Chapter Ten

Rights and Rights Talk

10–01 According to some commentators, ancient Roman Law and medieval legal systems had no concept that compared to the modern notion of "rights". By this view, the closest analogue, "*ius*", referred instead to "the right thing to do" or "what is due according to law".[1] Even those commentators who think that ancient and medieval law *did* have a concept of "rights" comparable to our own agree that it played a far lesser role in legal thought then, compared to its role in modern legal systems.[2]

Rights and rights-talk are pervasive within modern discussions of law and government, a pervasiveness which sometimes leads to certain forms of confusion. The discussions of rights often exemplify a basic problem in conceptual analysis: the way abstract arguments can become entangled in particular policy views.

Rights come in at least two types: legal rights and moral rights,[3]

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[1] See, e.g. John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980, 2nd ed., 2011), pp. 205–220; David M. Walker ed., *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980), p. 1070 (entry on "Right"); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Scholars Press, Atlanta, 1997). One can still find (especially among Continental European theorists) a distinction between "objective right" (roughly, "the right thing to do") and "subjective right" (closer to our usual understanding of right, a claim vested in an individual). Some historians argue that Roman law *did* in fact have a concept comparable to modern understanding of "[subjective] right." e.g., John Witte, Jr., *The Reformation of Rights* (Cambridge University Press, Cambridge, 2007), pp. 23–26; John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Wm. B. Eerdmans Publishing Co., Grand Rapids, Mich., 2006), pp. 33–35; Charles Donahue, Jr., "*Ius* in the Subjective Sense in Roman Law. Reflections on Villey and Tierney", in Domenico Maffei ed., *A Ennio Cortese* (Il Cigno Edizioni, Rome, 2001), vol. I, pp. 506–535, available at *http://www.law.harvard.edu/faculty/cdonahue/writings.php*.

[2] "It is an exaggeration to say, as [Sir Henry] Maine did, that [the Romans] constructed their system without the conception of a right, but they certainly did not attach anything like the same importance to it as do modern lawyers." H. F. Jolowicz, *Roman Foundations of Modern Law* (Oxford University Press, Oxford, 1957), pp. 66–67 (footnote omitted).

[3] Wherever there is a normative system, one can have talk of rights: thus, one can speak of one's right to declare a draw after a three-fold repetition of position in chess, or a right to an apology in particular circumstances under a code of chivalry, and so on.

depending on whether the claim in question is grounded on the authoritative sources (e.g. statutes, judicial decisions, or constitutional provisions) of a particular legal system, or on a moral theory. Jeremy Bentham (1748–1832) famously argued that talk of moral rights (or "natural rights" or "human rights") was "simple nonsense . . . nonsense upon stilts."[4] The idea is that while legal rights have a clear correlate in the world, in legal texts and the willingness of legal officials to enforce them through various enforcement procedures, no such clear correlate exists for moral rights. However, this sceptical view of moral rights is not shared by many.

One regular source of confusion in discussions about rights is the way that different types of questions often go under the same label. At one level, one can ask conceptual questions about the nature of rights, a claim related to the "nature" or "essence" of rights. Such questions often go to the kind of entities that can have rights, or restrictions on the content of rights. For example, one conceptual claim sometimes made is that one can only have rights to something beneficial.[5] This derives from, or at least is supported by, our linguistic intuitions: It makes sense to say "I have a right that you pay me five dollars", but perhaps not to say "I have a right that the state imprison me for five years as punishment for what I have done".[6] Additionally, there are often conceptual debates about whether certain classes of entities (e.g. corporations, future generations, animals, the environment and foetuses) are capable of having rights.

In contrast to conceptual questions are substantive or policy questions: to what extent does this entity have (moral or legal) rights, relative to a particular dispute, or to what extent *should* this legal system—or all legal

[4] Jeremy Bentham, "Anarchical Fallacies", reprinted in Jeremy Waldron ed., *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, London, 1987), pp. 46–69, at p. 53 (Bentham's text was written between 1791 and 1795, but not published for the first time until 1816). On this point, Bentham's views on natural rights are often considered more radical for their time than they in fact were. As one commentator notes: "In fact, Bentham was, in this regard, firmly in a long tradition of voluntarist natural lawyers with a deep-seated suspiciousness of rights considered as ultimate or inalienable". Knud Haakonssen, "Protestant Natural Law Theory: A General Interpretation", in Natalie Brender and Larry Krasnoff eds., *New Essays on the History of Autonomy* (Cambridge University Press, Cambridge, 2004), pp. 92–109, at p. 105.

[5] See generally H. L. A. Hart, "Legal Rights", in *Essays on Bentham* (Clarendon Press, Oxford, 1982), pp. 162–193, at pp. 174–181 (discussing Bentham's "Benefit Theory of Rights"); Neil MacCormick, "Rights in Legislation", in P. M. A. Hacker and Joseph Raz eds., *Law, Morality and Society* (Clarendon Press, Oxford, 1977), pp. 189–209, at pp. 202–205.

[6] Even this may go too far. Theorists who believe that being punished for one's crimes is a sign of being treated by society with dignity could (and sometimes do) speak of one having a "right to punishment". See, e.g. Herbert Morris, "Persons and Punishment", 52 *Monist* 475 (1968). However, note that this does not undermine the general point, that it only makes sense to speak of one's right to X, when X is perceived as being, directly or indirectly, a positive thing. Here, these commentators see punishment as a kind of benefit (being treated with respect).

systems—protect a certain category of people, activities, places or things? It is easy when reading articles about rights to confuse the conceptual issues and arguments with the issues and arguments about substantive or policy matters. Also, to say that some person or entity does (or should) have rights, related to a particular dispute, is not the end of the question. A third inquiry is also needed. Even assuming that the entity is the sort of thing that *can* have rights, and even assuming that, relative to this dispute, the entity *does* have rights, one can still ask whether its rights are of sufficient strength to prevail over any countervailing rights other entities may have.

A common confusion of this type occurs in discussions about abortion, as when someone responds to an argument in favour of legalising abortion by saying "foetuses have rights". This mixes the three levels of discussion. It is consistent to say: (1) (as a conceptual matter) foetuses are the kinds of entities that can have rights; (2) foetuses have a right to life that is relevant to the question of a woman's moral or legal right to obtain an abortion; but, nonetheless, (3) (as a matter of policy or morality) women have a moral or legal right to choose an abortion, because their right to control their body overrides whatever rights the foetus has.[7] One can show the independence of the levels of analysis by a hypothetical argument towards the opposite conclusion: that one could argue that while (1) a foetus is *not* the kind of entity that can have rights, (2) abortion should not be allowed because it is contrary to the (moral or legal) duties women have towards the unborn children that they are carrying.

To put the matter another way, from the statement "Y is capable of having rights", it does not follow that Y *has* any rights, and it similarly does not follow that whatever rights Y does have will outweigh the conflicting legal interests in the matter under consideration.

The confusion in this area is encouraged by the use of rights rhetoric in political discourse (more prevalent in the United States than in most other countries). When people want to say that making sure that no one goes homeless is a worthy and important government objective, they often use the shorthand "people have a right to shelter", and when people want to express their belief that abortion should be prohibited, they sometimes choose the shorthand, "unborn babies have rights too!" Because talk of rights—legal rights, natural rights, human rights—is so entwined in political struggles, it is not surprising that many discussions of rights are muddled. The next section will discuss an important effort to try to clear up the confusions in talk about rights, proposed by Wesley Hohfeld a century ago.

Among the better known recent conceptual claims for rights is Ronald Dworkin's "rights as trumps": that rights (in particular, moral rights against the state) should be understood in policy matters as always

[7] A similar argument is offered in Judith Jarvis Thomson, "A Defense of Abortion", 1 *Philosophy & Public Affairs* 47 (1971).

prevailing when competing against considerations of general welfare.[8] Such rights claims can be overcome, the argument goes, only in the face of comparable, competing rights, or when facing the highest or most urgent concerns for the common good (avoiding imminent loss of life, etc.). The Dworkinian notion of rights as trumps works best when speaking of citizen rights against the state (trumping mere utilitarian considerations); it is more problematic if offered as a general claim about (all) rights.

There are also sceptical views of legal rights, some of which will be discussed briefly later in this text: from the American legal realists (Ch. 17), critical legal studies (Ch. 19) and Scandinavian legal realism (Ch. 22).

HOHFELD'S ANALYSIS

10–02 Wesley Hohfeld (1879–1918) wrote a pair of famous articles in which he tried to make "rights-talk" clearer.[9] First, he argued that the use of the word "right" in legal discourse[10] was often loose, covering four different kinds of legal concepts:

(1) "rights", narrowly understood as claims correlative to other persons' duties;

(2) "liberties",[11] meaning that the holder has no legal duty to refrain from the activity in question (the law may or may not expressly protect the ability to partake in the activity in question);

(3) "powers", the ability to change legal relationships (e.g. through contracts and wills); and

(4) "immunities", which correlate with disabilities of another (as constitutional rights correlate with disabilities of the government to act in certain ways).[12]

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[8] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977), pp. 184–205, also available at *www.nybooks.com/articles/10713*.

[9] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 *Yale Law Journal* 16 (1913); Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", 26 *Yale Law Journal* 710 (1917). Aspects of Hohfeld's analysis, including the idea that liberties and powers are legal rights in a wider sense, can be found in earlier work. e.g. John Salmond, *Jurisprudence* (7th ed., Sweet & Maxwell London, 1924), pp. 235–252.

[10] For a discussion of the ways in which Hohfeld's analysis might work better for legal rights than for moral rights, see Heidi M. Hurd and Michael S. Moore, "The Hohfeldian Analysis of Rights", 63 *American Journal of Jurisprudence* 295 (2018).

[11] In his articles, Hohfeld uses the word "privilege" for this concept, but in the current legal literature, the concept is usually labelled as "liberty"; "privilege" has a different set of connotations.

[12] Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", pp. 28–58; see also Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial

Hohfeld also offered two sets of connections among legal concepts through the visual image of squares:

(1)

(Claim-) Right	**Duty**
Liberty	**No-Right**

(2)

Power	**Liability**
Immunity	**Disability**

Within each box, concepts which are across from each other are "correlates", and those which are at a diagonal are opposites. If I have a claim-right regarding some matter, then someone else has a duty. If I have a liberty regarding some matter, then I do *not* have a duty; and so on.

In application, many of the legal rights we speak about are not in fact just one of the Hohfeldian types, but are in fact (to use Leif Wenar's term) a "molecule" of Hohfeldian elements.[13] A property right, for example may encompass a privilege to use the object, a claim-right that others not use the object, a power to transfer one's property rights, and an immunity against others' altering the owner's claim-rights.[14]

It is important to note that Hohfeld is *not* making an empirical claim when he states, for example, that claim-rights are correlated with duties. Hohfeld's definitions—along with the correlates included as part of the definitions—were stipulations. Thus, it makes no sense to criticise Hohfeld on the basis that his definitions are false. As stipulations, Hohfeld's definitions can be evaluated as helpful or confusing, and discussed in terms of the extent to which they deviate from common usage, but they cannot be adjudged to be empirically true or false.[15] It would make no more sense to say that one had discovered a Hohfeldian claim-right without a corresponding duty, than it would to say that one had discovered a married bachelor. The question is only whether Hohfeld's proposed analytical clarifications are more helpful than confusing or misleading, and most commentators seem to think that they are.

Secondly, Hohfeld argued that all rights-statements ("rights" here understood either narrowly, in their first sense, as claims correlative to another party's duty, or broadly, as involving any of the four legal concepts named) should be reducible to a three-variable proposition: A has

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Reasoning", p. 717; J.W. Harris, *Legal Philosophies* (2nd ed., Butterworths, London, 1997), pp. 83–93.

[13] Leif Wenar, "Rights", in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy* (2015), *http://plato.stanford.edu/entries/rights/*, § 2.1.6.

[14] Leif Wenar, "Rights", § 2.1.6.

[15] See Matthew H. Kramer, "Rights Without Trimmings", in Matthew Kramer, N. E. Simmonds and Hillel Steiner, *A Debate Over Rights* (Clarendon Press, Oxford, 1998), pp. 7–111, at pp. 22–24. For a discussion of stipulations in theory, see Ch. 2. For the claim that Hohfeld's analysis of the connections between these legal concepts are *not* merely stipulative, but expresses a necessary or conceptual truth about rights, see Sean Coyle, "Are There Necessary Truths About Rights?", 15 *Canadian Journal of Law and Jurisprudence* 21 (2002).

a right against B for X (where A and B are people or institutions, and X is an object or activity). For example, "Sarah has a right against John for five dollars" or "I have a right that Congress not interfere with my publishing this book".[16]

Among the problems that this kind of analysis avoids are the issues that arise when someone says "we have a right to education" or "we have a right to a job", but the speaker is unwilling to say (or thinks it unnecessary to say) whom this right is against. If someone claims that she has a right to a job, does she think that it is the government's obligation to give her a job, or perhaps the obligation of the largest employer in town, or perhaps the obligation of anyone with the means to offer employment? If the claimant is not willing to specify in such cases whom the right is against, one can suspect that the reference to rights is merely a form of rhetorical emphasis: "we have a right to a job" then becomes nothing more than a way of saying "we want a job very much" or "it would be a very good thing were someone to offer us jobs".

WILL THEORY VERSUS INTEREST THEORY

10–03 In the analytical tradition, there are two primary conceptual theories about the nature of rights.[17] The first is known as the "interest" or "beneficiary" theory of rights, and is associated with Jeremy Bentham (1748–1832) and Neil MacCormick (1941–2009). This view equates having a right with being the intended beneficiary of another party's duty.[18] Joseph Raz offered a somewhat different formulation of the view, equating a party's having a right with "an aspect of [that party's] well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[19]

The second approach is the "will" or "choice" theory of rights, and is associated primarily with H. L. A. Hart (1907–1992). Hart viewed a (legal) right as a protected bilateral liberty, and equated having a right with the right-holder's "being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct

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[16] Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", pp. 742–766.

[17] For a recent and detailed overview of the debates about the best conception of rights, see, e.g. Kramer, "Rights Without Trimmings", pp. 60–101; N. E. Simmonds, "Rights at the Cutting Edge", in Kramer, Simmonds and Steiner, *A Debate Over Rights* (Oxford University Press, Oxford, 1998), pp. 113–232, at pp. 134–152, 195–232; Hillel Steiner, "Working Rights", in *A Debate Over Rights*, pp. 233–301.

[18] See H. L. A. Hart, "Legal Rights", pp. 174–181 (discussing Bentham's views); Neil MacCormick, "Rights in Legislation".

[19] Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986), p. 166.

covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed."[20]

The relative advantage of the will theory is that it seems to point to something distinctive about rights in a way that the interest theory does not. The disadvantages of will theories of rights include that (1) they seem to exclude or to treat as lesser forms of rights inalienable rights (including some constitutional rights or "human rights"), or rights held by infants or other legally incompetent persons; and (2) they seem less clearly applicable when talking about *moral* rights, as contrasted with legal rights (and thus are not good candidates for conceptual theories of "rights generally").[21]

Some scholars have tried to offer a third approach to rights, one which combines elements of the other two.[22] However, there remains significant doubt that this "third way" is in fact distinct and can offer advantages over traditional approaches.[23]

For most readers (and most commentators), the argument about a will theory of rights versus an interest theory is a somewhat dry analytical debate. However, Nigel Simmonds has argued that the debate is best understood as invoking broader conflicting ideas about the ordering of society. Under this view, will theories are grounded in a Kantian picture of society, in which principles of justice and the rules of society can be derived from Reason, and all citizens have equal rights. Public law is a small realm of collective choice, to be sharply distinguished from private law, where the choices of autonomous citizens were to be respected and enforced. By contrast, according to this view, interest theories reflect a vision that denies that all interests can be reconciled and rendered mutually consistent, and it thus must be left to positive law-making to impose a reasonable ordering of interests.[24]

OTHER TOPICS

10–04 There are a number of topics within the area of rights that I do not have time to consider here. A sample will give a sense of how wide (and deep) the discussion of rights can go. First, to what extent can or should an

[20] Hart, "Legal Rights", p. 183.

[21] Both will theories and interest theories can have trouble with third-party beneficiaries of transactions, depending on whether and when the legal system in question offers the right of enforcement to such beneficiaries. See, e.g. MacCormick, "Rights in Legislation", pp. 208–209.

[22] See, e.g., Gopal Sreenisavan, "A Hybrid Theory of Claim-Rights", 25 *Oxford Journal of Legal Studies* 257 (2005).

[23] Matthew H. Kramer and Hillel Steiner, "Theories of Rights: Is There a Third Way?", 27 *Oxford Journal of Legal Studies* 281 (2007).

[24] See generally Simmonds, "Rights at the Cutting Edge".

analysis of legal rights be the basis of a general theory of rights (which would include moral as well as legal rights)?[25] One peculiarity of legal rights is that lawmakers, in principle, can ascribe rights to any entity they wish—whether it is capable of choice, and whether it even currently exists. Legal agents or guardians can be empowered to enforce rights on behalf of corporations, infants, the permanently comatose, trees,[26] or future generations. One could, of course, dismiss some such situations as involving something that was not "really" a legal right, but here one must be careful not to beg the question (about the nature of legal rights) that is being asked.

Secondly, can a connection be drawn between rights, and the capability to have and claim rights, on one hand, and the intrinsic dignity of human beings and the respect due all human beings on the other hand?[27] Thirdly, Hohfeld's three-variable approach to legal rights to the contrary, does there remain a place and a need for a two-variable rights claim ("A has a right to X"), because there are exceptional cases of rights without correlative duties, because rights may be generative of duties in a case-by-case manner (a judge deciding in a particular case that *because* the plaintiff has a certain right, additional duties should be newly imposed on the defendants),[28] or because rights *in rem* are not properly analysable in terms of rights *in personam*?[29] Fourthly, to what extent does the recognition of rights or an emphasis on rights help or hinder the search for progress and social justice?[30] Fifthly, why are some interests and demands perceived as rights and others are not?[31] Sixthly, do (moral) rights sometimes entail a (moral) right to do wrong?[32]

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[25] See Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, Oxford, 1994), pp. 238–260.

[26] Cf. Christopher D. Stone, *Should Trees Have Standing?: Law, Morality and the Environment* (Oxford University Press, New York, 2010).

[27] See Joel Feinberg, "The Nature and Value of Rights", 4 *Journal of Value Inquiry* 19 at 28–29 (1970).

[28] See, e.g. MacCormick, "Rights in Legislation", pp. 199–202; Harris, *Legal Philosophies*, pp. 88–91; cf. Kramer, "Rights Without Trimmings", pp. 22–60, 101–111 (defending Hohfeld's analysis from a variety of attacks, and criticising various misunderstandings of Hohfeld).

[29] See J. E. Penner, *The Idea of Property in Law* (Clarendon Press, Oxford, 1997), pp. 23–31.

[30] This topic will be discussed briefly in the section on critical legal studies in Ch. 19; see also Morton J. Horwitz, "Rights", 23 *Harvard Civil Rights—Civil Liberties Law Review* 393 (1988); Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights", 22 *Harvard Civil Rights—Civil Liberties Law Review* 401 (1987).

[31] See, e.g. Alon Harel, "What Demands are Rights? An Investigation into the Relation between Rights and Reasons", 17 *Oxford Journal of Legal Studies* 101 (1997).

[32] See, e.g. Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, Cambridge, 1993), pp. 63–87 ("A Right to Do Wrong"); William A. Edmundson, *An Introduction to Rights* (2nd ed., Cambridge University Press, Cambridge, 2012), pp. 108–115 ("A Right to Do Wrong?").

Suggested Further Reading

Kenneth Campbell, "Legal Rights", in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/legal-rights/* (2017). **10–05**

William A. Edmundson, *An Introduction to Rights* (2nd ed., Cambridge University Press, Cambridge, 2012).

Alon Harel, "Theories of Rights", in Martin P. Golding and William A. Edmundson eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, Oxford, 2005), pp. 191–206.

H. L. A. Hart, "Legal Rights", in *Essays on Bentham* (Clarendon Press, Oxford, 1982), pp. 162–193.

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Carlos Nino ed., *Rights* (New York University Press, New York, 1992) (contributors include Robert Alexy, Neil MacCormick, Joel Feinberg, H. L. A. Hart and John Rawls).

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