prescription, on the other. Even if it is true that we can only determine the location of any rights conferred by a law by reference to the purpose of that law, it does not follow that the prescriptive requirements of the law itself must themselves be determined in a purposive manner. Therefore, the Interest Theory does not commit us to a purposive mode of adjudication,

¹⁰⁴ See Kramer's essay, above, in this volume.

¹⁰⁵ See Kramer, above.

even if the identification of rights itself involves a purposive form of reflection.

On this interpretation of the classical Interest Theory, conflicts between interests are regulated by posited rules, and the judge's primary task must be the interpretation and enforcement of such rules. What part of the adjudicative process is then occupied with the identification of rights? The observation that a law confers this or that right on this or that individual seems, in this theory, to play no part in the forms of adjudicative reasoning. It amounts at best to an interesting footnote addressing a question which can never be raised within the context of the application and enforcement of the law.

In some cases, however, the rules may fail to make it clear who has *locus standi* to complain of a breach of the rules. Perhaps the question of rights will arise in this context, even for a version of classical Interest Theory that rejects a purposive mode of interpretation for the posited rules more generally. Since powers of enforcement are (for the Interest Theory) at best contingently associated with rights, decisions on the question of *locus standi* to complain will not themselves constitute decisions on the location of rights; but, in determining the issue of *locus standi*, the court may well wish to determine the purpose of the law, and to identify the individuals whose interests are protected by the law. Such a determination would (on this account) be a determination of the parties' rights, and would represent an intermediate judgment standing midway between the interpretation of the rules and the decision on *locus standi*. *X*'s possession of a right under a certain law would not entail *X*'s *locus standi* to sue, but would be an important consideration in determining that issue.¹⁰⁶

Yet nothing is gained by describing this intermediate judgment as one concerning the parties' 'rights': indeed, the very contingency of the association between such considerations and the recognition of *locus standi* militates strongly against any such description. We would normally identify the question of *locus standi* to sue for breach of a rule with the question of whether that rule confers a right. What is gained by treating the concept of a right as referring

¹⁰⁶ See, for example, MacCormick's observation that 'to interpret a law as right-conferring is to give a justifying reason why there should be a remedy at private law for its breach'. MacCormick, 'Rights in Legislation' in PMS Hacker and J Raz, *Law, Morality and Society* (Oxford: Clarendon Press, 1977), 207.

to an interest that may or may not (when all things are considered, in the concrete circumstances of the case) justify recognition of *locus standi*? If we believe that the *locus standi* to sue should in general (although not invariably) follow the interests served by the relevant rule, we can say as much in straightforward terms: we do not need to hijack the concept of a right in order to defend such a substantive claim.

In a sense, the classical Interest Theory exhibited little concern to ascribe a significant role to the concept of a right. The main impetus behind the theory was a negative one: to reveal as hollow the pretensions of the classical Will Theory, by exposing the inevitability of conflicts between interests, and the illusory nature of a supposed non-conflictual realm within which free wills might be consistently joined. The classical Will Theory certainly gave a central role to the concept of a right, for it was that concept which (by uniting the features of permissibility and inviolability) provided the central structuring principle of the entire position. It was the object of the Interest Theory, by contrast, to emphasize the centrality of posited rules, and the law's need to confront the complex and conflict-ridden substance of human interests. That some versions of the theory rendered talk of 'rights' more or less superfluous might not have been perceived as a real problem.

Our conclusions might therefore be congenial to some advocates of the Interest Theory. Many others, however, have felt uncomfortable with a position that ascribes such a reduced role to rights, and their response has involved a dramatic departure from the analytical insights of Hohfeld. Directly opposing Hohfeld's fragmentation of legal rights, these theorists have sought to restore the notion of a right to a central place within the development and systematization of legal doctrine.

Peremptory Force and the Modern Interest Theory

The classical Will and Interest Theories of rights were sweeping interpretations of the form of moral association that found expression in law. On the one hand was a basically Kantian view that derived the legitimacy of law from a system of rights grounded in the form of the will in abstraction from its content. On the other hand was a theory that viewed the law as being in the service of certain goods, and that derived the law's legitimacy from the need

for positive rules to demarcate the boundaries between conflicting interests.

In the classical debate between the Will and Interest Theories, it was the Kantian Will Theory that tended to emphasize law's systematic character. Rights provided the focal point for the systematic presentation of law in so far as they served to unify many facets of legal regulation that were later to be separated by the Hohfeldian analysis: permissibility, inviolability, empowerment, etc. The systematic character of legal doctrine reflected the law's approximation to the Kantian realm of equal freedom, while the latter served to legitimate the law's coercive demands. Within this scheme of thought, legal concepts took on a reality that was independent of positive enactment: the 'heaven of juristic concepts', pursued with ardour by the followers of Savigny and ridiculed by the later Ihering, was a working out of the detailed implications of principles thought to express the possibility of mutually compatible freedoms.

The emphasis upon the systematic coherence and autonomous character of legal doctrine, which was characteristic of the Will Theory, was abandoned by classical versions of the Interest Theory. The rejection of a belief in the Kantian realm of compossible freedoms, and an emphasis upon the pervasiveness of conflicts of interest, seemed naturally to lead to an emphasis upon the posited character of law. Legal reasoning no longer appeared to be autonomous and distinct from the general calculus of public policy: being concerned with constantly proliferating conflicts of interest, the law came to be thought of as a form of 'social engineering'. The most highly general of doctrinal principles were construed as 'jural postulates' serving only to guide a basically instrumental form of reason.

For those who view this collapse into instrumentalism with dismay, various responses to the problem are possible. One response might consist in the insistence that the identification of rights is an entirely separate task from the interpretation and enforcement of the rules that protect the rights. Another might be to revise the theory by abandoning the claim that rights correspond to the interests that it was the law's purpose to protect: instead, rights would be identified with those interests an encroachment upon which formed a sufficient condition for violation of the correlative duty. The first option threatens to reduce rights to an irrelevant appendage to legal thought, while the second option causes the Interest Theory to

forfeit any claim to represent an interpretation of our form of moral association, or of the bases of legitimacy (for example, as we pointed out earlier, the theory will have to ascribe, in an uninformative way, a great many rights to the state); it becomes an exercise in conceptual regimentation which many will feel to be of doubtful value or significance.

The most popular versions of the Interest Theory¹⁰⁷ in recent years, however, have adopted a third strategy. In the first place, this modern version of the Interest Theory offers a challenge to the notion that each right (claim-right) is correlative to a duty. Rather than being regarded as the correlative of duties, it is argued, rights should be regarded as marking the interests which *justify the imposition* of duties:¹⁰⁸ duties are imposed to serve the interests of the right-holder. This first argumentative move abandons any attempt to preserve an austere focus on posited rules in the identification of rights, because it builds into the process of identification an inquiry into the law's justification. Such an abandonment of positivism could threaten to make debate concerning the existence of legal rights unacceptably open-ended; but the theory seeks to constrain the potentially open-ended character of the debate by emphasizing the role of rights in the systematization of law. Legal rights are portrayed as representing interests which ground a diversity of legal impositions and entitlements: my right to free speech, for example, may be the basis of certain duties imposed on *X*, certain liabilities incumbent upon *Y*, as well as certain liberties and powers possessed by myself. The fragmentation of legal relations embodied in the Hohfeldian analysis is portrayed as a superficial appearance only: beyond the level of Hohfeldian relations is a deeper level of 'rights' where the coherence of the law is made clear.¹⁰⁹ This deeper level of rights not only overcomes the appearance of fragmentation in the

¹⁰⁷ I shall refer to these versions collectively as 'the modern Interest Theory'.

¹⁰⁸ The theory in question need not claim that individual interests of the right-holder provide the ultimate justification for the relevant duties. The interests of persons other than the right-holder (or values other than interests) may provide the justification for the duty; this will be consistent with the existence of the right where the relevant justifying interests or values are best served by serving the right-holder's interests. See Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), ch 2.

¹⁰⁹ It might be suggested that 'local' rather than 'global' coherence would be sufficient (see Raz, *Ethics in the Public Domain* (n 108 above), 298–303). My own suspicion is that convincing grounds for claiming the existence of rights fitting the model proposed by the modern Interest Theory would require far more than 'local'

law, but also guides the further development of legal doctrine. For the law may guide its own development, by providing legal reasons for the creation of new legal duties, liberties, powers, and so forth.

To some extent, therefore, a curious reversal has taken place. The mantle of the classical Will Theory, with its emphasis upon the systematic and integrated nature of legal doctrine, has been assumed by the modern Interest Theory. This manoeuvre, however, is only one of two main strategies that need to be adopted if the theory is to prevent a collapse into naked instrumentalism within which the integrity of rights is eclipsed. The second strategy consists in the claim that rights are individuated interests possessing special force or weight.

In Raz's version of the Interest Theory, rights are said to possess 'peremptory force'. This claim should strike us as surprising, since it appears to conflict with the theory's denial of correlativity between rights and duties. When we speak of rights as possessing peremptory force we would ordinarily mean that my possession of a right is not simply one consideration to be taken into account along with many others: my possession of a right concludes the issue of what is to be done. As Hart points out, 'the word "peremptory" in fact just means cutting off deliberation, debate or argument and the word with this meaning came into the English language from Roman law, where it was used to denote certain procedural steps which if taken precluded or ousted further argument.'¹¹⁰ The 'peremptory force' of rights is captured by both of the classical theories of rights in their acceptance of correlativity. The existence of my right, on either theory, entails the existence of certain duties. To assert that I have a right holding in relation to some individual is not to draw attention to an important consideration that that individual should take account of: it is to claim that that individual bears a duty to act in some relevant way.

Raz tells us that *X* can be said to have a right 'if and only if *X* can have rights, and, other things being equal, an aspect of *X*'s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.¹¹¹ Raz does not hesitate to describe

coherence. The narrower one's focus in the search for coherence, the more slender will be one's basis for claiming that an interest is recognized in law as a general right.

¹¹⁰ Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), 253–4.

¹¹¹ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 166.

this analysis as ascribing 'peremptory force' to rights.¹¹² Yet such a description hardly seems appropriate. For, within Raz's theory, the knowledge that I have a right will never have the power to conclude the issue that we would ordinarily associate with peremptory force. Rights ground duties, for Raz, only if the reasons for recognizing such a duty are not outweighed by conflicting considerations: the right is a sufficient reason for holding someone to be under a duty only *other things being equal*. Establishing the existence of a right will, for this theory, be only the first step in a potentially complex course of reasoning that may or may not lead to the conclusion that a certain individual is under a duty. Any particular individual against whom I assert my right can respond by saying that, while the existence of my right is accepted, (a) my right establishes that a duty exists but not that he is himself under a duty; (b) whether he is under a duty depends upon how my interests are to be balanced against many competing considerations; and (c) when so balanced, my interests are outweighed: therefore (d) he is under no duty correlative to my duty. It is in this sense that Razian rights, far from possessing 'peremptory force', are in fact simply markers of important interests that are to be taken into account along with a host of competing considerations.

Raz might respond by saying that it is proper to regard Razian rights as possessing peremptory force in so far as we can infer from the existence of a right the existence of a duty somewhere, incumbent upon someone. The inference is possible because an interest that is *permanently* defeated by competing considerations and therefore *never* grounds a duty cannot be ascribed the status of a genuine right.¹¹³ Hence, if we know that every child has a right to education, we will know that there are duties to provide children with education even though we have no idea who bears the duties.¹¹⁴ This seems a weak defence, however, in so far as it leaves us with no specific individuals against whom our right will possess peremptory force: against any such individual, the right can be connected with a duty only via a complex process of balancing.

¹¹² eg Joseph Raz, *The Morality of Freedom*, 192. Sometimes the point is formulated in a more guarded way, eg at 249 he writes thus: '[R]ights have a special force which is expressed by the fact that they are grounds of duties, which are peremptory reasons for action.' In this formulation, *duties* possess peremptory force while *rights* possess 'special force' but not peremptory force.

¹¹³ *ibid*, 184.

¹¹⁴ *ibid*, 184–5.

It is with regard to legal rights that we possess our clearest and most emphatic sense of the peremptory force of rights. When I demonstrate to a court of law that I have a right to a sum of money that the defendant contracted to pay, I do not expect the court to tell me that they will take account of my right, along with many other factors, in deciding whether to hold that the defendant is under a duty to pay: I expect my right to be conclusive of the matter. In some circumstances (of national emergency perhaps) both rights and duties may be overridden: but, even allowing for that, I expect my right to be as conclusive of the outcome as a finding of duty would be. I do not expect my right to be only one factor that may or may not result in a finding of duty. Nor could Raz defend his weakening of the notion of peremptory force by pointing to the fact that even duties may be overridden in some circumstances, for the effect of his theory is to loosen the bonds of correlativity linking rights to duties, and this is a quite separate issue from that of the ultimate defeasibility of duties.

Individuated Interests and Boundary Conditions

It is important for Raz to defend the idea that rights possess peremptory force within his theory because it is by reference to that notion of peremptory force that he seeks to explain our sense that rights are not simply to be balanced against other conflicting considerations. In his view, the independence of rights from the general balancing of reasons is not to be explained by the *importance* of rights, since some rights have little importance.¹¹⁵

If, however, the rejection of simple correlativity between rights and duties does indeed (as I have suggested above) involve abandoning the notion of rights as possessing peremptory force, an attempt might be made by modern Interest Theorists to explain the special force of rights in other terms. One possibility would be to say that, in according to an interest the status of a right, we judge the interest to be of such importance that it cannot adequately be represented within an aggregative perspective, or as a mere facet of the common good.

Take, for example, my interest in free speech. One way of handling the importance of free speech would be to regard it as a

¹¹⁵ *ibid*, 186.

consideration within the community's general pursuit of welfare or well-being. Whatever the weight attached to my interest in free speech, it would have to be balanced against other considerations affecting the lives of other persons, such as the need to secure certain benefits for the community as a whole. A sufficiently large improvement in well-being (perhaps constituted by the conferment of small benefits upon a large number of individuals) would justify encroachments upon my interest in free speech. Here the interest in free speech (whether styled 'a right' or not) is simply being added to an overall conception of the common good.

On a different approach, however, my interest in free speech might be accorded a degree of inviolability against considerations of the common good. Such 'inviolability' could be conceived of in different ways. One might speak of rights as 'absolute', and insist that infringement upon their scope can never be justified. Or one might speak of rights as 'side-constraints' on action, which constrain our ability to pursue desirable goals, and which can be encroached upon only in extreme and catastrophic circumstances. Or one might speak of according 'lexical priority' to rights, with the qualification that such lexical priority is to obtain only in relatively favourable circumstances.

Whatever model for the priority of rights is adopted by a theory, however, certain structural conditions must be satisfied if the theory is to retain its internal coherence and plausibility. If rights are not to be presented as constituting the sum total of moral concern, importance must be attached to considerations of the general welfare or the common good when the strict demands of individual rights have been fully satisfied; and if that is so, some boundary conditions must be set upon the scope and requirements of rights, to mark a watershed between the constraining force of rights (on the one hand) and the realm of more general welfare considerations (on the other).

For example, we know that many of our projects expose others to appreciable risks. When a community decides to construct a tunnel or a railway, or to permit the operation of a chemical factory, there is a risk that people may be killed or injured as a result. Now, let us suppose that people have a right not to be killed, and that this right is 'absolute', or enjoys 'lexical priority' over general welfare considerations. If we must at all costs avoid killing people, it would seem that we cannot engage in such risky projects: all of our decisions

must be based on an attempt to minimize risks to life, without regard to other interests and values that might be served by actions involving some small risk to life. Even when we allow for the fact that a theory of this type could permit the balancing of rights one against another,¹¹⁶ it would remain a deeply unattractive position.

It is for this reason that advocates of such strong, overriding rights find it necessary to put boundary conditions upon the requirements of their favoured rights. Thus the 'right not to be killed' must become the 'right not to be killed intentionally', or 'the right not to be killed negligently', or something of that sort. It is then possible for us to consider the construction of a tunnel or a railway, or the operation of a chemical factory: while these enterprises may result in deaths, the deaths will not necessarily be 'intentional' or 'negligent'.

It should not be assumed that this argument (that overriding rights will require boundary conditions) is dependent upon the acceptance of an aggregative account of the general welfare. Some theorists would endeavour to argue that such aggregative notions of 'general welfare' or 'common good' are mired in unacceptable assumptions of monism or commensurability. If we accept the existence of a plurality of incommensurable values (they suggest) we should reject aggregative notions of the general welfare or the common good in favour of interpretations that treat the common good as itself the maintenance of a framework of enabling entitlements and conditions, rather than the pursuit of collective goals.¹¹⁷ Even on this interpretation, however, the community will presumably still have economic policies to pursue, roads and hospitals to provide, and decisions to take on what private activities it will permit (for example, can I start up a chemicals factory?). While abandoning aggregative notions, such theorists find it necessary to fill the gap by vaguer notions of practical wisdom: they do not suggest that moral and political judgment is wholly a matter of observance of individual rights.

How does the need to establish boundary conditions upon the overriding force of rights pose a problem for this version of the

¹¹⁶ Too great a proliferation of such rights might result in a situation where the process of balancing rights was identical to a general calculus of welfare or balancing of interests at large: this would render the supposed weightiness or inviolability of rights wholly nugatory.

¹¹⁷ See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

Interest Theory? The point is as follows. According to the theory now under consideration, to accord to an interest the status of a 'right' is to treat the interest as capable of justifying the imposition of duties upon others. The right is not a simple reflection of the duty (as it could be within, for example, Kramer's version of Interest Theory) but is the ground for imposition of the duty. The boundary condition upon the scope of a right, however, cannot itself be grounded in an individual interest. I have an interest in being alive, and therefore have an interest in not being killed. But I do not have an interest in not being killed intentionally or negligently which is distinguishable from my interest in not being killed accidentally and non-negligently. Whether I am killed intentionally or unavoidably, I am just as dead.

An advocate of the Interest Theory may well suggest that, in offering this argument, I am guilty of a very simple fallacy. For they might point out that what precisely is required by a right will depend not only upon the scope of the interest underlying the right, but also upon a range of conflicting considerations. Perhaps, therefore, boundary conditions do not need to be grounded directly in the relevant interest: they may rather result from the combined force of the interest together with countervailing considerations.

We must remind ourselves, however, of the special overriding force that the theory currently being considered ascribes to the interests that underlie rights. Because of this overriding force, countervailing considerations of a kind that could limit the force and scope of a right would need to possess a similar weightiness. Countervailing considerations of a less weighty character might help to determine the precise way in which the right was protected (a right should be protected *effectively*, but need not be accorded every *conceivable* form of protection) but the point of what I am calling a 'boundary condition' is to demarcate the boundary between the special force of rights and the ordinary force of prudential or policy considerations. If this boundary was itself to be shaped by the calculus of general (non-weighty) considerations, it would scarcely be serving to constrain the range of relevance and force attached to those considerations.

Is it conceivable that the existence of countervailing *rights* might dictate the existence of a boundary between rights and ordinary (non-weighty) considerations of welfare? While one cannot in principle rule out such an outcome as impossible, it would be so

remarkably fortuitous that one would need to see the supporting argument set out in detail before being convinced that it was a real possibility. On the face of it, countervailing rights and weighty interests will not assist in the task of clearing a space for the operation of ordinary, non-weighty, welfare considerations.

Someone might object to this argument by suggesting that boundary conditions *can* be grounded in interests. Thus, it could be argued that my interest in not being killed intentionally (for example) is indeed distinct from my interest in not being killed accidentally. In both cases, it is true that I wind up dead; but, in the former case, I suffer the additional moral injury of being treated as a mere conduit for someone else's plans and projects, a disposable instrumentality to be consumed and discarded according to the requirements of another. In itself, this argument has some merit; but it would result in a fragmentation of interests that is incompatible with the way in which any appealing version of the theory would need to identify legal entitlements.

Recall my earlier observation about the curious reversal of positions that has taken place between the Will and Interest Theories. I suggested there that the Interest Theory seems to have taken over the concern with doctrinal coherence and integration that was once associated with the classical Will Theory. This concern for doctrinal coherence arises partly from the need to constrain the ease with which legal entitlements can plausibly be asserted, and partly from the need to justify postulation of a non-Hohfeldian concept of 'right'.

It is true that we may sometimes be able to establish the existence of a legal right by pointing to a legal provision that expressly confers the right (although, as we saw earlier, MacCormick fails to produce a convincing example of the express conferment of a right that fits the Interest Theory's model). In other cases, a specific legal right may be inferred from the express conferment of some more general legal right. To confine the language of rights to such contexts of express conferment, however, would involve a quite radical revision of legal thinking. Apart from anything else, much of the law (at least in a common law system) is not expressed in a canonical set of words resembling a statute or code. Consequently, judges and doctrinal analysts may vary considerably in the frequency with which they expound the law in terms of 'rights' rather than (say) 'duties' or 'doctrines'. It would be strange indeed to make the number of rights

conferred by English law depend upon such variations in expository style.

If legal rights may exist even in situations where posited legal rules have not expressly conferred them, this is presumably because (on the Interest Theory) the relevant interests provide an explanatory ground or justification for the relevant legal duties, powers, immunities, and so forth. Given the ease with which discrete legal provisions may be rationalized in a variety of different ways, however, such ascriptions of rights will only be convincing where they can demonstrate an ability to systematize a plurality of discrete laws, exhibiting them all as serving some single interest or constellation of interests.

Indeed, it is the possibility of discovering interests which so systematize a body of law (thereby revealing in that body of law a coherence which might otherwise have escaped notice) that sustains the postulation of a non-Hohfeldian concept of right by the Interest Theory. As we noted earlier, Hohfeld's intention is to establish certain distinctions within the logic of rights: he is not seeking to deny the existence of pragmatic implications or associations surrounding those logical relations. The simple observation that we can employ a non-Hohfeldian notion of rights provided we are satisfied with something less than strict entailment is, as I indicated earlier, a fatuous one. The argument has merit only if it can point to some intellectual gain that is to be won by the adoption of such a non-Hohfeldian conception. Such a gain might well be a reality if the Interest Theory could discover otherwise overlooked pockets of coherence in the law, where discrete provisions can be assembled around a limited set of interests.

Of course, if the relevant interests are simply factors registering in some overall conception of the collective well-being, the theory will have done nothing to advance the integrity of private rights, but will merely have served to exhibit the systematic properties of legal instrumentalism. Thus, to produce a version of the Interest Theory which offers some intellectual foundation for the integrity of rights, we need a theory that combines two features: on the one hand, it must identify interests of such generality that they serve to systematize and order the law; but, on the other hand, the interests must be distinct from the general welfare schedule and be of overriding importance. To satisfy that latter condition (as I argued earlier) we will need to define boundary conditions for the interests; but

such boundary conditions cannot be grounded in the interests themselves. If the last claim is contested, and it is suggested that boundary conditions *can* be grounded in individual interests, the result will be to fragment rights in a way that prevents them from satisfying the requirements of generality and systematic coherence.

6 The Modern Will Theory

Analysis and Interpretation

We are concerned with the analysis of a concept. Yet what is involved in such an activity? On one model, the analysis of a concept is a matter of unearthing deep criteria that regulate our use of a word: criteria that we ordinarily employ with ease, but cannot articulate. In some contexts, for some concepts, such a model of analysis may perhaps be adequate. Elsewhere, however, it is inapplicable. For it is wrong to assume that some relatively complete set of criteria must invariably underpin our use of a word, if that use is to be meaningful and intelligible. Consider, for example, the following observation of Wittgenstein's:

We are unable clearly to circumscribe the concepts we use; not because we don't know their real definition, but because there is no real 'definition' to them. To suppose that there *must* be would be like supposing that whenever children play with a ball they play a game according to strict rules.¹¹⁸

We might well think of the discourse of rights as a game played without strict rules: some more or less regular forms of practice emerge; innovations are made and are accepted or rejected; diverse versions of the game appear. Seen against this background, the enterprise of conceptual analysis may seem to represent, not the articulation of established criteria, but a lack of trust in the free development of the game. By adopting some meticulous analysis or definition, we seek to render words 'rigid, predictable, and invulnerable to the twists and turns that a word receives both in dialogue and in the history of the language in general'.¹¹⁹

¹¹⁸ Ludwig Wittgenstein, *The Blue and Brown Books* (Oxford: Blackwell, 1975), 25.

¹¹⁹ Joel Weinsheimer, *Gadamer's Hermeneutics* (New Haven: Yale University Press, 1985), 1.

There is ample evidence, within the literature on rights, of a lack of trust in the natural development of patterns of discourse. The very prestige attaching to 'rights' in modern culture guarantees that the word will be invoked more and more widely, leading to 'inflation' of the 'currency' of rights.¹²⁰ One cure for inflation is the reintroduction of a gold standard, and such a gold standard for the ascription of rights has been the underlying goal of many of the conceptual analyses that have been proffered. The very problems that generate the desire for such a standard, however, also form an obstacle to its introduction. Extensive invocation of the concept of 'a right' stretches our sense of the concept's contours, making retrenchment seem a more radical departure from ordinary usage. In so far as the aim of the analysis is to render certain claims of right misconceived or illegitimate, the analysis can command assent only to the extent that it can resolve the substantial moral questions at issue. Yet such issues are (to put it mildly) hard to resolve, and too austere 'analytical' a debate about rights scarcely seems the appropriate medium for their resolution.

Some theorists claim that moral and political values need play no part in informing our conceptual analyses: we can select the analysis that makes the simplest and most enlightening job of systematizing our more 'conceptual' intuitions about rights. On the assumption, however, that no clear criteria are available for simple unearthing or articulation, any systematic presentation of the concept of a right will require certain departures from common usage: our choice between different analyses will be a choice between alternative regimentations of the discourse. How can we make such a choice except by deciding what is important and unimportant? One theory denies that small babies have rights. Another theory would say that the citizens of a state may be richly endowed with rights even though the decision whether to enforce such rights is exclusively in the hands of state authorities. Our choice between such theories is a judgment about the importance of claims of precisely this sort. How are we to judge the importance of such claims otherwise than by reliance upon our moral and political understanding?

The claim that our choice can be based on intellectual values such as clarity and simplicity seems to suggest that the systematization of

¹²⁰ See, for a fairly typical example, the concerns about the 'inflation' of rights discourse, and consequent devaluation of rights, expressed by LW Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), 1–15.

our discourse about rights will itself make no substantive difference to our representation of the moral issues: as if the substantive points (whatever they may be) can always be made in other terms, and we are here discussing only the best use of a convenient shorthand. To anyone who is sceptical about the very extensive importance now attached to claims of 'right', the idea that the real issues may always be described in other terms is an attractive and plausible one. Yet, even while emphasizing a concern for clarity above all, analytical theorists are quick to attach substantive significance to denials of rights-claims made by their opponents. Thus, when the Will Theorist denies that babies have rights, his opponents are inclined to find in his claim a moral deficiency, and not simply a terminological inconvenience.¹²¹

Joseph Raz is therefore right to emphasise the fact that, when we are concerned with concepts which are 'deeply embedded in the philosophical and political traditions of our culture', attempts to elucidate those concepts 'are partisan accounts furthering the cause of certain strands in the common tradition'.¹²² Raz's version of the Interest Theory would rule out (or at least severely constrain) any employment of the concept of 'a right' within an anti-perfectionist political theory (since convergence in the identification of rights would depend upon some fairly high degree of agreement in our conceptions of well-being). Such an account of rights could not, with any plausibility, be arrived at as a consequence of a purely clarificatory theory that claims to prescind from substantive moral or political issues. Being so deeply embedded within the moral or political debate, the analysis could only form a part of a much broader political theory focused upon conceptions of well-being: it would clearly be a mistake to seek to arrive at the analysis of rights by any less ambitious route. 'One can derive a concept from a theory but not the other way around.'¹²³

In my own view, the modern Will Theory of rights is best defended in political terms. An acceptable account of the nature of rights should reinforce those aspects of the tradition of rights discourse that are most distinctive and important, and should address the dangers that most obviously threaten that tradition

¹²¹ Kramer is more circumspect in this regard, finding the denial of children's rights to be 'outlandish' but not 'ghastly'.

¹²² Raz, *The Morality of Freedom* (n 111 above), 63.

¹²³ Raz, *ibid*, 16.

with over-inflation and vacuity. The modern Will Theory is well suited to these objectives; yet, at the same time, it is a surprisingly modest position. It does not presuppose the truth of any very sweeping and monistic account of justice or liberty, nor is it intended to sustain some such view. Indeed, the modern Will Theory arises precisely from the loss of faith in grand theoretical resolutions to the problem of politics, and its virtues are most easily appreciated from the perspective of a mature acceptance of pluralism and conflict within our political values.

The classical Will Theory combined the ideas of permissibility and inviolability: an area of free choice, and a related duty. The notions of freedom and inviolability were firmly grounded in a perceived connection between the concept of a right and the justification of coercive enforcement. Thus the theory gave expression to certain formal intuitions about the character of rights, such as the notion that rights ground peremptory demands, and the idea that rights give us options which we may exercise or not as we choose. The theory was intended to explicate the analytical structure of legal ideas, but at the same time it linked its analysis to a sweeping attempt at the theoretical resolution of central problems of the liberal legal order. The notion of a right was thought to point to an ideal (and essentially Kantian) conception of justice immanent within legal thinking, and in this way to surmount the question of how the impersonal governance of law might be compatible with the integrity of individual projects.

The classical Interest Theory celebrated the failure of this ambitious project, but the fundamental instrumentalism of that theory caused it to neglect the problems that had generated the Will Theory in the first place. Dominated by the single thought that law is an instrument in the service of welfare-based goals, rather than the working out of an immanent scheme of justice, the classical Interest Theory exhibited little interest in the aspects of rights that had been highlighted by the Will Theory. Rights ceased to be thought of as protected options linked to individual project-pursuit, and became the obverse or rationale of duties imposed by posited rules.

Modern versions of the Interest Theory have departed still further from the intuitions that informed the Will Theory. In treating rights as reasons that will justify the imposition of duties 'other things being equal', the theory abandons the idea of rights as possessing

peremptory force. The theory possesses few or no resources for explaining the associations (such as that between *choice* and *peremptory force*) that generated the ambitious visions of the classical Will Theory in the first place. Instead, the authors of this theory point out the congruence of their position with 'changes in the climate of opinion', acknowledging that the theory ascribes to 'right' a much wider sense than might have been considered proper thirty or forty years earlier.¹²⁴ Far from serving to arrest the process whereby rights-discourse becomes increasingly vacuous, such theories appear to celebrate and accelerate that development.

Classical Virtues in a Modern Context

Hohfeld's analysis had the effect of exposing a rift between permissibility and inviolability, thereby revealing the shortcomings of the classical Will Theory as a piece of analytical jurisprudence. In this way significant gaps were exposed in apparently seamless passages of legal reasoning; and such exposure in turn lent weight to the accusations of emptiness frequently levelled at the Kantian theory of justice. The core ideas of an area of choice and a related duty, however, could be connected otherwise than by the conjunction of permissibility and inviolability; and in this way they could be detached from the grand but implausible ambitions of the classical Will Theory.

Thus we come to the version of Will Theory developed by H. L. A. Hart. Although quite different from the classical Will Theory, and adroitly avoiding the pitfalls of that approach, Hart's theory nevertheless sought to combine some of the key ideas that had formed the core inspiration for the classical position. Thus Hart's theory builds upon the two notions of an area of choice and a correlative duty, and emphasizes the close connections between rights and coercive enforcement; but it does so in a manner that is less ambitious than the older view, precisely because it avoids the latter's sweeping inferences from the conjunction of choice and coercive constraint. In Hart's theory, the duty is not imposed as a protection for free choice: rather it forms the object of the relevant choice. To possess a right, on this view, is to have control over a duty incumbent upon someone else. The right is not the rationale of

¹²⁴ Raz, *The Morality of Freedom*, 249.

the duty, nor its justification: it is the power to waive or to demand performance of the duty.

This theory has a number of virtues, but two in particular merit our attention. In the first place, the theory reflects our sense that rights are involved with the choices of the right-holder: rights are things that may be exercised, and right-holders have a choice about *how* they shall be exercised. Secondly, it reflects our sense that rights ground peremptory demands that we may make against others: my rights are not simply good reasons for others to behave in certain ways, but preclude any attempt to make the required conduct contingent upon a calculus of my interests along with other considerations. Nor are my rights the *justification* for duties: when I invoke my right, I do not claim that the imposition of a duty on you is justified (still less that it *would* be justified in the absence of competing considerations). I claim that you *are* under such a duty, and the content of that duty makes my choice decisive for you in some particular respect.

In both of these respects, Hart's Will Theory is a great improvement over the most fashionable¹²⁵ contemporary versions of the Interest Theory. Theories of the latter type must of necessity deny the existence of any conceptual connection between rights and choices, and therefore must treat the exercisability of a right as a contingent feature that it may or may not possess. Moreover, while proclaiming the centrality of rights within both politics and legal reasoning, they are forced into an unacknowledged abandonment of the peremptory force of rights, and an inability coherently to explain the special weight which is to be accorded to rights by contrast with general welfare considerations.

Whereas the classical Interest Theory found itself uneasily both relying upon positivism and (in its proposals for the identification of rights) undermining positivism, the modern Will Theory does not in any way depend upon positivism, but it is entirely consistent with such truth. In so far as legal positivism is true, the conditions in which a certain legal duty is performable will be ascertainable by reference to positive sources of law. Where those conditions include an exercise of will by some other person, that person enjoys a right which is correlative to the duty. There is no need, on this theory, to

¹²⁵ Most of the remarks that follow are inapplicable to Kramer's version of the Interest Theory.

embark upon an inquiry into the justifications for the duty, or the purposes of the rule imposing the duty: the existence and content of legal rights will be ascertainable from the content of rules specifying the content of duties.

The Interest Theory, in both its classical and modern versions, is of course dependent upon our ability to identify *interests*. Our ability to reach convergent conclusions about legal rights is therefore dependent upon our ability to reach convergent conclusions about the scope and existence of interests. For example, suppose that local authorities have a duty to ensure that all children spend each day in school. We can agree in our conclusion that this duty is grounded in the childrens' right to education only if we can agree that children have an interest in being educated. If I think that education is a form of social discipline which is detrimental to the interests of the child, I may conclude that the duty is grounded in the adults' interest in not having their houses burgled while they are out at work. We cannot identify interests without some conception of 'the good', however minimal. Therefore, we cannot identify rights (on the Interest Theory) except against the background of a broad range of agreement on 'the good'. Many political theorists, however, seek a set of political arrangements which are not dependent upon such agreement: they seek to make 'the right prior to the good'.¹²⁶ Whatever the strengths or weaknesses of such a view, the Will Theory is neutral between such a view and its critics. If neutrality of this kind is a virtue, the Will Theory has this further advantage over its rivals.

Hohfeldian Complexities

By contrast with the classical Will Theory, the modern Will Theory is compatible with the Hohfeldian analysis of rights, for, although the theory links rights with both choices and duties, it does not claim that permissibilities entail inviolabilities: that is, that liberties entail claim-rights. The relevant choice is a choice concerning the waiver or enforcement of the duty, not a reason for imposing the duty or a liberty that is protected by the duty: in the absence of

¹²⁶ See, for example, John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972). Kramer's version of the Interest Theory is an exception here, since the evaluative judgments upon which his theory depends are sufficiently weak to be untroubling to theorists such as Rawls.

the duty, the choice would not be unprotected, but would simply lack an object.

Compatibility with the Hohfeldian analysis also serves to distinguish the theory from influential contemporary versions of Interest Theory, which seek to locate rights on the level of justificatory considerations underpinning or grounding Hohfeldian jural relations. Although not technically inconsistent with Hohfeld's analysis, such positions tend to downgrade the importance of the analysis by suggesting that it concerns itself with remedial instrumentalities whereby rights are protected, rather than with the rights themselves. The Hartian theory, by contrast, is not committed to this move, and is thereby able to preserve the straightforward and immediate connections between rights and duties which (as we saw above) are an important foundation for understanding the peremptory character of rights.

In fact, Hart's theory is not only compatible with Hohfeld, but may actually cast an interesting light upon some otherwise problematic features of Hohfeld's analysis. For, although the theory is primarily intended to clarify the nature of Hohfeldian claim-rights (in this respect it resembles Kramer's version of the Interest Theory) it is reasonable for us to ask what claim-rights, liberties, powers, and immunities have in common that leads pre-Hohfeldian analysts to confuse them, and that generates our common tendency to speak of them all as 'rights'. Hart's answer was as follows:

The unifying element seems to be this: in all four cases the law specifically recognizes the *choice* of an individual either negatively by not impeding or obstructing it (liberty and immunity) or affirmatively by giving legal effect to it (claim and power).¹²⁷

Hart's identification of *choice* as the key idea underpinning the notion of rights was subsequently developed by him in a misconceived and non-Hohfeldian way. For, in *Essays on Bentham*, Hart put forward the claim that the idea of a 'bilateral liberty' was central to claim-rights, liberties and powers (although not to immunities).¹²⁸ This thesis confronted him with a series of difficulties which he might well have avoided;¹²⁹ most significantly it led him

¹²⁷ HLA Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 35n.

¹²⁸ *ibid.*, 188.

¹²⁹ Discussed in Carl Wellman, *A Theory of Rights* (Totowa, New Jersey: Rowman and Allanheld, 1985), ch 3.

to make the misguided concession that immunities could not be adequately accounted for on the Will Theory.¹³⁰ This concession is understandably viewed with satisfaction by Interest Theorists, and even theorists seeking to defend a version of the Will Theory have been thrown off course by Hart's claims. Thus, the attempt to accommodate such examples has led theorists such as Wellman to urge upon us the idea that a right should be conceived of as a complex of Hohfeldian elements, rather than as one or other such element taken discretely.

In fact it is not difficult to demonstrate that Hart's original statement (from 'Definition and Theory in Jurisprudence', quoted above) of the unity underlying Hohfeldian diversity provides a better analysis than does his later 'bilateral liberty' view, enabling him to avoid most of the difficulties in which his argument may subsequently have become ensnared.

The passage from 'Definition and Theory in Jurisprudence' sees an immunity as protecting choice 'negatively by not impeding or obstructing it'. It is not necessary to construe such negative protection in a way that would require the immunity to involve a bilateral liberty possessed by the right-holder. An immunity such as the inability to inherit protects choice *negatively* by ensuring that our proprietary holdings will be altered only by our own choice. Our autonomy is thus protected by rendering us immune to a particular kind of interference (albeit one that we might frequently regard as beneficial). An inability to inherit comprises such an immunity combined with a disability preventing us from waiving the immunity. The disability is clearly not a 'right' on the Hohfeldian analysis, but that does not preclude us from regarding the immunity as a right. A similar analysis might be applied to the constitutional immunities which caused Hart to doubt his version of the Will Theory: to the extent that they are immunities, they protect our autonomy from one type of interference; their non-waivability manifests the fact that the right is conjoined with a disability.¹³¹

Powers can be said to give effect to choices 'affirmatively' even when those powers are not joined to bilateral liberties. The suggestion that, to count as a 'right', a Hohfeldian power must be conjoined with a bilateral liberty is quite mistaken: the argument simply

¹³⁰ Hart, *Essays on Bentham* (n 110 above), 190–2.

¹³¹ See Hart, *Essays on Bentham* (n 110 above), 190 *et seq.*

confuses the juridical conception of liberty with the fact of choice. If I am placed under a legal duty, I have to that extent forfeited my (juridical) liberty;¹³² but I still retain a choice about whether I will perform my duty or not. The law can, if it so chooses, give legal effect to my choice by recognizing it as the valid exercise of a power. Situations where persons possess legal powers that they are under a duty not to exercise are, in fact, not at all unfamiliar.¹³³

Hart was therefore correct in his early analysis of the element of uniformity linking claim-rights, liberties, powers, and immunities. It is a mistake to suggest that each type of right involves a liberty to perform an act, the rights varying only with regard to 'the kind of act or act-in-the-law which there is liberty to do'.¹³⁴

Theorists have pondered upon the question of whether rights can be identified with individual Hohfeldian claim-rights, liberties, powers, and immunities, or whether rights must be conceived of as complex conjunctions of simple Hohfeldian elements. We have already seen that certain modern versions of the Interest Theory argue for the 'complex conjunction' view. Hart's later 'bilateral liberty' version of Will Theory tended to support this stance, by suggesting that every right involves a bilateral liberty combined with a Hohfeldian claim-right or power (immunities, by Hart's concession, not fitting the analysis). By rejecting that later version of the theory in favour of Hart's earlier statement, we have to that extent resisted the 'complex conjunction' view of rights, and defended a more austere Hohfeldian approach.

There remains, however, one final shot in the locker of the complex conjunction view, and it is a shot aimed directly at Hart's version of the Will Theory (including the early version of that theory). For, since Hart analyses claim-rights as involving or amounting to powers of waiver over correlative duties, he may seem to be faced by two alternatives. He can either *identify* claim-rights with powers of waiver, or he can treat claim-rights as *involving* powers of waiver.

¹³² Hart seems to make a related mistake when he assumes that a duty entails a unilateral liberty. Duties may generally involve unilateral liberties, but this need not invariably be so, because there is nothing in the logic of rights to exclude the possibility of conflicting duties. Hart, *ibid.*, 173.

¹³³ For example, in situations where the exceptions to the principle *nemo dat quod non habet* apply, a seller of goods may be committing a tort in selling, and yet the sale will nevertheless pass good title to the purchaser.

¹³⁴ Hart, *Essays on Bentham* (n 110 above), 189.

The first option seems to introduce a serious confusion of different levels in the Hohfeldian analysis. Claim-rights, liberties, duties, and no-rights occupy the plane of primary rules which are concerned directly to prescribe conduct. Powers, immunities, disabilities, and liabilities, by contrast exist on the plane of secondary rules, which are concerned not to prescribe conduct so much as to provide facilities for the alteration of prescriptions that obtain at the primary level.¹³⁵ By insisting that a claim-right is a species of power, therefore, Hart's theory would seem to confuse the importantly distinct categories of primary and secondary legal relations.

The second option, by contrast, appears to concede ground to the complex conjunction view. On this interpretation, Hart's analysis of rights as powers of waiver or control over correlative duties is best read as treating such rights as complex assemblages of Hohfeldian elements. Thus a Hartian right might be said to be a Hohfeldian 'claim-right' combined with a Hohfeldian 'power' (a power of waiver or enforcement). On this interpretation, Hart would not be guilty of the simple confusion alleged against him by the first objection, but might justly be accused of introducing cumbersome complexities into the analysis of rights without any very adequate reason. Furthermore, his theory would (on this account) be reliant upon the notion of a 'claim-right' (such claim-rights forming but one constituent of fully-fledged Hartian rights) while leaving that notion wholly unexplained and opaque.

Most theorists have assumed that Hart would opt for the second approach. Such an interpretation gains weight from the fact that Hart's later 'bilateral liberty' version of the Will Theory is itself committed to a complex conjunction view of rights. Having rejected Hart's later view as clearly inferior to his earlier statement of the Will Theory, we must now see whether we can defend a version of Will Theory that wholly excludes any element of the complex conjunction view: we must therefore see if the first option (identifying claim-rights with powers of waiver) can be defended.

The charge levelled against the first approach is that it confuses the distinct categories of primary and secondary legal relations. For, if duties are correlative to claim-rights, and claim-rights are powers, then concepts drawn from the primary level of conduct regulation

¹³⁵ Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

are being logically tied to concepts drawn from the secondary level of rule-alteration.

At this point we must recall a point explained earlier in the essay. The notion of 'correlativity' in Hohfeld's analysis could be construed in a number of different ways. In particular, we might take Hohfeld to be proposing general definitions of 'duty', 'immunity', (and so forth) wherein the definition of each term entails its correlative. Alternatively, we might take him to be proposing an analytical representation of a bounded sphere: the sphere of 'jural relations', conceived as applying either to law in general, or perhaps to that part of law that deals with relations between individuals (private law). He would then not be asserting that the correlativities obtain in virtue of the general meaning of the words employed, but in virtue of certain general features of the sphere of relations under consideration.

If Will Theorists wish to rely upon Hohfeld's analysis, they are of necessity committed to the latter interpretation of his work. For Will Theorists assert that claim-rights are correlative to duties, but not all duties are correlative to claim-rights. The correlativity therefore cannot obtain in virtue of the meaning of the words: it is correlativity within a strictly bounded sphere. As we explained earlier, this may seem to be a very significant concession, and a weakness in the Will Theory. What needs to be borne in mind, however, is the fact that the tight and general connections that can be established between power and liability (and between immunity and disability) cannot obtain between duty and claim-right, even for the Interest Theory. Unless one is prepared to drain the notion of 'interest' of all content, treating it as an entirely formal notion that bears the name 'interest' only as an arbitrary label,¹³⁶ one must concede that duties without corresponding interests are logically conceivable. One may argue that certain contingent features of the real world dictate that it is impossible for duties to exist wholly disconnected from interests: legal duties are bound up with the interest in securing obedience to law, for example; and perhaps moral duties connect with interests by virtue of some constraint

¹³⁶ In such a theory, the word 'interest' might well be replaced by 'heffalump' or 'strudge'. Kramer's Interest Theory does not employ the term 'interest' in this empty way, but has real, if minimal, content. To the extent that the notion of interest has real content, however, a connection between duties and interests cannot be deduced from the bare notion of 'duty', but requires certain extraneous assumptions.

on the type of duty that can plausibly be regarded as moral in character. But here the existence of relevant interests is entailed by something other than the bare notion of duty: the involvement of duties with interests is deduced from the notion of law, or morality. Even for the Interest Theorist, therefore, the connection between duty and claim-right, as a jural relation obtaining between two persons, is not a necessary feature of the concept of duty.

Once we see that the connections here cannot, with any plausibility, be construed as strictly logical bilateral bonds, the objection to construing a claim-right as a specific type of power becomes less substantial. If the Hohfeldian jural correlatives were bilateral logical bonds, the appearance of powers at more than one point in the analysis might well introduce a serious confusion. Given, however, that the claim-right/duty relation cannot plausibly be construed in this way, it is less clear that any such confusion would be involved. The position would then be that all powers logically entail liabilities. *Some* powers, being powers of waiver and enforcement over duties, entail duties as well as liabilities.¹³⁷ Such powers can be labelled claim-rights. The liabilities that they entail (being powers, they must entail liabilities) include such changes in one's jural relations as: a bailee of goods being placed under a duty to restore the property to the owner, upon the owner making demand for it; a contractual bailee of goods being absolved from the duty to restore goods to the owner on a certain day, by the owner saying that a later delivery will be acceptable.

The Importance of Enforcement

The disparate considerations set out above amount to a substantial if inconclusive case in favour of Hart's (early) version of the Will Theory. Earlier in this essay I pointed out that our more formal or conceptual intuitions about rights can be assembled in different ways, and that arguments in favour of a particular conception of rights can be expected to exhibit no more than a degree of persuasiveness. The primary motivation of the classical Will and Interest

¹³⁷ To avoid confusion, it is worth pointing out that the entailment of duties by such powers differs from the entailment of liabilities in not being content-independent or formal. In other words, the existence of a correlative liability is entailed by the bare notion of a power; whereas any correlative duty is entailed by the *content* of the power.

Theories did not lie in a desire to systematize and clarify conceptual structures and connections, so much as a desire to ground more sweeping theories of legitimacy. In particular, they sought to explain the relationship between *subjective* and *objective* right; or between the private projects of individuals and the collective project represented by the political community's will and expressed in the community's law. At the heart of the classical theories, therefore, lay a concern for the *integrity* of private rights, in the sense of the possibility of ascertaining the bounds of private rights without direct reliance upon the distributive or aggregative projects of the collectivity. In that sense, the classical theories of rights aspired to be theories of the *Rechtsstaat*.

In consequence of the collapse of the Kantian Will Theory, and the entanglement of the Interest Theory with the problems of legal positivism, such sweeping solutions to the problem now seem implausible and optimistic. Indeed, we may perhaps go further and suggest that the desire to place the notion of rights near the centre of our models of legitimacy and legal argument is itself a factor helping to erode the integrity of rights. For this does indeed seem to be the lesson of experience that is to be learnt from the indeterminacies of the classical Will Theory and the vaporous ambitions of the modern Interest Theory.

Perhaps the integrity of rights is best sustained, not by an abundance of theoretical flag-waving, or by constant mention of rights in our doctrinal arguments, but by the careful combining of various expedients, jointly composing a context of legal and moral assumptions that make such integrity possible. Analytical theories of rights cannot be expected on their own to resolve the problem. Yet it is nevertheless the case that some small part of the case supporting such an analytical theory might be the contribution that the theory makes to an intellectual, moral, and institutional context within which the integrity of rights can best be sustained.

We might therefore reflect upon the broad significance of rights within our rival analytical theories. From this perspective, it can easily be seen that the Kantian Will Theory attaches to rights a significance that sits very comfortably with the concern for integrity, whereas versions of the Interest Theory tend to undercut such concern. For all varieties of the Interest Theory, the right-holder is essentially a bearer of interests rather than a locus of choice or will. Classical versions of the Interest Theory find it necessary to identify

legal rights by means of an inquiry into the *purpose* of the relevant duty-imposing rules: in this way they threaten a collapse of rights into the aggregative or distributive projects that compose the legislative project. Alternatively, such theories identify rights by reference to the conditions sufficient to establish a breach of the relevant duty: but (as we saw above) this approach is likely to result in a great many rights being assigned to the state rather than to private citizens. Some contemporary versions of Interest Theory, by contrast, avoid these problems only by treating rights as non-conclusive reasons for the imposition of duties. Such an approach results in the suppression of the peremptory character of rights: rights become weighty considerations which are to be balanced against many other considerations in deciding whether a duty should be recognized; and with the loss of their peremptory character, rights are collapsed into the general range of interests that are considered in the context of the state's distributive and aggregative projects.

The modern Will Theory, by contrast, builds the notion of 'a right' firmly upon the twin ideas of choice and peremptory force. Where rights exist, the enforcement of duties is not a matter for the state in pursuit of collective policies, but a matter for the choice of private individuals. Nor are rights reduced by this theory to the status of weighty considerations in a general weighing and balancing of interests. We might well regard the private enforcement of such peremptory demands as an essential hallmark of the *Rechtsstaat*. All versions of the Interest Theory, by contrast, would be compatible with a state of affairs where all powers of enforcement and waiver are monopolized by the state and its officials. There is surely a good deal of force in the Will Theory's claim that, in such circumstances, citizens would have no rights at all, regardless of how effectively their interests might be catered for in the state's policies and enactments. If we regard the choice of a theory of rights as but one facet of a search for interpretations that sustain the integrity of rights within the rule of law, the Hartian Will Theory has much to recommend it.

MacCormick on Waiver and Alienability

Neil MacCormick has offered what is perhaps the best-known and most influential critique of Hart's version of the Will Theory. It is

appropriate to conclude this defence of Hart's position by considering MacCormick's arguments.¹³⁸

MacCormick's general position on rights has already been considered. This consists in his claim that rights should not be identified with individual Hohfeldian advantages, but represent the grounds for imposing duties, liabilities, and so forth, and thus for conferring Hohfeldian claim-rights, liberties, powers, and immunities. Hohfeld's analysis represents (on this account) an analysis of the various instrumentalities whereby rights may be protected, rather than being an analysis of rights themselves. A more adequate account of rights would, in MacCormick's view, bring out the dynamic role played by rights in legal reasoning. My response to this position consisted in a direct challenge to the pertinence and accuracy of MacCormick's observations. Before turning to MacCormick's arguments aimed more specifically against the Will Theory, it is perhaps desirable to recapitulate the main points made earlier:

- (1) Nothing in Hohfeld's theory denies that the conferment of one legal advantage may in appropriate circumstances provide good grounds for the conferment of some other advantage: the fact that you are already acknowledged to have a power to do *X* may sometimes be a good reason for conferring the liberty to exercise that power, or even a claim-right not to be interfered with in the exercise of that power. Hohfeld's analysis simply denies that any such consequences are logically entailed by the concept of a right.
- (2) MacCormick's account of rights assumes a particular understanding of the character of legal reasoning. It is far from clear,

¹³⁸ In what follows I ignore MacCormick's most well-known criticism of the Will Theory: that the theory must deny that children have rights. The argument is not one that has ever impressed me, although some find it compelling. The present essay concerns *legal* rights, and Hart offers a quite persuasive set of reasons for ascribing legal rights to children even when the relevant powers of waiver and enforcement are exercised by adults (see *Essays on Bentham* (n 110 above), 184n). As regards moral rights, there is surely much merit in the claim that our moral concern for very small children is based on a concern for their welfare quite independently of their choices; as they grow older, some of our duties towards them come to be contingent upon their will. Is not this moral difference aptly reflected by the Will Theory of rights? The Interest Theory, by contrast, must provide us with some reason for ascribing rights to babies, rather than simply speaking of the importance of their welfare. The special peremptory force of rights does not provide such a reason: for, as we have seen, versions of the Interest Theory (like MacCormick's) that abandon the strict correlativity of rights and duties also, by that very move, abandon the peremptory force of rights. Rights become reasons for imposing duties, which must be balanced against other conflicting considerations.

however, that his picture of legal reasoning is at all accurate. If a statutory provision were to expressly confer a 'right' without explaining the implications of that right (does it entail a duty, and if so on whom? does it involve a power? an immunity? etc), it would be treated as ambiguous or incomplete, not as identifying an interest which the court may then protect in whatever way it considers appropriate. When courts reason from the certainty of one right to the existence of another, they do not generally employ the balancing process suggested by MacCormick's account of rights, but operate with more technical doctrinal considerations. In any case, it is surely a mistake to render one's conceptual analysis of rights so dependent upon a particular and highly contestable account of legal reasoning.

We are now in a position to turn to those arguments offered by MacCormick which do not contest general notions of correlativity, or the general adequacy of Hohfeld's analysis, but which tackle the central claims of Hart's Will Theory. The first argument offered to that effect proceeds from Hart's openly acknowledged difficulties in accommodating immunities within his analysis. MacCormick notes Hart's concessions on this point and then makes what at first seems to be a point supportive of the Will Theory, suggesting that Hart's concessions were unnecessary:

There is something, on the face of it, odd about Hart's concession that immunities cannot be properly taken into account within the four corners of the 'Will Theory' as propounded by himself. For it is often the case that A's immunity is waivable by A's choice... That being so, it follows that there is a class of immunities which could comfortably be brought within the Hartian version of the will theory, namely the whole class of those immunities in relation to which the immunity-holder has a power of waiver.¹³⁹

This point, however, quickly leads MacCormick to what he deems to be 'the fundamental implausibility of the "Will Theory"'.¹⁴⁰ For we may sometimes protect a right by depriving the right-holder of the power to waive that right:

But there's the rub, there, for the 'Will Theory', the paradox. For it appears that this legal dispensation, be it ever so advantageous from the point of

¹³⁹ Neil MacCormick, 'Rights in Legislation' in PMS Hacker and J Raz, *Law, Morality and Society* (Oxford: Clarendon Press, 1977), 195.

¹⁴⁰ *ibid.*

view of securing liberty, is so forceful as to thrust liberty beyond the realm of 'right' altogether. If there be no power to waive or assert the immunity, the claim, or whatever, upon some matter, upon that matter there is, *by definition*, no right either.¹⁴¹

It will be remembered that we saw earlier how Hart's concessions in relation to immunities were quite unnecessary and misconceived. This was *not*, however, on the ground suggested by MacCormick (that an immunity may be combined with a power of waiver): for the fact that an immunity may be combined with some other Hohfeldian advantage clearly contributes nothing whatever to establishing that the immunity in itself is a right. The point was rather that (as Hart's early formulation of the position made clear) an immunity recognizes the right-holder's choice not *positively* by giving effect to it, but *negatively* by ensuring that one's legal position is not affected by anyone else's choice. The power to *waive* an immunity is no part of the immunity itself, and may or may not be found together with an immunity. An immunity that is conjoined with a disability to waive will be permanent and inalienable. Since the immunity is inalienable, it will always continue to exist, and its holder will continue to enjoy the protection that it affords. That protection can without distortion be thought of as a (negative) recognition of the right-holder's will, for it has the effect that, within the range of the immunity (and in relation to the person against whom the immunity holds) the right-holder's legal position cannot be altered at the will of others. So far as MacCormick's argument is aimed at *immunities* therefore, it can be defused by invoking Hart's early formulation of the *negative* respect in which immunities protect the will, rather than his later concessions with regard to immunities.

MacCormick's point can, however, be detached from the context of immunities and offered as a more general argument. Claim-rights, liberties, and powers may all be rendered inalienable, and such inalienability is seen as a strengthening of the right, generally reserved for our most important rights. Yet, says MacCormick, 'the will theory seems to cut off the use of "rights"-language at a predetermined point on the scale of protection which the law may confer upon people's interests.'¹⁴² Workers may be unable to

¹⁴¹ Neil MacCormick 'Rights in Legislation' in PMS Hacker and J Raz, *Law, Morality and Society* (Oxford: Clarendon Press, 1977), 196.

¹⁴² *ibid.*, 197.

contract out of the most important forms of protection conferred upon them by safety legislation: but it seems odd to regard the workers' rights as being extinguished by this additional protection, when we more naturally regard them as thereby strengthened.

To accommodate this more general version of MacCormick's argument we cannot rely upon the distinction between positive and negative recognition of the right-holder's choice. Instead, we must distinguish between the *exercise* of a right, and its alienation or *extinguishment*. The worker is prevented from alienating his right precisely so that he continues to possess and enjoy it. So long as he does continue to possess the right, he has certain options (to sue or not sue) that he would not otherwise possess. Since options of precisely that type are amongst the forms of protection of the will emphasised by Hart's theory, that theory need have no difficulty in treating the worker's remaining options as 'rights'. Nor need the Will Theorist deny that the imposition of such disabilities (inalienabilities) can be seen as a strengthening of the worker's rights: one does indeed strengthen a right when one ensures that the right-holder will continue to possess the options represented by the right no matter what transactions he enters into with regard to the right.

It must be admitted that Hart sets out three distinguishable levels in the control exercised by a right-holder (including the ability to extinguish the right) and describes the conjunction of all three levels of control as the 'fullest measure' of control that may be accorded.¹⁴³ Does it not then follow that a reduction in the level of control denotes a reduction in the protection of the right (given that the Will Theory treats control by the will as being the very essence of a right)? And does this not conflict with our sense that rendering a right inalienable may strengthen rather than weaken its protection?

The assumptions underlying this objection are overly simplistic. Where we are confronted by different facets of control, the strength or efficacy of the protection given to the individual will cannot be judged simply by the number of facets present in any particular entitlement. The different dimensions of autonomy represented by the different forms of control cut across each other; just as the worker's autonomy to alienate his rights may cut across his

¹⁴³ Hart, *Essays on Bentham* (n 110 above), 183–4.

continuing autonomy to choose whether or not to sue his employer. To provide all the different facets of control will not necessarily offer the most effective or extensive protection to the right-holder's will. Much depends upon the circumstances and the nature of the threats to choice in any concrete set of circumstances. Given these complexities, there is no reason to assume that it will be possible to range rights monotonically upon a single scale of strength or weakness; there is still less reason to expect such strength or weakness to be a simple function of the number of different facets of choice associated with the right.

MacCormick and Criminal Law

By distinguishing the power to extinguish or alienate a right from the continued option of enforcing a right, we can render consistent with the Will Theory the example of right-holders who are legally disabled from contracting out of their rights. MacCormick offers a further example, however, which is less easily disposed of. The example concerns the limited scope given to consent as a defence in the criminal law. Consent is a defence to charges of minor assault and, in that sense, we may if we wish say that the potential victim of assault has a power to waive the duty not to assault. Consent is not, however, a defence to charges of more serious assault, and no similar power of waiver exists in relation to such assaults. If one follows the Will Theory in identifying rights with powers of waiver, therefore, one seems forced to conclude that we have a right not to be subjected to minor assaults but no right not to be subjected to major assaults.

To deal with this counter-example to the Will Theory, we must address the general question of rights and the criminal law. In the first place, we must bear in mind that the present essay is concerned with the analysis of *legal* rights, and aims to defend the Will Theory of rights simply and solely in that connection. In relation to criminal law, the Will Theorist will contend that legal rights are not conferred by criminal law. Perhaps we have moral rights not to be murdered or assaulted, and perhaps the criminal law is aimed in part at the protection of such moral rights: but these rights are not conferred by criminal law and are, to that extent, not themselves legal rights. If we were to restrict our discussion to rights *conferred by criminal law*, therefore, the Will Theorist would deny

that there is a right not to be assaulted, whether the assault be major or minor.

Some of the rights protected (though not conferred) by criminal law are rights conferred by *private* law: the most obvious example being the rights of property that are protected by the law of theft. There is a private law right not to be assaulted, which is manifested in the availability of civil actions for assault, and which may also receive protection from the criminal law. This right extends to both major and minor assaults. The Will Theorist has no difficulty in accommodating this right. In the first place, consent *is* generally a defence in private law, so the power to waive the duty obtains across the range of gravity of the assault; and, secondly, even if consent were not a defence to serious assaults, the decision whether or not to sue would nevertheless remain with the right-holder.

But what of the *moral* right not to be assaulted? The insistence that we are solely concerned with legal rights, and can therefore afford to ignore this question, may seem unsatisfactory. For it is surely the case that legal and moral rights are more than simple homonyms. An acceptable analysis of legal rights must therefore at least imply appropriate ways of analysing moral rights, even if subtle adjustments are required to render the fit fully adequate; and MacCormick's example seems to suggest that the implications of the Will Theory are, in this context, wholly absurd. It is absurd to suggest that we have a moral right not to be subjected to minor assaults, but no moral right not to be subjected to major assaults; since this seems to be an implication of the Will Theory, that theory must be rejected.

What is the point of talking of moral 'rights', rather than simply speaking more straightforwardly of moral right and wrong? One suggestion is that rights represent the 'personal' aspect of morality: rights are involved when your action is not simply wrong but has *wronged* someone, giving that person the moral authority to complain and perhaps to demand compensation.¹⁴⁴ Let us adopt, for present purposes, this broad notion of a moral right on the grounds that it ascribes a distinctive role within morality to the notion of a right, and it sits comfortably with the Will Theory as an analysis of legal rights. We may then say that there is a moral right not to be

¹⁴⁴ See eg, David Lyons, *Rights, Welfare, and Mill's Moral Theory* (Oxford: Clarendon Press, 1994), 4–5.

assaulted, but no moral right in relation to assaults to which we have consented: for we cannot reasonably complain of something to which we consented (setting on one side special circumstances of fraud, ignorance of relevant facts, and so forth). Once the point is formulated in this way, we see that it is not the gravity of the assault that defines the limit of our right, but the fact of our consent. We do indeed have a (moral) right not to be subjected to assaults be they serious or minor, since any such assault will give us the authority to complain and demand redress, and the option of exercising that moral authority.

The limits of our moral rights do not, of course, coincide with the limits upon wrongdoing: that is a consequence of having a non-redundant conception of a moral right. Thus, serious assaults may be wrong even when they *are* consented to: they may exhibit and foster a depraved taste for cruelty, or may impair the community's human resources such as capacity for labour. The criminal prohibition of such consensual assaults might also be justified in other terms, without reliance upon the claim that even consensual assaults are morally wrong. Perhaps (for example) the uncertainties of establishing genuine consent in the relevant contexts are such that blanket prohibition is the best way of protecting the vulnerable from non-consensual assault.

What has now become of MacCormick's problem? Once we distinguish between various sorts of rights (moral rights, rights conferred by private law, and rights allegedly conferred by criminal law) we see that at no point is the Will Theorist committed to saying that we have a right not to be subjected to minor assaults, but no such right in relation to serious assaults. Only a tendency to conflate different varieties of rights (or perhaps a question-begging tendency to assume, in relation to moral rights, the truth of the Interest Theory) can account for the contrary impression.