Dudley Knowles

# POLITICAL PHILOSOPHY

Fundamentals of Philosophy
Series editor: John Shand

the purposes of this discussion since they do not amount to compulsion and control, to echo Mill. If governments could brainwash their citizens into looking after themselves better, that would count as paternalism, as does any policy which is intended to force all citizens to ameliorate their condition. Fluoridization of the water supply, as a strategy to improve *everyone's* (not just children's) teeth, would be an example. Second, the *main purpose* of the interference must be to prevent citizens harming themselves. If the intention of seat-belt legislation is to cut the costs of hospital treatment following road accidents, it is not paternalistic. If the desired effects of restrictions on smoking concern the comfort and good health of non-smokers, again the interference is not paternalistic.

Something like the law of double effect will be operating here, since in cases of this sort, those who are made to wear their seatbelts or limit their smoking reduce to some degree the likelihood of harm to themselves. And mention of the law of double effect should alert liberals to the possibility of hypocrisy. There are whole armies of folk desperate that others improve themselves and unconcerned that the objects of their sympathetic attention may balk at their mission. If, in the pursuit of their goal they can sneak their favoured proposals into the category of legitimate interference by the back-door citation of any small probability of harm to others, they will leap on the evidence to whitewash the coercion they believe to be warranted in any case.

Mill's instincts were sound; if the effects to be prevented can be inhibited by some other means less intrusive on the citizen's freedom, if drivers, for example, could be got to pay a premium on their insurance policies to cover the additional costs their choice of not wearing a seat-belt might impose on others (and if this option could be effectively enforced), one who goes down the route of universal coercion is acting in a paternalistic fashion. All too often, the intentions of would-be interferers is occult. Those who would manipulate our conduct willy-nilly are not likely to restrain their manipulation of the terms of the debate. Although paternalism is a characterization of the intentions or purposes of the interferer, those who oppose paternalism, as Mill did, have to identify it solely in terms of the likely effects of proposed policies, and the readiness of the proposers to consider alternatives. In any policy

debate which raises the spectre of paternalism, motives which are properly recognized as suspicious can rarely be challenged directly. Double-talk abounds, as well as double standards.

Here is a list of practices which have invited do-gooders to intervene on behalf of their benighted fellows: masturbation (doctors used to propose clitoridectomy for women self-abusers, and all manner of restraint for men), dangerous sports (boxing, notably, but never to my knowledge high-altitude mountaineering which until recently carried a one-in-nine chance of death per climber per expedition), gambling, smoking, drinking and drug-taking, eating ox-tail stew or T-bone steaks, driving cars without seat-belts, riding motorcycles without crash-helmets, suicide and consensually assisted euthanasia, incarceration of adults of unsound mind and prone to self-mutilation and injury. I have deliberately mixed up the daft, the controversial and the not-so-controversial, so as to prompt reflection amongst readers.

We know the *form* of the case that has to be made out for paternalistic interference because we find it readily justifiable in respect of children. When we lock the garden gate to prevent our children playing with the traffic, we suppose they are ignorant of the degree and likelihood of the danger. Or, if we have explained this carefully, we believe them prone to misjudgement in their evaluation of the likely costs and benefits. We insist that children attend school and force them to take nasty-tasting medicine. We prevent them harming themselves in the ways that their ignorance or poor judgement permits. As children mature, sensible parents allow them to take more decisions for themselves. Mistakes will be made, but one hopes that these will encourage the adolescent to develop the capacities necessary for prudence – a curiosity about the future effects on themselves of their conduct, the intelligence to investigate what these may be, sound judgement concerning the benefits of risky activities. These skills need to be cultivated through increasing the opportunities for their exercise. Then, hey presto, somewhere between 13 and 21 years of age, depending in most jurisdictions on the activity in question, adults emerge with the capacity to decide for themselves how best to pursue their own interests with whatever risk of harm to themselves.

At adulthood or thereabouts, there is a presumption that individual agents are in the best position to judge these matters – a

presumption we shall examine in due course. We suppose that grown-ups are in possession of all information germane to their decisions, but if this is arcane or technical, governments strive to make it widely available, to the point, as with tobacco smoking, of hitting folks over the head with it on every occasion of consumption. 'Preappointed evidence' was Bentham's term for this useful practice, approvingly cited by Mill.[67] We also suppose that grown-ups can evaluate the benefits of a risky activity, can achieve a reasonable measure of the worthwhileness for themselves of the sort of life they set about. Here there is less scope for preappointed evidence; the attractions of high-altitude mountaineering are likely to be a mystery to non-participants, not least to those who make some effort to comprehend them by reading the grim accounts of the activity which the mountaineers themselves provide – five weeks of hell-on-earth, then one beautiful sunset.

Is this presumption reasonable? With respect to the provision of information concerning the degree and probability of harm, countries like the UK with compulsory education to the age of 16, supplementing the advice of parents who for the most part wish their children to be safe, have plenty of opportunities for putting over appropriate messages. For the adult, preappointed evidence is ubiquitous as sports stars queue up for TV opportunities to convince us of the benefits of walking to work, and government health warnings are printed on billboards. Interestingly, Mill thought this principle should apply, too, to the dangers of drugs and poisons – as indeed it does, with appropriate doses and information concerning contra-indications being supplied with prescribed drugs. But 'Doctor Knows Best' is a safer policy for the majority of us who are pharmacologically challenged. Mill thought that 'to require in all cases the certificate of a medical practitioner would make it sometimes impossible, always expensive, to obtain the article for legitimate uses'.[68] Most contemporary readers will regard this as a prescription for a National Health Service, with readily available services free or cheap at the point of delivery, rather than a justification of self-prescription.

Matters are very different concerning the *value* of risky activities. Here, perforce, societies must leave most adults unprepared. Again, the example of mountaineering is instructive. Schools and

families can give children a taste of the experience, but this will be diluted in homeopathic proportions; taking children on mountains is not like a trip to the ballet. Risk, at least for the schools and public authorities who regard their involvement as educational, must be excised as far as possible; no wonder the glories are obtuse to the many who cannot imagine what the free and self-directed pursuit may be like.

Further difficulties concern activities whose point is forever opaque to non-enthusiasts. At least in the case of mountaineering, society has cast the gloss of adventure over the game, and the culture of stoicism and self-knowledge promises a glimmer of imaginative identification, though aspirants will probably find the outcome disappointing. But think of train-spotting, beetle-collecting or playing dominoes![69] If one doesn't *do* these things, how can one appreciate their value? Mercifully, the question of paternalism does not arise here since the hobbies I have mentioned do not generally harm their practioners. But what, for example, do we innocents make of the life of the alcoholic or drug-taker? I read William Burroughs's *Junkie* [70] as an advertisement for the liberated existence of the heroin addict. There is no conventional vice which does not have, or may not find, its literary, or theatrical, or painterly celebrant of self-destruction. If the glory of seeing a steam-driven Britannia class locomotive, charging down the line, is utterly opaque to us, what chance do we have of imagining the transcendent effects of a shot of heroin?

There is a respectable answer to this question. At the point of experimental choice, there can be more or less commitment. A decision to try the heroin may be the cause of one's foregoing future acts of choice.[71] It is unlikely that the sight of *Britannia* herself or the exhilaration of winning a clever game of dominoes will prove addictive. I guess it wouldn't matter if heroin addiction were as harmless as the universal human addiction to fresh air. But, at least in the dismal circumstances in which this addiction is generally pursued, it is hard to think of addiction as a worthy lifestyle choice as opposed to the dreadful consequence of an ignorant or careless mistake. Hard, but not impossible – which alternative signals the difficulty of paternalist intervention. It is a just about universal feature of human society that its worst features (extreme poverty, homelessness, loneliness) have prompted

personal strategies of self-oblivion which can be presented as perfectly rational in the awful circumstances.

It might be thought that paternalism, given the hostility to it which I have intimated, poses a particular difficulty to the account of liberty I have been developing. I argued, following Locke and Rousseau and, in modern times, Joseph Raz and Philip Pettit, that our liberty is not enhanced by the opportunity to do evil with impunity. In fact, concern for our moral liberty may lead us to endorse social constraints on our actions as the most effective means of self-discipline. From this point of view, one might judge that even laws which directly prevent harm to others, laws against theft, for example, have a paternalistic tinge if they are viewed as the outcome of citizens' desire that their resolve be bolstered in the face of temptation. This line of thought will positively encourage paternalistic interference, since it is predicated on a belief in its necessity.

I insist that the problem is not as severe as it appears. In the first place, this element of a theory of liberty must be placed alongside an insistence on a measure of political liberty as promoted by democratic institutions. Paternalistic interferences which are the product of rulers imposing their values on hapless citizens – as parents might regulate the conduct of their children – are not justifiable. The institutions of political decision-making must make it intelligible that citizens are imposing these limitations on themselves, however remote or indirect the mechanisms.

For some, the introduction of democracy onto the scene will make matters worse. Wasn't it the illiberal, tyrannical even, tendency of democratic egalitarianism to make everyone's lives their neighbours' business (and to put this prurient concern into social effect) that Mill noticed from de Tocqueville's writings on America which prompted him to write *On Liberty* ?[72] Don't both democratic institutions and the democratic temper encourage intrusive paternalistic practices? I am prepared to admit that they might. The sensitive liberal ear *burns* daily at the rhetoric of elected politicians who are desperate to keep their fellows on the straight and narrow to their evident benefit.

To some, this seems to be how they interpret the pursuit of the public good that they were elected to serve. No sooner are local councillors elected (on platforms such as reducing unemployment

or protection of the environment) than they enthusiastically set about censoring films, sitting on licensing committees and regulating the opening hours of clubs that young people attend. It never occurs to them that these matters may not be their proper business. Just this morning I heard a government (Home Office) minister on the radio announcing solemnly that a new system of on-line lotteries to be played in pubs represented a serious danger to the moral health of the nation. It *must* be investigated! The combination of alcohol and gambling is reprehensible and dangerous (everywhere, presumably, except the Royal Enclosure at Ascot). At no point in the discussion was the suggestion made that this sort of activity is outside the remit of government authority, that it represents an opportunity for pleasurable individual misbehaviour which should be immune to interference.

On the other hand, that democracies have developed in this intrusive fashion does not entail that they either must or should do so. Philosophical argument cannot of itself prevent the misuse of institutions – and even Mill's harm principle is just that: a *philosophical principle*. It is not a brick wall whereby households can be fenced off from their neighbours and all the coercive instruments of society at large. So we can insist, on the basis of a theory of liberty, that those who love liberty will not treat their fellow citizens as imbeciles whose lives are to be managed so as to prevent them harming themselves. In particular, having assured themselves that grown-ups have where possible all the information they need to make prudent choices, they will be cautious about restricting their fellows' engagement in risky activities since they will be humble about their own capacities to discern what good these activities serve. The democratic citizen who values liberty knows full well the difference between asking, of herself: Is this activity a temptation that I wish the state to assist me in controlling? and asking, in respect to others: Is this an activity that I wish to stop them pursuing? It is one lesson of Rousseau's doctrine of the general will, of which more later, that genuine democratic institutions require their participants to *think* along particular tracks. It is because he believes he addresses an audience who value liberty that he cannot accept that its members will violate each other's rights.

Finally, although we must acknowledge some space for paternal-

istic interference, we must insist that this does not give *carte blanche* to interfere to even the most straight-thinking, sound-valued *state*. Suppose I am correct to believe that I need the help of others if I am not to harm myself in ways I deplore but cannot avoid and I accept that self-discipline, on my part, requires social engagement. If one is alert to the facts of history concerning ambitious state projects of individual amelioration, projects ranging from Prohibition and temperance legislation to the War on Drugs (led in the UK at the moment by a *Drug Czar*!), one will recognize that the state is very good at creating criminals and not very good at changing their behaviour.

As we noticed before, we should worry about the effects of government interference, even where it is legitimated by the harm principle. First, it's likely to be inefficient, as claimed above; second, where it *is* efficient, we should consider the enervating effects of big government on the spirit and liveliness of the citizens.[73] Family, friends, self-help groups, churches even, represent better resources for the weak-willed than the agencies of the state. If the state has a role in enabling its citizens to conduct their lives in less self-harming ways, this duty may best be discharged, almost paradoxically, by state support of non-governmental agencies.

## Conclusion

There have been times when philosophers radically circumscribed their task. In the middle years of the twentieth century, some claimed, modestly, that the analysis and articulation of concepts was the proper task of philosophers, the limit of legitimate philosophical ambition. In this period, amongst these philosophers, it is fair to say that political philosophy suffered grievously, although the clarity and precision of this work affords an example of best practice in point of style, if not philosophical methodology. Berlin's work on liberty represented a notable advance on the prevailing standards of philosophical correctness. He showed that an important ethical concept is susceptible of (at least) two, and possibly two hundred, different analyses. There is no one coherent way of thinking about liberty; there are at least two – and these amount, each of them, to rich traditions, each tradition dissolving

into disparate components which challenge fellow contenders for the torch of 'the best way of thinking about the value of liberty'. As we have seen, Berlin has been criticized for the exclusiveness of his categories. Talk of 'negative' and 'positive' liberty occludes an underlying schema into which all mentions of liberty may be fitted. MacCallum's point may be taken as a legitimate demand on putative analysis, but Berlin's real purpose was to demonstrate the costly ethical commitments of one analysis against another – where each alternative satisfies the test of conceptual coherence.

If there are many ways of thinking clearly about liberty, as about democracy or justice, the important question concerns which way we are to select as most apt to characterize judgements about the importance of liberty as a political value. Which analysis, amongst the two (or twenty-two) available, best illuminates why so many people think liberty is worth striving for? The account I have been developing is complex – and these are its chief constituents. Basically, agents are free when they are not hindered in their pursuit of what they take to be the good life. Hindrances are to be construed widely. In a political, or more widely social context, they will include laws backed by sanctions as well as the coercive instruments of positive morality. But individuals can also claim to be unfree when governments in particular fail to empower them in sufficient measure to attain levels of accomplishment which are the necessary preconditions of a life which is authentically their own. In insisting that the object of liberty should be the pursuit of the good life, I mean to exclude from the value of liberty opportunities to do evil. I mean to include, not merely the wherewithal to pursue exalted ideals, but also the possibility of fashioning an autonomous track through the conflicting demands of various loyalties, interests and commitments. Political institutions can foster liberty on this capacious understanding in a range of ways. Democracy is necessary since for many a life of active political engagement is an important ingredient of the good, intrinsically a component of self-directed existence, as valuable in its fashion as the religious life or the life of artistic creation or appreciation. Democracy has instrumental importance since it enables the fastidious citizen to construct or embrace coercive measures which impose some discipline on her pursuit of worthwhile goals – where the imposition of such controls is a necessary supplement to her

solitary strivings. Whether such constraints are necessary is a matter of personal moral strength, but even where they are not, coercion is still necessary to fashion a space for unhindered activity secure from the interventions of others.

A sound theory of liberty should recognize the Janus-face of the criminal law in particular. It can serve as a protection, demarcating with the force of sanctions the boundaries which freedom requires if the pursuit of the good life is to be safe within them. Equally, though, and just as obviously, such laws can limit liberty, as they do when the prospect of punishment makes forbidden pursuits too costly to contemplate. If such pursuits are innocent or necessary for a worthwhile life, the law is acting as a limitation on freedom.

We have claimed that democracy is a necessary condition of political freedom, but as the author of coercive laws it is also a threat. And perhaps de Tocqueville was right: democratic legislatures, in their representative form through the operation of the mandate, are prone to operate capriciously in the lives of citizens, legislating to solve social problems without a thought as to whether intervention in specific areas of conduct is their proper task. To deal with this problem of overbusy legislation, as well as to curtail a society's moral instincts for self-repression, limits have to be drawn to the competence of agencies with the capacity to curtail agents' freedom. The most familiar ways of doing this are through the applications of principles which may or may not be given constitutional entrenchment. Mill's harm principle is one such; a principle of protected rights is another. This may be thought an alternative to the harm principle or else as a supplement to it. Other candidate principles have been examined, including principles of legal moralism and offence. I have argued that these are not independent principles. Either they are defective or best taken as appeals to the relevance of specific types of harm. The most difficult cases for the harm principle concern paternalistic interference. Here the concern to prevent agent's harming themselves cuts across the value of autonomy which is the deepest justification of free institutions. Formally, there is something odd about the application of a principle of autonomy to justify coercion. It may be necessary where a measure of coercion establishes the social conditions necessary for an autonomous life to be engaged –

as with children. With adults the situation is altogether different. Governments and citizens individually should be modest in respect of both their ambitions and effectiveness concerning the likelihood of their interference promoting the good of their helpless and obdurate fellow citizens.

## *Chapter 4*

# Rights

### Introduction

Nowadays the rhetoric of human rights seems to be just about universal. No tyrants, no autocracy, seem to be so benighted that they refuse, in public at least, to endorse the claims of human rights. In practice they may jail or torture political opponents, or refuse to educate women, but when applying for aid to the United Nations they will give solemn assurances that human rights are respected in their jurisdiction, respected at least as far as is practical under conditions of emergency, respected at least in point of intent: that when the current crisis has been alleviated, normal conditions will be swiftly resumed. 'Normal conditions', of course, will comprise the promotion and protection of a standard list of human rights. The 'standard list' is likely to be provided by the United Nations Universal Declaration of Human Rights or the European Convention for the Protection of Human Rights. If any political principles have been elevated to the pantheon of political correctness, to the point where denial of them taints the

innocent philosophical sceptic, human rights have. This makes it all the more important that we examine their philosophical credentials.

Human rights have acquired a quite unique standing amongst political values, partly as a consequence of this official international recognition. Initially, they could be easily listed – rights to life, liberty and property. In the American Declaration of Independence, 'the Pursuit of Happiness' was included; The Rights of Man as declared by the French Revolutionary Assembly incorporated rights to liberty, property, security and resistance to oppression. In the United Nations Charter and the European Convention, the so-called social and economic rights have been included, rights to health, education, welfare provision and much else. The call for rights has overstepped even these capacious boundaries, to the point where readers will encounter demands that a previously unheard-of human right be recognized just about every time they open a newspaper. The infertile claim a human right to give birth and the fertile claim a human right to abortion. The practice of installing prepayment meters for water has been denounced in the UK as the violation of the human right to a mains water supply.

Such claims may be made to sound silly. Sometimes they are. Most often, they suggest that their claimants are deriving the legitimacy of the demands they make or the illegitimacy of the practices they denounce from more general principles of rights. Either way the language of rights has become ubiquitous.

In the comfortable West, at least, a cynical reason for this may be offered – a reason that I don't feel qualified to assess. Cold War warriors, it has been suggested, feared the obvious attractions of communist ideology to the poor and starving of this world, for much the same reason that nineteenth-century British politicians feared calls for the extension of the franchise: calls for the end of private property as we know it invite the poor to trespass and help themselves. An alternative ideology was necessary to combat this malign doctrine and the theory of human rights fitted the bill nicely. Citizens of the West, it is suggested, have come to believe the propaganda of their own governments. Criticisms which are expressed in terms of a denial or violation of human rights have acquired a distinct potency. For all these reasons, it is

urgent that the political philosopher investigates closely the notion of human rights.

## Analysis and definition

### *Preliminaries*

The language of rights is lumbered with jargon – no bad thing if it serves a clear technical purpose. But the jargon has to be explained and clarified, and the task can be as nit-picking as any that philosophers have devised. Let us get down to it.

Our main focus will be on rights which are universal, universally claimed or universally ascribed, rights of the form that, if anyone has them, everyone does. These will be what the French declared to be the Rights of Man; often they have been described as natural rights. Hegel, for reasons I will return to later, called them abstract rights. The term 'human rights' is best, for two reasons: first, it connects with the language of the charters, declarations and conventions mentioned above which inscribe rights as a principle of international law. For better or worse, it is human rights to which these documents refer and so it is human rights that citizens claim against their governments. Second, the older term, natural rights, carries with it a distinct provenance. Natural rights, to simplify, were deemed natural because they were the product of natural law. What is natural law?[1] To many, it represented that law which God had prescribed as apt for creatures with natures like ours, those rules which God had determined that humans should follow if they are to fulfil the purposes He had laid down for them. If humans cannot be expected to fulfil their prescribed purposes unless they respect each others' claims of right, we have an argument that natural law sanctions natural rights. In a nut-shell, this is Locke's argument for natural rights.

It is a good argument, too – so long as one accepts the theological premisses. We cannot imagine how humankind might be the trustees of God's purposes without God granting them the necessary wherewithal, the moral space and essential resources required for their accomplishment. If God's prescription of the moral space of rights is necessary for His subjects to fulfil His

purposes, this severe injunction must bind not only persons who would wantonly interfere with each other's activity, but also the state, in particular, sovereigns, who were unaccustomed to finding normative limits to their exercise of absolute power.

However strong the argument, protagonists cannot expect it to find support from those who would deny, or remain agnostic, with respect to the theological premisses. A secular counterpart is evidently needed. Locke himself suggests that one is available when he insists that reason may be employed to derive the necessity and content of a system of rights – and this track will be followed later. For the moment we should recognize that talk of natural rights carries the transcendental, non-naturalistic, imprint of talk of natural law. If the whiff of sanctity is unattractive to many, there is little value in trying to spread it. That is the further reason why it is best to speak of human rights.

Human rights are a species of moral rights; generally, they register moral claims and are to be vindicated by moral argument. As such they have been contrasted with *legal rights*, which are the product of some specific legal system. This contrast in provenance may conceal a good deal of overlap. The law may recognize moral rights, embodying in statutes standard liberal rights – to free speech, freedom of association or religion or whatever. This recognition may take the form of the explicit incorporation of an international charter into a municipal legal system or it may be effected as specific proscriptions outlaw e.g. theft or unpermitted use of personal property. But not all moral rights may be recognized in particular legal systems. The legal systems may be defective. There may also be good reason, in particular cases, why moral rights should not be made legally enforceable. The ancillary costs of legislation and enforcement, including the augmentation of police powers, for example, may be too costly to bear. Most often, one who claims a moral right will demand that this right become a legal right, enlisting the powers of the state for their protection or the delivery of some resource, or else requiring the state to constrain itself in the delivery of other goods if these services would involve the violation of rights. But this distinction is worth marking, not least since it sets up for discussion Bentham's dismissal of talk of natural rights as nonsense.[2] Legal rights, by contrast, are the creations of legal systems.

The straightforward distinction of legal and moral rights occludes a further distinction between positive rights and what we may call critical rights, echoing H.L.A. Hart's distinction between positive and critical morality.[3] On this account, positive rights will be rights that are recognized within some appropriate system of actual, operative, rules. Legal rights are evidently positive rights, but other systems of rules may recognize rights claims. Thus religious rights may be positive, as when worshippers have the right to be married in church or buried in a churchyard. Positive rights may be assigned within the rules of games. If an opponent leads out of turn in a game of bridge, declarer has rights to require one of a range of optional continuations of play. Most confusingly, one may also speak of moral rights as positive rights in circumstances where a recognized system of moral rules entitles one to make a legitimate claim. Thus parents may claim a positive moral right to obedience from their children and children a positive moral right of independence upon reaching maturity. Where all parties agree that this is part of the system of domestic regulation which binds them, that this is how, in fact, morality works here, positive moral rights are being described. One may, of course, accept that a parent's moral right to beat her child is positively established within a given community without endorsing that system of positive morality, just as one may identify a legal rule which one judges to be iniquitous.

By contrast, critical rights are the rights that *ought* to be recognized, whether, as a matter of fact, they are recognized or not. It would be odd to claim a critical legal right. Why not state simply that the law ought to recognize such and such a right where, in fact, it does not? But there is logical space for such a locution. There is a special point for insisting on its application in the case of morality, since a system of positive morality may be criticized in respect of rights on two fronts: first, it may recognize rights which can find no critical endorsement. We can use again the example mentioned above. Parents may insist, wrongly, the critic protests, that they have the right to beat their children. The parents may be correct so far as the positive morality of their community is concerned. Third parties may judge that they do no wrong, perhaps that they should be praised even for not sparing the lash, not spoiling the child. The critic, on the other hand, judges that there is no

such critical moral right, that the practice of corporal punishment does not satisfy whatever tests critical reflection imposes – and, obviously, the critic may claim that the exercise of such a positive moral right violates a right not to be physically assaulted.

Second, critical reflection may support the case for rights which positive morality does not recognize. Where positive morality may grant parents a veto over the prospective marriage partners of their children, critics may demand that adult children have the critical moral right to decide these things for themselves, independently of parental permission. Of course, just as legal rights may coincide with moral rights, so may positive moral rights coincide with the rights demanded by a critical morality. In such cases, one acknowledges that the positive system of moral rights is in no need of repair.

One may think that this distinction – of positive and critical moral rights – is a distinction with a rationale but no purpose. Later in this chapter, we shall see that much hinges on the question of whether rights have some distinctive moral force. At that point, I shall insist that the distinction which I have just drawn is vital for a clear construal and successful answer to the question.

## *Hohfeld's classification*

Wesley Hohfeld's analysis of rights is an exemplary study in jurisprudence. Hohfeld's prime concern, as the title of his book, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, reminds us, was the understanding of fundamental legal concepts.[4] His analysis of rights was focused on legal rights, but it has proved useful to students of rights more generally. Basically, he claimed that the notion of a legal right was ambiguous, having four distinct senses. He himself believed the ambiguity was so endemic and productive of confusion that we should cease to speak of legal rights altogether. It is fair to say that his disambiguation was so successful, the lessons of his careful analysis so widely learnt, that this proposal has proved unnecessary.

### *Liberty rights or privileges*

When we say 'P has a right to *x*', we may mean no more than 'P has no duty not to *x*'. A right of this sort was termed a privilege by Hohfeld; others have termed it a bare liberty or a liberty right. The most important feature of such rights is that they are compatible with others acting in ways that prevent the bearer of rights from *x*-ing. The most famous example of a liberty right is that of Thomas Hobbes's right of nature, defined as 'the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own nature'.[5] Hobbes's point, in insisting that persons may use even one another's bodies, is that if one's life is at stake, all is permitted. It is rational to use others as a human shield, perhaps, when the bullets begin to fly. But if, for Hobbes, I do no wrong when I use your body in this way, you, equally, do no wrong when you resist (or duck). No one else has a duty to permit you to exercise the right. Suppose, as Locke believed, one has the right to labour on land that is unowned and thereby to bring it under ownership. This right, too, is a liberty right. Everyone has this right. If you reach the vacant land before I do, and work upon it productively, the land is yours, notwithstanding my efforts to claim it.

### *Claim rights*

Claim rights are undoubtedly the most important rights in political theory. On this understanding, one who asserts a claim right to *x*, claims that some other party has a duty to let him *x* or a duty to provide *x*. Thus 'P has right to *x*' entails that some Q (a specific agent, a government or, indeed, everyone) has the duty not to interfere with P's *x*-ing or a duty to provide *x*, where *x* is some good or service. Already we have introduced some complexity into the analysis, and this is worth teasing out.

Rights, we are often told, imply duties. Often, this is the barely concealed threat of the politician who wishes to instruct people that if they do not act responsibly and toe the line, rights will be withdrawn. For others, such a statement may be a gentle reminder that those who claim the moral stature of bearers of rights also have the stature of holders of responsibilities. In both cases, the

appearance of logic is doing swift service for what are, at bottom, substantial theses which require careful argument and considered application in the circumstances of their employment. It is at least open to argument that one may have rights but no duties. In essence, this is how Hobbes characterized the position of the sovereign *vis-à-vis* the citizens – the sovereign has rights against the citizens but no duties to them. The citizens have duties to the sovereign, but no rights, other than the residual right of nature, which they can claim against the sovereign who threatens their lives. This is as clear a characterization of absolute sovereign power as any. The thesis, Hobbes's thesis, that a rational agent would endorse this asymmetrical pattern of rights and duties, cannot be repudiated by any logical thesis to the effect that rights entail duties on the part of the rights holder.

In the case of claim rights, a clear logical thesis is available. Claim rights are, logically, correlative to duties. This correlativity thesis is what distinguishes claim rights from liberty rights. In the case where P's right to *x* entails a duty on the part of Q not to interfere with P's *x*-ing, we have a right of the classical liberal form, a right of non-interference. Thus one who claims a right of free speech claims that the state (and, no doubt, other citizens severally) have a duty not to prevent her making her opinions known to other citizens. They may not have a duty to listen, but they do have a duty not to shut her up. Rights of this sort have been termed negative rights and rights of action.[6]

By contrast, claim rights of provision (positive rights, rights of recipience) engage a different dimension of correlativity. This is the case where P's claim right to *x* imposes a duty of service on some Q. P's right that Q fulfil a contract is of this sort. Amongst human rights, such rights as those to education, decent working conditions and health-care impose a duty of service provision on the appropriate governmental (or international) agencies.

The correlativity of rights and duties in the case of claim rights should not be taken as a thesis asserting the analyticity of the corresponding claims concerning rights and duties. In insisting that P's claim right to *x* imposes a duty on some Q, we suggest (and most certainly do not preclude) a justicationary thesis to the effect that Q's duty may be derived from P's right, that P's right is the ground of Q's duty.[7] Exactly how the derivation may be

accomplished may be a complex issue. P's right may give rise to a range of duties distributed amongst different agencies.[8] My right to life imposes a duty on other persons not to kill me and perhaps a duty of care whenever others (in a manner not too costly to themselves) can prevent third parties killing me or, in Good Samaritan cases, give me necessary first-aid. This right may also impose a duty on the state to protect me against killers.

This cluster of distinctions (rights of non-interference vs rights of provision, rights of action vs rights of recipience, negative rights vs positive rights) has been the source of continued argument concerning human rights, not least since it has been related to the distinction of classical liberal rights from the social and economic rights promulgated in the 1948 UN Charter, and I shall return to it later. For the moment let us continue the task of charting the terminology appropriate for claim rights.

The next distinction to be uncovered is a point of jurisprudence, as signalled by the Latin vocabulary – the distinction between rights *in personam* and rights *in rem*. Rights *in personam* entail correlative duties on the part of assigned individuals. The classical example is that of the right of the creditor to the debtor's service. If you promised to pay me £100, I have the right, *in personam*, to claim the £100 from you. Rights *in rem* are rights claimable against anyone or any institution. My right to wander through the streets of Glasgow is a right I can claim against anyone who tells me to clear off, individuals or officials, a right against the world. Where human rights are concerned, rights of non-interference are generally rights *in rem* – rights claimable against anyone who may contemplate interference. Human rights *in personam* are hard to find, but there may be examples. The rights of children against their parents, to fostering care, may be an example. Certainly the duties of parents are not the same as the duties of citizens, although tax-payers may have a duty to foot bills for the costs of child-care where parents prove incapable of fulfilling their duties.

A last distinction has been usefully explored in recent years by Jeremy Waldron – that between *special* rights and *general* rights.[9] Special rights arise out of some contingent deed or transaction; the standard example, again, would be the rights arising out of a promise or contract. It is (just) imaginable that there could be a

world without promises. In which case, in this peculiar world, there would be no promisee's rights. If victims have a right to compensation from those who violate their rights, this right, too, would be a special right. It is contingent on the occasion of negligence or crime. General rights, by contrast, are not the product of contingencies. A person's right to life, violated by his murder, holds independently of anything that he may have done or suffered. It follows that general rights are universal. A right is general which 'all men have if they are capable of choice: they have it qua men and not only if they are members of some society or stand in some special relation to each other'.[10] An equally useful way of drawing this distinction is to equate special rights with *conditional* rights and general rights with *unconditional* rights. In fact, this second way of putting things strikes me as superior. It allows us to say that everyone has the right that promises to them be kept, subject to the condition that a promise has been made. Everyone has the right to compensation, subject to the condition that they have been injured.

These distinctions offer us a useful apparatus for characterizing philosophical disputes. But they are not sledgehammers designed to effect knock-down arguments, capable of silencing opponents by their sure-handed employment. Take the distinction of rights of non-interference and rights of provision. Some have insisted that genuine human rights are general rights holding *in rem*. This is unproblematic if one is characterizing the traditional liberal freedoms – the rights to life, free speech, association etc. . . . All persons may have them, claiming them against all others who may interfere. It is held, by contrast, that rights of provision, positive rights, in particular the social and economic rights recognized by the United Nations Charter, immediately give rise to problems. With rights of non-interference, everyone has a correlative duty not to interfere. With rights of provision, someone must have a duty to make available the goods and services claimed of right. But who, exactly?[11]

The wrong way to settle this issue is to insist that since genuine human rights are rights *in rem*, held against everyone, and since it is impossible to hold *everyone* responsible for the provision of the necessary goods, in the same way that everyone has a responsibility not to kill others, rights to the provision of goods and services,

such as the economic and social rights, cannot be genuine human rights at all. A proponent of economic and social rights may simply challenge the premiss that genuine economic rights are rights *in rem*. Clearly a lot of work has to be done in specifying exactly who or which agency has the duty to provide the goods demanded. In the case of the right to education, for example, duties may be assigned to parents, to tax-payers, to schoolteachers, to local authorities and the state, or to international, intergovernmental agencies. Everything depends on what the right to education is thought to entail in the particular circumstances.

It may look as though the lack of specificity here, in respect of the agent or agency against which the right is claimed, itself marks a striking contrast between rights of non-interference and rights of provision. But this would be a mistake. Take a standard negative right, what looks at first sight to be incontrovertibly a right of non-interference – the right to life, in pristine colours, construed as the right not to be killed, a right claimed against all others. In any realistic circumstances, one who claims such a right will not be satisfied with proscriptions that make it clear that one who violates such a right does wrong. She will require protections more solid than this. She will require, of her government, that such acts are declared illegal. Further, she will require that the institutions of government (in this case, primarily the police), take whatever actions are necessarary to protect her from potential violations. Against explicit threats to herself or to those of her sex, race, ethnic or religious community, special protection may be required. Against a background of general risk, she may demand that the agencies of the state undertake whatever preventive measures may best protect her and all others. Whatever the social background or perceived incidence of danger, citizens may demand institutions to back up the legal proscriptions designed to protect rights. They will insist upon courts of law to judge guilt and penal institutions to inflict whatever punishments the courts deem appropriate. Just as soon as one begins to specify the form of institution required to achieve protection, to guarantee as far as possible the moral space required to pursue whatever activities one claims to be legitimate as of right, one is committed to the provision of resources to finance the protective activities. Characteristically, rights of non-interference are claimable both *in rem*, against all and sundry who