

ARTICLES

THE LEGAL RIGHTS DEBATE IN ANALYTICAL JURISPRUDENCE FROM BENTHAM TO HOHFELD*

JOSEPH WILLIAM SINGER**

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I dedicate this work to my friend Marcel Pallais Checa (1955-1979) and to the Nicaraguan Revolution for which he gave his life. My friend believed that it was possible to end the human misery in his country, to reconcile power and the good. He did something terribly difficult, which was not for himself alone.

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** Associate, Palmer & Dodge, Boston, Massachusetts. B.A. Williams College, 1976; M.A. (Political Science) Harvard University, 1978; J.D. Harvard Law School, 1981; Clerk for Justice Morris Pashman (Supreme Court of New Jersey) 1981-1982.

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INTRODUCTION

*If I will not be for myself—who will be?
And if I am only for myself—what am I?*¹

Hillel

*The Problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.*²

Jean-Jacques Rousseau

*The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act, as the destroyer of liberty. . . Plainly the sheep and the wolf are not agreed upon the definition of the word liberty.*³

Abraham Lincoln

In 1913, Wesley Newcomb Hohfeld published his famous article in the *Yale Law Journal* on fundamental distinctions among types of legal rights.⁴ To the modern reader, Hohfeld's analysis appears at once pathbreaking and naive. At the time of its publication the article generated similarly contradictory reactions. His analysis was regarded by some as a brilliant innovation and by others as a perpetuation of the old conceptualist nonsense.

Hohfeld's article is a landmark in the history of legal thought. I propose to explicate the significance of Hohfeld's scheme by placing

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1. HILLEL, as quoted in *A TREASURY OF JEWISH FOLKLORE* 105 (N. Ausubel ed. 1948).
 2. J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 13-14 (Everyman's ed. 1950).
 3. A. LINCOLN, as quoted in L. HUBERMAN & P. SWEEZY, *INTRODUCTION TO SOCIALISM* 77 (1968).
 4. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913) [hereinafter cited as Hohfeld, *Legal Conceptions*].

it in historical context. This will demonstrate that Hohfeld's analysis is the culmination of a long debate within analytical jurisprudence about the meaning of legal liberties and legal rights. Hohfeld did not merely correct a minor technical error but offered a radical critique of the liberal ideal of a legal system based on reasoning from rights. Hohfeld effectively annihilated both the Benthamite and Austinian views of legal rights and liberties. Yet neither he nor anyone else to the present day has offered a satisfactory alternative.

I will begin in Part I by describing the fundamental contradiction in liberal political theory. I will argue that legal theorists seek to resolve it by inventing techniques of argumentation that lessen the sense of contradiction. I will then summarize the particular techniques used by analytical jurists to mediate the contradiction in liberal theory, and the development of these techniques from the late eighteenth to the early twentieth century.

Part II will describe Hohfeld's system of definitions of legal conceptions and their relation to the predicament of liberal legal theory. Part III will describe in detail the meta-theory of self-regarding acts invented by the classical analytical jurists of the late eighteenth century and the first half of the nineteenth century. This meta-theory served to legitimate the existing legal system by describing and justifying the legal rules in a way that appeared to resolve the contradiction in liberal thought. This discussion will suggest the shortcomings of the classical theory and the areas in which it was most vulnerable to attack. The single greatest fault of the classical theory was its inability to cope with the problem of damage without legal redress or *damnum absque injuria*.

Part IV will describe the technique of conceptualism used by some of the classical jurists. This technique further legitimated the legal system by making the application of the self-regarding theory appear to be a matter of objective logic rather than partisan politics.

Part V will describe in detail the treatment of *damnum absque injuria* in the second half of the nineteenth century by the critics of the classical theory. I will also describe the process by which they slowly chipped away at both the self-regarding theory and its companion technique of conceptualism.

Finally, in Part VI, I will argue that Hohfeld's article is significant because it represents the complete rejection of the meta-theory of self-regarding acts as a means to describe or justify the legal system. His analysis is also an important element of the legal realist assault on conceptualism. Hohfeld not only re-exposed the fundamental contradiction in liberal political theory, but offered a method of critique that could be used to attack future efforts to re-

solve the contradiction by revival of the classical sophistry.

I. THE PREDICAMENT OF LIBERAL LEGAL THEORY

A. *Contradiction and Mediation*

Liberalism is the invitation to act in a self-interested manner, without impediment from other people, as long as what we do does not harm them.⁵ This political theory is founded on a contradiction. We want freedom to engage in the pursuit of happiness. Yet we also want security from harm. The more freedom of action we allow, the more vulnerable we are to damage inflicted by others. Thus, the contradiction is between the principle that individuals may legitimately act in their own interest to increase their wealth, power, and prestige at the expense of others and the principle that they have a duty to look out for others and to refrain from acts that hurt them. Since liberal citizens are motivated by self-interest, the only way to achieve security is to give power to the state to limit freedom of action. The contradiction between freedom of action and security therefore translates into the contradiction between individual rights and state powers. We must determine the extent to which individual freedom of action may legitimately be limited by collective coercion over the individual in the name of security.⁶

Liberal theorists, both legal and otherwise, have always claimed that the fundamental contradiction is illusory. There are, after all, at least three logical answers to a dilemma.⁷ The first two possibilities involve characterizations of the two horns of the dilemma in ways that deny that they are incompatible. For example, one may define freedom of action or legal liberty in a way that negates the proposition that it inevitably puts the security of others at risk. On the other hand, rights of security may be conceived in a manner that both makes them appear to be absolute and negates the proposition that they restrict the legitimate freedom of action of others. Thus if we define liberty as free actions that do not affect others at all, and rights as absolute protection from harm, the contradiction vanishes. This method of mediating the contradiction

5. See J. S. MILL, *ON LIBERTY* 70-86 (Norton ed. 1975); T. HOBBS, *LEVIATHAN* 189-90 (Penguin ed. 1976); J. ROUSSEAU, *supra* note 2; C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1-4 (1964); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968).

6. J.S. MILL, *supra* note 5, at 10-11; Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205, 209-13 (1979) [hereinafter cited as Kennedy, *Blackstone's Commentaries*]; R. UNGER, *LAW IN MODERN SOCIETY* 128 (1976).

7. R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 224-25 (1974).

seeks to identify objectively and to separate the two contradictory concepts through some overriding principle. Such a method denies that either of the categories implicates the other at all.⁸

The third answer to a dilemma is to generate a middle position. This can be done, for example, by employing balancing tests or a utilitarian calculus, or by identifying other criteria such as intent or fault that seem to bridge the gap between the two principles and to provide guidance in choosing between the seemingly irreconcilable opposites.⁹

These methods of mediating the fundamental contradiction seek to provide a meta-theory that can guide the rulemaker in choosing between the contradictory theories of freedom of action and security in particular instances. Such a theory is necessary in a liberal world because both the plaintiff and the defendant operate in a self-interested manner. The plaintiff claims that her security has been invaded by the harmful acts of the defendant. The defendant will respond that she is privileged to inflict the damage because to forbid her from doing so would illegitimately constrict her legal liberty. The purpose of a meta-theory is to provide a way to decide in particular cases which of the parties is right and which is wrong.

Public law theories address the appropriate power of the state. The state must have sufficient power over the lives of individual citizens to prevent them from acting in ways that illegitimately harm others. In this way the state prevents the domination of private individuals over each other thought to characterize the state of nature. At the same time, state power should itself be limited to prevent it from illegitimately restricting individual freedom more than necessary to achieve the desired level of security. Thus, public

8. The reliance on categorization and deductive logic to resolve the contradiction between freedom of action and security can easily be adapted to either natural rights theories or analytical positivism. Whether the starting point is natural law or analytical concepts in positive law, the method relies on logic to categorize the two horns of the dilemma in a way that resolves the contradiction.

9. These three answers to the dilemma depend on logic. The fourth answer, of course, is to refuse to enter the arena of logic. Reconciliation exists, if at all, outside the realm of reason. One might assert that morality has little to do with logic or consistency, but arises out of human emotions and experiences rather than logical analysis. This would not mean (as is often thought) that morality is essentially arbitrary. Our emotions and preferences are in fact not completely arbitrary; we tend to hold certain moral beliefs about torture, for example, with somewhat more conviction than, say, our favorite food. See B. MOORE, REFLECTIONS ON THE CAUSES OF HUMAN MISERY AND UPON CERTAIN PROPOSALS TO ELIMINATE THEM 1-13 (1972).

A fifth answer to the dilemma would be to deny that it accurately depicts the available choices. For example, Aristotle claimed that human freedom consisted not of a proper division between freedom of action and security, but acting in accord with moral law to perfect one's human nature. See ARISTOTLE, POLITICS 234 (Oxford ed. 1975).

law must also address the need to prevent public domination by an oppressive state.

Public law theorists jump back and forth between two types of theories. Sometimes they use natural rights, social contract, or utilitarian arguments to invent theories of individual constitutional rights against the state. These theories define individual interests that are to be preserved from invasion by a predatory government. At other times, these theorists seek to fragment state power to make it less threatening. This is done either through federalism—dividing power between the states and the federal government—or separation of powers between the various branches of government. In either case, power is given to some governmental entity to protect citizens from being oppressed by another part of the state.

Private law theories ignore the state and focus on the appropriate legal relations between private citizens. Whether these relations are basically conflictual, as Thomas Hobbes and Niccolo Machiavelli thought, or basically harmonious, as John Locke and Adam Smith thought, the goal is an ordering of private relations that allows great freedom of action without sacrificing security. However, as Abraham Lincoln suggested in his story of the sheep and the wolf, liberal citizens find it impossible to agree on the criteria for determining the appropriate limits to legal liberty. To solve this problem, private law theorists invent arguments that appear to resolve the contradiction by neutral principles that transcend the bounds of self-interest.

The basic contradiction between freedom of action and security may be expressed in its systematic as well as its particular aspect. Liberalism consists of the contradictory principles of property and competition.¹⁰ The legal system operates on the one hand to maintain the value of property interests by securing those interests from invasion by others. On the other hand, it allows the value and distribution of property ownership to be determined by competition in the marketplace. Thus a property owner, under the rule of law, is protected in some ways and vulnerable in others.

The contradiction between property and competition may be generalized to describe the legal system as a whole. The legal system may be characterized by two broadly competing models which I will

10. Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 6 (1894):

Take the case of advice not to employ a certain doctor, given by one in a position of authority. To some extent it is desirable that people should be free to give one another advice. On the other hand, commonly it is not desirable that a man should lose his business. The two advantages run against one another, and a line has to be drawn.

call the model of the rule of law and the model of the marketplace.

The model of the rule of law describes the legal system in terms derived from social contract theory. The purpose of the legal system, under this view, is to replace the anarchic, violent, and insecure state of nature with a system that provides security for life, liberty and property while allowing full freedom of individuals to engage in the pursuit of happiness, subject to the duty not to harm others. The image of individual freedom and security depends on a lack of concentration of power in the public or private sphere. The state alone has the power to use force to compel individuals to act in certain ways. It acts through the legal system and is informed by some theory such as natural rights or utilitarianism. Such state actions are legitimate because they prevent private individuals from dominating each other. At the same time the state acts according to a system of rules to prevent private domination, it adheres to rules that limit its exercise of power. Thus the legal system prevents private domination without allowing the state to fall into the role of oppressor.

The most salient aspect of the model of the rule of law is that it characterizes life under the legal system as harmonious and egalitarian. Even the marketplace may be described as a realm of voluntary exchange in which individuals freely engage in transactions that redound to the benefit of everyone. If this image is believed, then such a system makes life secure, gentle, serene.

The model of the marketplace, on the other hand, characterizes life under the legal system as a process of competition and struggle. This view is applicable not only to the economic realm, but to the realm of ideas and the realm of politics. The purpose of the marketplace is to choose winners and losers in the struggle for wealth, power and prestige. The competition takes place according to certain rules, to be sure, but it is a realm of conflict, hierarchy and class division. The model of the marketplace is legitimated by the belief that the winners deserve to win and that the whole society is better off because of the individual striving that the marketplace generates. Nonetheless, power becomes concentrated in such a system. And along with the winners, such a system produces victims.

Our legal system sometimes allows conflict to occur and sometimes prohibits that conflict in the interest of harmony. Some types of conflict are good either in their own right or because of their beneficial consequences. However, people do not agree on which types of conflict are good and which are bad. They cannot even agree on whether a particular interchange represents a free and voluntary interaction between equal individuals or an illegitimate and oppres-

sive exercise of power by one person over the other. This is the problem of the wolf and the sheep.

Legal theorists hope to give advice to the shepherd to decide between conflicting claims of freedom and security. They have therefore invented various techniques to lessen the sense of contradiction between the model of the rule of law and the model of the marketplace as descriptions of the legal system under which we live. The classical jurists proposed analytical systems that mediated the contradiction by describing the legal system in a way that obscured the extent to which it allowed conflict and damage without legal redress. This article is the story of the invention and destruction of that form of mediation.

B. Analytical Jurisprudence

Analytical jurisprudence began as an effort to express clearly the formal concepts used by judges and lawyers in legal reasoning. The central issue in the history of analytical theory is the debate about the definitions of legal rights and legal liberties. Although the jurists claimed that their definitions of legal conceptions were merely formal, those definitions had substance built into them. The history of analytical definitions of rights and liberties is best understood as the construction of a theory whose purpose was to mediate the fundamental contradiction between freedom of action and security. The jurists did this by describing and implicitly justifying the legal rules in force in ways that lessened the sense of contradiction.

The classical analytical jurists, such as Jeremy Bentham, John Stuart Mill and John Austin, invented a meta-theory based on the distinction between self-regarding and other-regarding acts. They asserted that legal liberties were permissions by the sovereign to engage in self-regarding acts. People were free to do anything that did not hurt others. To the extent a person's acts were conceived to be harmful to others, they were prohibited. This theory boldly asserted that it was possible to create a set of legal rules that would allow individuals great freedom to act in a self-interested manner without exposing them to harm inflicted by others. The classical writers also asserted that since liberties involved merely self-regarding acts, the legal system imposed duties on others not to interfere with the permitted acts. The actions that were permitted were also thought to be protected against interference by others.

By adopting the meta-theory of self-regarding acts as a legitimating principle for the rules in force, the classical jurists gave scant attention to the problem of *damnum absque injuria*, damage

for which there is no legal redress. The classical descriptions of the legal system minimized the extent to which the legal system allowed people to harm each other. They also minimized the extent to which the legal system allowed people to interfere with the permitted acts of others. The classical school is represented not only by Mill, Bentham and Austin, but by Henry Terry, John Salmond, Frederick Pollock, Sheldon Amos, Christopher Columbus Langdell and John Chipman Gray. It stretches from roughly 1780 to 1910, with its heyday in the latter half of the nineteenth century.

The modern jurists criticized the old distinctions and definitions. They rejected the utility of defining liberties as permissions to engage in self-regarding acts. They recognized that much of the legal system consisted of rules that allowed people to harm others. They realized that certain interests received no protection whatever from the legal system and that others were protected only to some extent. It became the dominant view that there were limits to the protection granted virtually every legally protected interest. The modern jurists' efforts to recognize and understand *damnum absque injuria* focused on harms allowed in the course of economic competition and harms allowed in the absence of the requisite intent or negligence that would have made them actionable. They came to believe that the meta-theory of self-regarding acts was not only a false description of the legal rules but that it was bad policy. There were good reasons to allow people to act in ways that harmed the interests of others.

While the classical jurists focused on the security and individual freedom offered by the rule of law, the modern critics focused on its victims. Because they recognized that the law creates losers as well as winners, they criticized and finally rejected the classical theory. The modern credo held that to the extent others have legal liberties, one has no security. The ideological message was completely the reverse of the classical message. The modern writers who invented this new theory wrote from the 1870's to roughly 1920. They include Oliver Wendell Holmes, Henry Terry, Edward Weeks and John Salmond. The modern theory culminated in Wesley Hohfeld's famous article in 1913.

The legal rights debate is the story of the rise and fall of the meta-theory of self-regarding acts. In the process of criticizing the meta-theory, the modern writers also attacked the various errors of conceptualism with which that meta-theory had slowly become embroiled. This article is a history of that meta-theory and the criticisms of it that culminate in Hohfeld.

II. HOHFELD'S SYSTEM

A. *Fundamental Legal Conceptions*

Hohfeld identifies eight basic legal rights: four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities). "Rights" are claims, enforceable by state power, that others act in a certain manner in relation to the rightholder. "Privileges" are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. "Powers" are state-enforced abilities to change legal entitlements held by oneself or others, and "immunities" are security from having one's own entitlements changed by others.

The four negations or opposites of the primary legal entitlements refer to the absence of such entitlements. One has "no-right" if one does not have the power to summon the aid of the state to alter or control the behavior of others. "Duties" refer to the absence of permission to act in a certain manner. "Disabilities" are the absence of power to alter legal entitlements and "liabilities" refer to the absence of immunity from having one's own entitlements changed by others.

The eight terms are arranged in two tables of "correlatives" and "opposites" that structure the internal relationships among the different fundamental legal rights.¹¹

JURAL OPPOSITES

right	privilege	power	immunity
no-right	duty	disability	liability

JURAL CORRELATIVES

right	privilege	power	immunity
duty	no-right	liability	disability

Hohfeld's concept of "opposites" conveys the message that one must have one or the other but not both of the two opposites. For example, with regard to any class of acts one must either have a right that others act in a certain manner or no right. Similarly, one must have either a privilege to do certain acts or a duty not to do them.

11. See Hohfeld, *Legal Conceptions*, *supra* note 4, at 30.

The concept of “correlatives” is harder to grasp. Legal rights, according to Hohfeld, are not merely advantages conferred by the state on individuals. Any time the state confers an advantage on some citizen, it necessarily simultaneously creates a vulnerability on the part of others. Legal rights are not simply entitlements, but jural relations. Correlatives express a single legal relation from the point of view of the two parties. “[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”¹² If A has a duty toward B, then B has a right against A. The expressions are equivalent. Rights are nothing but duties placed on others to act in a certain manner. Similarly, privileges are the correlatives of no-rights. “[W]hereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or in equivalent words, X does not have a duty to stay off.”¹³ If A has no duty toward B, A has a privilege to act and B has no right against A. Thus, if A has the privilege to do certain acts or to refrain from doing those acts, B is vulnerable to the effects of A’s actions. B cannot summon the aid of the state to prevent A from acting in such a manner no matter how A’s actions affect B’s interests.

Hohfeld’s central goal was to clarify the fundamental difference between legal liberties and legal rights.¹⁴ He criticized his predecessors for not understanding the “fundamental and important difference between a right (or claim) and a privilege [or liberty].”¹⁵

12. *Id.* at 32.

13. *Id.*

14. I will use the terms “privileges” and “liberties” interchangeably since in the Hohfeldian analysis, they occupy the same structural position. The usual distinction is that liberties are acts that are completely unregulated and privileges are exceptions to generally imposed duties. See 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 16 (1863).

Hohfeld also found it important to distinguish between privileges and powers. Powers are not mere legal liberties, as the old phrase “freedom of contract” implied. What is important about the power to make a contract or to eject a trespasser is not just that one has no duty not to do so, or that others have duties not to interfere, but that the state will enforce the contract or the ejection. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799, 817 (1972) [hereinafter cited as Hart, *Legal Powers*]. Enforcement of contracts does not merely ratify the results of individual will; it chooses whose will to enforce by overriding the will of the one who breached the contract. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933). One can imagine a legal system in which there were privileges to make contracts, but no powers. Contracts—agreements for consideration—could be made, but they could also be breached with impunity. Current contract law permits some agreements and promises, such as promises to make gifts or contracts without consideration, but will not enforce them. It is simply not true that all private arrangements altering legal entitlements that are permitted by the state will also be enforced by courts.

15. Hohfeld, *Legal Conceptions*, *supra* note 4, at 33.

The classical analytical jurists, like Thomas Holland, John Chipman Gray and John Austin, were correct to deduce duties from rights since they express the same legal relation. Rights are nothing but duties on others. However, they were wrong to deduce duties from mere privileges or liberties. It is not true that merely because one has the legal liberty to do an act that others have legal duties not to interfere with the permitted act.

Hohfeld commented on an example given by John Chipman Gray. Gray wrote:

The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to each shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic.¹⁶

Hohfeld commented that this description of the property right fails to distinguish between rights and liberties and that it is a logical error not to do so.

These two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not. A, B, C, and D, being the owners of the salad, might say to X: "Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you." In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated.¹⁷

X's legal liberty to eat the salad may be accompanied by a duty on others not to interfere. However, one does not necessarily always have both a liberty and a right. Others may have liberties as well. Notice also that the example Hohfeld gave is one of conflicting liberties. A gives X permission to take the salad if she can. A then proceeds to try to prevent X from eating it. A's privilege to keep the salad conflicts with X's privilege to take it.

Just as privileges do not imply rights, rights do not imply privileges. A's right to keep trespassers off her land does not necessarily imply a privilege in A to use the land. Thus one might conceive of a remainderperson who has no liberty to enter the land but retains a right to keep trespassers off. Rights do not necessarily imply privileges any more than privileges imply rights. Everyone may have a duty to stay off the land or to refrain from eating the salad.

16. *Id.* at 34 (quoting J. GRAY, *THE NATURE AND SOURCES OF THE LAW* § 48 (1909)).

17. *Id.* at 35.

The importance of the distinction between privileges and rights can be illustrated by Walter Wheeler Cook's discussion of the 1917 United States Supreme Court case *Hitchman Coal & Coke Co. v. Mitchell*.¹⁸ In that case, an employer sought an injunction to prevent a union's attempt to organize certain mines. The Court assumed that the employer's legal liberty to employ nonunion labor implied a duty on the union not to try to unionize the employees.¹⁹ Cook argued that this reasoning confused rights and liberties. The employer had a *privilege* to hire nonunion labor; it was not unlawful to do so. However, this did not necessarily imply a *right* to hire nonunion labor with accompanying duties on others not to interfere with the privilege. Cook argued that the Supreme Court relied on precedents that gave employers mere liberties to hire nonunion labor to conclude they also had a right against interference by the union.²⁰ Legal liberties are not necessarily accompanied by duties against interference. Moreover, Cook argued that "it does not follow that, because some acts of interference with the enjoyment of the benefits of a lawful agreement are unlawful, all acts of interference are necessarily prohibited."²¹ The employer has privileges but so may unions. The employer's liberty to employ nonunion labor may coexist with the union's liberty to organize the employees.

B. Hohfeldian Debate

Hohfeld's discussion created quite a stir among legal scholars. In the decade that followed publication of his famous article, dozens of commentaries were written on it. Defenders of Hohfeld battled with his critics. There seemed to be no agreement on whether, or why, Hohfeld's analysis was important. The Hohfeldian debate was exceedingly complex and picayune.²² It would be exhausting and

18. 245 U.S. 229 (1917).

19. Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779, 787-90 (1918) [hereinafter cited as Cook, *Labor Unions*]; Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in READINGS IN JURISPRUDENCE 484, 485 (J. Hall ed. 1938) [hereinafter cited as Cook, READINGS].

20. Cook, *Labor Unions*, *supra* note 19, at 779, 790-93.

21. *Id.* at 788.

22. Carleton Allen has written of the debate about Hohfeld that "the subject is, in my opinion, one of the most complex in legal analysis." Allen, *Legal Duties*, 40 YALE L.J. 331, 351 (1931). A more or less complete list of articles pertaining to the legal rights debate follows: Allen, *Legal Duties*, 40 YALE L.J. 331 (1931); Bingham, *The Nature of Legal Rights and Duties*, 12 MICH. L. REV. 1 (1913); Clark, *Relations, Legal and Otherwise*, 5 ILL. L.Q. 26 (1922); Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919); Cook, *Labor Unions*, *supra* note 19; Cook, READINGS, *supra* note 19; Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); Corbin, *Legal Analysis and Terminology*, in

fruitless to recount it in detail. I have therefore abstracted two basic controversies, around which much of the technical disputes

READINGS IN JURISPRUDENCE 471 (J. Hall ed. 1938); Corbin, *Offer, Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917); Corbin, *Rights and Duties*, 33 YALE L.J. 501 (1924); Corbin, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 607 (1921); Corbin, *What is a Legal Relation?* 5 ILL. L.Q. 50 (1922); Dainow, *The Science of Law: Hohfeld and Kocourek*, 12 CAN. B. REV. 265 (1934); De Sloovere, *Analytical Jurisprudence as Related to Modern Legal Methods*, 9 N.Y.U. L.Q. REV. 407 (1929); Dickey, *Hohfeld's Debt to Salmond*, 10 U.W. AUSTR. L. REV. 59 (1971); Dowdall, *The Present State of Analytical Jurisprudence*, 42 LAW Q. REV. 451 (1926); Gobel, *Affirmative and Negative Legal Relations*, 4 ILL. L.Q. 94 (1921); Gobel, *Negative Legal Relations Re-examined*, 5 ILL. L.Q. 36 (1922); Gobel, *A Redefinition of Basic Legal Terms*, in READINGS IN JURISPRUDENCE 516 (J. Hall ed. 1938); Gobel, *The Sanction of a Duty*, 37 YALE L.J. 426 (1928); Gobel, *Terms for Restating the Law*, 10 A.B.A. J. 58 (1924); Green, *The Relativity of Legal Relations*, 5 ILL. L.Q. 187 (1923); Harno, *Tort-Relations*, 30 YALE L.J. 145 (1920); Hart, *Bentham*, in JEREMY BENTHAM: TEN CRITICAL ESSAYS 73 (B. Parekh ed. 1974); Hart, *Bentham and the De-Mystification of the Law*, 36 MOD. L. REV. 2 (1973); Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799 (1972); Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 171 (A. Simpson ed. 1973); Hart, *Bentham and the United States of America*, 19 J. L. ECON. 547 (1976); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Hohfeld, *Legal Conceptions*, *supra* note 4; Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Husik, *Hohfeld's Jurisprudence*, 72 U. PA. L. REV. 263 (1924); James, *Bentham on the Individuation of Laws*, 24 N. IR. L.Q. 357 (1973); James, *Bentham and Legal Theory*, 24 N. IR. L.Q. 267 (1973); Kocourek, *Acts*, 73 U. PA. L. REV. 335 (1925); Kocourek, *The Alphabet of Legal Relations*, in READINGS IN JURISPRUDENCE 509 (J. Hall ed. 1938); Kocourek, *Attribution of Physical Qualities to Legal Relations* (pts. 1-2), 19 ILL. L. REV. 435, 542 (1925); Kocourek, *Basic Jural Relations*, 17 ILL. L. REV. 515 (1923); Kocourek, *The Century of Analytic Jurisprudence since John Austin*, in 2 LAW: A CENTURY OF PROGRESS: 1835-1935 195 (1937); Kocourek, *Classification of Jural Interrelations*, 1 B.U.L. REV. 208 (1921); Kocourek, *The Hohfeld System of Fundamental Legal Conceptions*, 15 ILL. L. REV. 24 (1920); Kocourek, *Juristic Knots and Nots*, 19 ILL. L. REV. 80 (1924); Kocourek, *Nomic and Anomic Relations*, 7 CORNELL L.Q. 11 (1921); Kocourek, *Non-Legal Content Relations*, 4 ILL. L. Q. 233 (1922); Kocourek, *Non-Legal Content Relations Revisited*, 5 ILL. L. Q. 150 (1923); Kocourek, *Plurality of Advantage and Disadvantage in Jural Relations*, 19 MICH. L. REV. 47 (1920); Kocourek, *Polarized and Unpolarized Legal Relations*, 9 KY. L.J. 131 (1921); Kocourek, *Reply to Paper of Professor Corbin*, 4 AM. L. SCH. REV. 614 (1921); Kocourek, *Rights in Rem*, 68 U. PA. L. REV. 322 (1920); Kocourek, *Tabulae Minores Jurisprudentiae*, 30 YALE L. J. 215 (1921); Kocourek, *Various Definitions of Jural Relation*, 20 COLUM. L. REV. 394 (1920); Kocourek, *Wanted: A Lawyer's Phrase for Legal Capabilities and Constraints*, 9 A.B.A. J. 25 (1923); Kocourek, *What is Liberty?* 15 ILL. L. REV. 347 (1920); Langdell, *Classification of Rights and Wrongs* (pts. 1-2), 13 HARV. L. REV. 537, 659 (1900); Lysaght, *Bentham on the Aspects of a Law*, 24 N. IR. L.Q. 383 (1973); Lyons, *Logic and Coercion in Bentham's Theory of Law*, 57 CORNELL L. REV. 335 (1972); Page, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 616 (1921); Patterson, *Bentham on the Nature and Method of Law*, 33 CAL. L. REV. 612 (1945); Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557 (1937); Pound, *Legal Rights*, 26 INT'L J. ETHICS 92 (1915); Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909); Pound, *The Progress of the Law: Analytical Jurisprudence, 1914-27*, 41 HARV. L. REV. 174 (1927); Radin, *A Restatement of Hohfeld*, in READINGS IN JURISPRUDENCE 501 (J. Hall ed. 1938), originally in 51 HARV. L. REV. 1141 (1938); Randall, *Hohfeld on Jurisprudence*, 41 LAW Q. REV. 86 (1925); Terry, *The Arrangement of the Law* (pts. 1-2), 17 COLUM. L. REV. 291, 365 (1917); Terry, *Arrangement of the Law*, 15 ILL. L. REV. 61 (1920); Terry, *Duties, Rights, and Wrongs*, 10 A.B.A. J. 123 (1924); Terry, *Legal Duties and Rights*, 12 YALE L.J. 185 (1903); Terry, *Proximate Consequences in the Law of Torts*, 28

revolved.

The first issue was whether legal liberties that were not accompanied by duties on others represented a *legal* category at all. Albert Kocourek argued in 1920 that a rule of law implies constraining liberty by imposing duties on people. Kocourek claimed that “[a] jural relation is a situation of legal and material fact upon which one by his own will may restrict or claim to restrict, presently or contingently, with the aid of the law, freedom of action of another.”²³ He argued that privilege/no-right relations are not legal relations at all since no governmental constraint is involved.²⁴ Kocourek explained his position with an example:

If A, the owner of a cigar, smokes it in his study, he exercises a liberty, or, in the language of the Hohfeld System, a “privilege.” No one has a claim against A that he shall not smoke the cigar. What is the possible juristic significance of the act? Does the law in any way undertake for the advantage of others to say that A shall, or shall not, smoke the cigar? Not at all. Then where is the juristic significance?²⁵

The juristic significance is, of course, that B has no right to prevent A from smoking the cigar, and thus if B sues A for damages for smoking a cigar in A’s study, B will lose. Moreover, no court in the land will issue an injunction to force A to stop smoking. A has a legal liberty to do so and no matter how much it upsets B, B has no right that A not do so. Hohfeld himself had explained this point:

A rule of law that *permits* is just as real as a rule of law that *forbids*; and similarly, saying that the law *permits* a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law *forbids* a certain act to X as between himself and Y. That this is so seems, in some measure, to be confirmed by the fact that the first sort of act would ordinarily be pronounced “lawful,” and the second “unlawful.”²⁶

Privilege and no-right are not mere negations. “They are also affirmations,” wrote Arthur Corbin, “that society will not penalize the

HARV. L. REV. 10 (1914); Williams, *The Concept of Legal Liberty*, in *ESSAYS IN LEGAL PHILOSOPHY* 121 (R. Summers ed. 1968), originally in 56 COLUM. L. REV. 1129 (1956).

23. Kocourek, *Various Definitions of Jural Relation*, 20 COLUM. L. REV. 394, 412 (1920).

24. Kocourek, *What is Liberty?—Is it an Act?—Is it a Relation?* 15 ILL. L. REV. 347, 349 (1920); Kocourek, *Basic Jural Relations*, 17 ILL. L. REV. 515, 518 (1923). This position had been argued much earlier by both John Austin (1863) and Frederick Pollock (1896). J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* *290 (1832) [hereinafter cited as J. AUSTIN, *PROVINCE OF JURISPRUDENCE*]; Hohfeld, *Legal Conceptions*, *supra* note 4, at 42 n.59.

25. Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 ILL. L. REV. 24, 36 (1920) [hereinafter cited as Kocourek, *The Hohfeld System*].

26. Hohfeld, *Legal Conceptions*, *supra* note 4, at 42 n.59.

holder of the privilege when he acts in the privileged way."²⁷ Frederick Green put it more poetically: "When the lion and the lamb lie down together, they are as much in relation as when one eats the other up."²⁸

Hohfeld's defenders argued that in a lawsuit the judge must decide whether to adopt the plaintiff's proposed rule that the defendant had a duty not to harm her or to adopt the defendant's proposed rule that she had a privilege to do the harmful act. If the plaintiff wins, the legal relation is declared to be one of right and duty. If the defendant wins, it is one of privilege and no-right. Surely a ruling that the defendant wins is a ruling of law.²⁹

The second basic issue in the Hohfeldian debate raged over the status of Hohfeld's eight terms: Roscoe Pound claimed that eight terms were too many;³⁰ Albert Kocourek claimed that eight terms were too few;³¹ and William Page claimed that it was impossible to know.³²

Roscoe Pound, for example, accepted the idea of a liberty unaccompanied by duties on others as a legitimate legal term, but he rejected the utility of identifying a correlative to liberty. Hohfeld's no-right, he claimed, "is not a significant legal institution."³³

Albert Kocourek, on the other hand, exclaimed, "Can we be sure that there are only four fundamental juristic terms? Could there not be more than four?"³⁴ He argued that there were not eight, but twenty-four basic conceptions. His new distinctions were based on various criteria such as whether the legal entitlements were founded on once valid claims (claims barred by the statute of limitations), or possibly valid claims (contingent property rights), or possibly invalid claims (revocable contract rights), and whether the claims were based on a previous tortious or illegal act.³⁵ He also claimed that Hohfeld's terms were themselves ambiguous. "Privi-

27. Corbin, *Jural Relations and their Classifications*, 30 YALE L.J. 226, 233-34 n.6 (1921) [hereinafter cited as Corbin, *Jural Relations*].

28. Green, *The Relativity of Legal Relations*, 5 ILL. L. Q. 187 (1923).

29. Cook, *The Associated Press Case*, 28 YALE L.J. 387, 391 (1919).

30. See, e.g., Pound, *Legal Rights*, 26 INT'L J. ETHICS 92, 96, 97, 100 (1915).

31. See, e.g., Kocourek, *Tabulae Minores Jurisprudentiae*, 30 YALE L.J. 215, 222 (1921) [hereinafter cited as Kocourek, *Tabulae*]; Kocourek, *Nomic and Anomic Relations*, 7 CORNELL L.Q. 11, 26 (1921) [hereinafter cited as Kocourek, *Relations*].

32. See, e.g., Page, *Terminology and Classification in Fundamental Jural Relations*, 4 AM. L. SCH. REV. 616, 618 (1921).

33. Pound, *supra* note 30, at 100.

34. Kocourek, *The Hohfeld System*, *supra* note 25, at 38.

35. Kocourek, *Tabulae*, *supra* note 31, at 222-25; Kocourek, *Reply to Paper of Professor Corbin*, 4 AM. L. SCH. REV. 614 (1921); Kocourek, *Relations*, *supra* note 31, at 24-33; Corbin, *supra* note 214, at 234-35.

lege” could refer either to unregulated activities, or exceptions from generally imposed duties, or liberty to affect the interests of another.³⁶

Hohfeld’s defender, Arthur Corbin, argued that there must be a compromise between having too many terms and too few. “Hohfeld effected this compromise at a convenient and serviceable point. . . . Hohfeld’s eight terms are adequate for the analysis of jural situations of fact, the several fundamental varieties of factual situations [described] in ordinary human words.”³⁷ While Corbin claimed that Hohfeld’s terms were sufficient to describe all factual and legal situations, he was not able to justify this assertion.

The Hohfeldian debate consumed a great deal of paper and energy. Yet I believe that those engaged in it went about it the wrong way. The eight terms presented by Hohfeld were a human invention. Their validity and importance must relate to their utility in solving some problem. The proper way to judge them is to look back to Hohfeld’s predecessors to discover the problem that the eight terms were supposed to resolve. It is only when we look back to see what Hohfeld was arguing against that we can make a judgment about whether Hohfeld’s terms were either necessary or sufficient to achieve some as yet unidentified purpose.

C. Restatement of the Contradiction

Viewed in historical context, it is clear that Hohfeld’s analytical system had a dual purpose. First, it corrected a particular conceptualist error. The writers he criticized claimed that rights flowed from privileges as a matter of deductive logic. To confer a legal liberty on someone necessarily meant imposing duties on others not to interfere with the permitted acts. Not to do so, they felt, would be a logical contradiction. Hohfeld demonstrated that it was a logical error to deduce rights from liberties. He argued that liberties that are not accompanied by duties on others not to interfere with the permitted acts exist in the legal system, and that there were often good policy reasons to allow these liberties. He sought to free us from feeling bound to impose duties on others every time we confer a legal liberty on someone. The rational lawmaker must use policy considerations to decide whether to confer such duties in the particular case. “Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should

36. Kocourek, *The Hohfeld System*, *supra* note 25, at 32, 35-36 n.28.

37. Corbin, *Jural Relations*, *supra* note 27, at 235-36.

be considered, as such, on its merits.”³⁸

Second, Hohfeld’s analytical system represented a full scale rejection of the meta-theory of self-regarding acts that had been adopted by the classical jurists. With this rejection, Hohfeld re-exposed the fundamental contradiction between freedom of action and security. Hohfeld rejected the classical assertion that liberties were permitted only to the extent that they did not affect the interests of others. The self-regarding theory was a misdescription of the rules in force. The rules often allowed damage without legal redress. Further, there was no reason to retain the theory in the hope that the legal rules would eventually conform to the theory since there were often good reasons to allow individuals to act in ways that harmed others. Thus, Hohfeld rejected the assumption that liberties can be justified by the fiction that they are self-regarding. On the contrary, Hohfeld defined legal liberty as freedom to harm others. By conceptualizing legal liberty in this manner, Hohfeld restated the fundamental contradiction between freedom of action and security: “To the extent that the defendants have privileges the plaintiffs have no rights; and conversely, to the extent that the plaintiffs have rights the defendants have no privileges. . . .”³⁹

Hohfeld also argued that liberties might legitimately conflict. Since liberties are not necessarily accompanied by rights, A’s liberty might, in some cases, be exercised in ways that interfered with B’s exercise of her liberty. Such interference represents a special case of damage for which the victim has no legal recourse. X and Y might both have a legal liberty to eat the salad on the table. Employers might have the liberty to hire nonunion labor at the same time that employees have the legal liberty to form a union. In cases such as this, the contradiction between freedom of action and security is particularly stark. The result is determined not by orderly rules of law but by a power struggle in which the state will not come to the aid of either party.

The next step in the story is to go back to elaborate the development of both the self-regarding theory and its conceptualist aspects to demonstrate the historical genesis of Hohfeld’s scheme.

38. Hohfeld, *Legal Conceptions*, *supra* note 4, at 36.

39. *Id.* at 37.

III. THE META-THEORY OF SELF-REGARDING ACTS

A. John Stuart Mill

John Stuart Mill's famous 1859 essay *On Liberty*⁴⁰ contains by far the clearest expression of the meta-theory of self-regarding acts. Therefore, I will discuss Mill's analysis before that of Mill's precursors, Bentham and Austin. Mill explicitly advanced the distinction between self-regarding and other-regarding acts as a way to mediate the fundamental contradiction between freedom of action and security.

1. SELF-REGARDING AND OTHER-REGARDING ACTS

Mill sought to define the "limit to the legitimate interference of collective opinion with individual independence" by reference to the principle of self-regarding acts.⁴¹ In the first prong of his argument, Mill defined an area of freedom in which one's actions are self-regarding in that they cannot be legitimately thought to impinge on the interests of others. Those actions cannot be rationally considered to be threatening to the security of others.

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. . . .

. . . This, then, is the appropriate region of human liberty.⁴²

The second prong of the argument suggests that certain interests are so obviously fundamental that acts by others that impinge on those interests cannot be rationally considered as self-regarding. Such injurious other-regarding acts are presumptively illegitimate.

If any one does an act hurtful to others, there is a *prima facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation.

. . . .
When . . . a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation in the proper sense of the term. . . . Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the

40. J.S. MILL, *supra* note 5.

41. *Id.* at 6.

42. *Id.* at 11-13; *see also id.* at 87 ("[T]he individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself").

public, the case is taken out of the province of liberty, and placed in that of morality or law.⁴³

Mill denied the contradiction between liberty and security by defining and conceptualizing liberty and security in a way that denies that they are incompatible.⁴⁴ He offered the self-regarding/other-regarding distinction as a meta-theory that could guide the rulemaker in choosing between the contradictory principles of freedom of action and security.

Mill understood that people might not always agree on which acts were self-regarding and which were other-regarding.⁴⁵ Nonetheless, the distinction is fundamental to his notion of liberty. In his discussion of prohibition, Mill argued that alcohol consumption belongs to the class of "acts and habits which are not social [other-regarding], but individual [self-regarding]."⁴⁶ But the proponent of prohibition would claim that alcohol consumption by others decreases her security. This person would argue:

I claim, as a citizen, a right to legislate whenever my social rights are invaded by the social act of another . . . If anything invades my social rights, certainly the traffic in strong drink does. It destroys my primary right of security, by constantly creating and stimulating social disorder.⁴⁷

Mill was horrified at this definition of "social rights" because such an absolute claim to the right of security would mean that no one was free to do anything:

A theory of "social rights" the likes which probably never before found its way into distinct language: being nothing short of this—that it is the

43. *Id.* at 12, 75-76; see also *id.* at 13 ("In all things which regard the external relations of the individual, he is *de jure* amenable to those whose interests are concerned, and, if need be, to society as their protector.")

44. Mill did make room for exceptions to the general principle of self-regarding acts. See *infra* text accompanying note 49.

45. The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them. If he injures his property, he does harm to those who directly or indirectly derived support from it, and usually diminishes, by a greater or lesser amount, the general resources of the community.

Id. at 74. Mill assumed widespread agreement on which acts were "self-regarding," and simply allowed that some harmful, self-regarding acts might be seen as other-regarding. Mill did not see that many actions he might classify as "self-regarding" could in fact be prejudicial to others even in the absence of harm to the self.

46. *Id.* at 83.

47. *Id.*

absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particulars violates my social right, and entitles me to demand from the legislature the removal of the grievance. So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify. . . .⁴⁸

This begs the question. Granted that security (what Mill called social rights) may not be absolute if we want to retain a realm of freedom of action, we still need to know if Mill's distinction between self-regarding and other-regarding acts helps us choose between freedom and security in particular instances. Mill sought to justify freeing individuals from governmental regulation so that they could pursue their self-interest as they conceived it. The only justification for imposing legal duties on people was to prevent them from harming others. At the same time, Mill equated the legitimate area of legal liberty with the concept of self-regarding acts. Since he assumed that the vast majority of actions permitted by such a legal system would be self-regarding, it would be possible to allow a wide range of personal liberty while protecting individuals from harm.

Yet if the injunction against harming others encompassed every conceivable impingement on their interests, the category of self-regarding acts would be quite narrow. Understood in this way, Mill's formula would create not a decrease, but a vast increase of governmental regulation. In fact, the prohibitionist merely uses Mill's own argument against him. The "monstrous principle" Mill attacked was his own. In fact, alcohol consumption is not merely self-regarding since it does decrease the security of others. Yet Mill believed it cannot be legitimately prohibited. What was monstrous to Mill was not that the prohibitionist defines alcohol consumption as other-regarding and security-threatening, but that she seeks to regulate it at all.

This example illustrates that the self-regarding/other-regarding distinction in fact fails to distinguish those interests that Mill believed may be legitimately granted legal protection and those that may not. In mediating the contradiction between freedom of action and security by relying on the self-regarding/other-regarding distinction, Mill reproduced the very contradiction he sought to resolve. What is left when the dust settles is nothing but the utilitarian calculus—the only other meta-theory Mill offered to resolve the contradiction.

48. *Id.* at 83-84.

2. EXCEPTIONS FOR INJURIOUS ACTS THAT PROMOTE THE GENERAL WELFARE

Mill asserted that the self-regarding theory would generally constitute a sufficient legitimating theory for a liberal legal system. However, he recognized that there might be exceptional cases in which one person's conduct harmed the interests of others; and yet we might still want to allow such conduct despite the injurious consequences. The liberty to inflict such damage without legal redress might be justified by its overall social utility. "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion."⁴⁹ Although actions harmful to others are presumptively invalid, they may be permitted if they tend to promote the general welfare:

[I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference. In many cases an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining. . . . But it is, by common admission, better for the general interest of mankind that persons should pursue their objects undeterred by this sort of consequence.⁵⁰

Mill's major example of this sort of legally sanctioned harm was the loss caused to certain individuals by economic competition.⁵¹

3. THE DUTY NOT TO INTERFERE WITH LIBERTY

The final component of the self-regarding theory is the association of liberties and duties. Since Mill defined liberty as permission to engage in self-regarding acts, he assumed that others have no legitimate interest in interfering with one's personal liberty:

[Liberty is] doing as we like . . . *without impediment from our fellow-creatures*, so long as what we do does not harm them. . . . The only freedom which deserves the name, is that of pursuing our own good in our own way, *so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.*⁵²

49. *Id.* at 70.

50. *Id.* at 87.

51. *Id.* at 87-88.

52. *Id.* at 13-14 (emphasis added).

Legal rights grant security from being harmed by others. Since liberty is part of one's condition of well-being, and liberties encompass merely self-regarding acts, it is natural under the utilitarian theory to assume that liberties should be accompanied by duties on others not to interfere with the permitted acts. Such duties promote the general welfare without harming anyone by guaranteeing each citizen full freedom to engage in acts that are of no legitimate concern to anyone else.

B. Jeremy Bentham

1. SELF-REGARDING ACTS AND LEGAL LIBERTIES

Jeremy Bentham wrote the first Anglo-American work of analytical jurisprudence, *Of Laws in General*, in 1782.⁵³ This work contains the most extensive and detailed treatment of the relations between rights and liberties of any analytical work up to Henry Terry's treatise of 1884. The analytical definitions proposed by Bentham to describe the legal rules rely, as do those of Mill, on the self-regarding/other-regarding distinction. Although Bentham is more oblique than Mill, Bentham's analytical scheme is a different version of the same meta-theory.

Bentham distinguished between permissive and coercive laws. Bentham derived two types of legal rights from these two types of laws: those that result from the absence of legal duties (legal liberties) and those that result from the imposition of legal duties (legal rights).⁵⁴ He divided laws into four kinds: (1) commands (you must do X); (2) prohibitions (you must not do X); (3) noncommands (you may forbear to do X); and (4) permissions (you may do X).⁵⁵

Bentham recognized that commands can be expressed as prohibitions and vice versa, and permissions can be expressed as noncommands and vice versa. "The law which prohibits the mother from starving her child commands her to take care that it be fed. The one may at pleasure be translated or converted into the

53. J. BENTHAM, *OF LAWS IN GENERAL* (H. Hart ed. 1970) [hereinafter cited as J. BENTHAM, *LAWS*]. This work was not published until 1945 as *THE LIMITS OF JURISPRUDENCE DEFINED* (C. Everett ed. 1945).

54. Hart, *Bentham on Legal Rights*, in *OXFORD ESSAYS IN JURISPRUDENCE* 171, 174 (A. Simpson ed. 1978) [hereinafter cited as Hart, *Legal Rights*]; see also J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 212, 302 (H. Hart ed. 1970); J. BENTHAM, *LAWS*, *supra* note 53, at 57-58, 294.

55. J. BENTHAM, *LAWS*, *supra* note 53, at 95.

other.”⁵⁶ This means that in his system there are in fact only two kinds of laws: permissive and coercive.

Bentham appears to have contradicted himself. He recognized the existence of permissive laws that express the sovereign will that people be left free to act. “Every law, when complete is either of a *coercive* or *uncoercive* nature.”⁵⁷ However, he often seemed tentative about the distinction and frequently denied that it existed. “The property and very essence of law, it may be said, is to command. . . .”⁵⁸ He stated that every law without exception must bind someone and restrict her natural liberty. Otherwise it would not be a law:

First then that there must be some person or persons who are bound or in other words coerced by [a law] is undeniable. These are the same persons who in other words have been termed the agile subjects of the law: without these a law cannot so much as be conceived. A law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases which come to the same thing would be so many contradictions in terms.⁵⁹

In the debate about whether liberties represent legal categories, Bentham seems to have been rather confused. He sometimes

56. *Id.* at 96; see also Lysaght, *Bentham on the Aspects of a Law*, 24 N. IR. L.Q. 383, 393 (1973).

57. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 302 (H. Hart ed. 1970) [hereinafter cited as J. BENTHAM, PRINCIPLES].

58. J. BENTHAM, LAWS, *supra* note 53, at 105.

59. *Id.* at 54. Bentham divided the persons affected by laws into two classes: agents or “agile subjects” and objects or “passible subjects.” The agile subject is, for example, the one who commits assault, and the passible subject is the victim. Laws prohibit agile subjects from injuring passible subjects. *Id.* at 34.

Bentham created a unitary view of legal questions, incorporating law, command, duty and right into a single logical system.

Every primordial law that is efficient is a command: every legal command imposes a duty: every legal command by imposing a duty on one party, if the duty be not only of the self-regarding kind, confers a right to services upon another.

. . . .

It follows that a law, whatever good it may do at the long run, is sure in the first instance to produce mischief. The good it does may compensate the mischief it does a million of times over: but still it begins with doing harm. No law can ever be made but what trenches upon liberty. . . .

Id. at 54.

How then do permissive laws fit into this system? Note that Bentham stated that only “efficient” laws impose commands. Certain laws are not efficient because they do not have the effect of limiting natural liberty. However, “*unimperative, unobligative* [and] *uncoercive* laws exist and may be expressions of sovereign will. *Id.* at 96, 98; Lyons, *Logic and Coercion in Bentham's Theory of Law*, 57 CORNELL L. REV. 335, 340 (1972).

In AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Bentham explained that a “coercive law is a *command*. An uncoercive, or rather a *discoercive*, law is the *revocation*, in whole, or in part, of a coercive law.” J. BENTHAM, PRINCIPLES, *supra* note 57, at

asserted that all laws are coercive and sometimes asserted that liberties constitute laws as well. Part of the reason for this confusion may be that Bentham, like Mill, conceptualized the vast field of human activity to be unregulated by the state, with narrowly defined duties to refrain from harming others or interfering with their legitimate liberty. Bentham wrote:

[E]very efficient law whatever may be considered as a limitation or exception, grafted on a pre-established universal law of liberty. The non-commanding and permissive phases of the law placed side by side and turned towards the universal system of human actions are expressed by the before-mentioned universal law of liberty: a boundless expanse in which the several efficient laws appear as so many spots; like islands and continents projecting out of the ocean: or like material bodies scattered over the immensity of space.⁶⁰

This vision is both descriptive and prescriptive. It is descriptive in that Bentham purported to explain what it is actually like to live under a rationally governed legal system. It is prescriptive because, like Mill, Bentham claimed that laws imposing duties are presumptively invalid since they encroach on liberty. The concept that all laws are coercive is meant to force us to justify them by the standard of utility. Wide liberties could and should exist with narrowly defined duties.

Bentham identified coercive laws and permissive laws as the two basic types of laws. Coercive laws confer rights by imposing du-

302. This view is modified in *OF LAWS IN GENERAL*. Bentham identified three types of permissive laws. First, permissive laws may be "active," in that they are countermands of previous laws that imposed duties. They permit some act to be done or not done that was previously prohibited or obligatory. J. BENTHAM, *LAWS*, *supra* note 53, at 57-58; Hart, *Legal Rights*, *supra* note 54, at 174; Lyons, *supra* this note, at 353-54. Second, "inactive" permissive laws grant original permissions. They merely state an aspect of one's natural liberty that remains unregulated by state commands. J. BENTHAM, *LAWS*, *supra* note 310, at 97-98. They remove doubts and tell the public what citizens have a legal liberty to do. *Id.* at 99; Lysaght, *supra* note 56, at 391. Third, permissive laws exist, in effect, where the law is silent. Laws are merely spots of duty on a general background of natural liberty. What the law does not prohibit or make compulsory, it permits to be done or not done as the subject chooses. J. BENTHAM, *LAWS*, *supra* note 53, at 98-99; Hart, *Legal Rights*, *supra* note 54, at 174. Permissive laws or "uncoercive mandates" thus either express the sovereign will that the subject is free to decide how to act, or imply, through the legislature's silence, that the subject is free to choose. J. BENTHAM, *LAWS*, *supra* note 53, at 97-99.

60. J. BENTHAM, *LAWS*, *supra* note 53, at 119-20; Lysaght, *supra* note 56, at 384. Bentham conceived of law as adding restrictions to natural liberty. The claim that all laws are mischievous is part of his attack on natural law thinkers like Blackstone. Bentham believed that the simple equation of natural law and positive commands kept Blackstone from being critical of English law. If all laws are mischievous restrictions on natural liberty, however, we must not take their worth for granted, but rather we must see if they satisfy the test of utility. If they do not tend to produce the greatest happiness for society, they are unjustified. See J. BENTHAM, *LAWS*, *supra* note 53, at 54.

ties on others not to interfere with one's liberty or security. Bentham then divided permissive laws into two kinds: liberties and powers.⁶¹ Powers are exceptions from generally imposed duties. They concern acts that prejudice the interests of others, which are nonetheless permitted by the legal system.

When the law exempts a man from punishment in case of his dealing with your person in a manner that either stands a chance or is certain of being disagreeable to you, it thereby confers on him a *power*. . . .

. . . .
When the acts you are left free to perform are such whereby the interests of other individuals is [*sic*] liable to be affected, you are thereby said to have a power over those individuals.⁶²

Liberties—permissive laws that are not powers—are permissions to do acts that do *not* affect the interests of other individuals. This follows from the distinction between powers and other types of permissive laws.

Bentham therefore described two types of permissive laws: those that allow individuals to do self-regarding acts (liberties) and those that allow individuals to harm others (powers). In conjunction with this general distinction, Bentham asserted that liberties are the rule and powers are the exception. He therefore tried to justify the rules in force by the self-regarding theory. He posited a presumption against allowing people to harm each other which could be overcome to increase social utility:

With regard to a man's person, it may be laid down as a general proposition that in most cases it is unpleasant to have another meddle with it. Every act therefore by which the person of another man is affected ought *prima facie* to be treated as an offense. . . . If there be any exception to the above position it is where you consent that your person shall be dealt with in such or such a manner. . . . The case of consent then forms one exception to the rule.

But though there should be a mischief in the case, the mischief may be outweighed: it will be outweighed whenever it is the necessary means of a more than equivalent good.⁶³

Bentham thus invented a three-tiered system of legal rights. First, legal liberties are permissions to do acts that are merely self-regarding. Such acts have no effect on the interests of others. Sec-

61. J. BENTHAM, *LAWS*, *supra* note 53, at 200-01; Hart, *Legal Powers*, *supra* note 14, at 803-04, 805-06, 814-16.

62. J. BENTHAM, *LAWS*, *supra* note 53, at 200-01, 290-91.

63. *Id.* at 200.

ond, legal rights provide security from being harmed by others or having one's interests adversely affected by their acts. Law is justified on utilitarian grounds precisely because it provides this security from harm. Third, legal powers are limited exceptions from generally imposed duties not to harm others or to affect their interests adversely. The liberty to hurt others is justified in limited circumstances when it maximizes social utility.

Bentham's logical system of the relation between permissive and coercive laws does not contain any correlative for legal liberty.⁶⁴ Hohfeld's category "no-right" was his expression of the vulnerability of those who might be prejudicially affected by the legally permitted acts of others. Bentham did not invent such an expression. Instead, he distinguished between those permissive laws that al-

64. Bentham's discussion of the logic of the relations between legal permissions, commands, prohibitions, and noncommands has been hailed as anticipatory of Hohfeld. Hart, *Bentham*, *supra* note 54, at 171; Friedmann, *Bentham's Limits of Jurisprudence Defined*, 64 *LAW Q. REV.* 341, 345-46 (1948); Patterson, *Bentham on the Nature and Method of Law*, 33 *CAL. L. REV.* 612, 615 (1945). However, there are crucial differences between Bentham's system and that of Hohfeld.

Bentham argued that for a system of laws to be internally consistent, the following conditions must obtain: (1) A command must include a permission, and exclude a prohibition and a noncommand. What is commanded to be done must also be unprohibited; it cannot be prohibited or uncommanded. (2) A prohibition includes a noncommand, and excludes both commands and permissions. What is prohibited must be uncommanded; it cannot be commanded or permitted. (3) A noncommand excludes a command; it may include either a prohibition or a permission but not both. What is uncommanded cannot also be commanded. It may therefore be either prohibited or permitted. (4) A permission excludes a prohibition; it may include a command or noncommand, but not both. An act which is permitted must not be prohibited; that act may either be commanded or not commanded but cannot be both. J. BENTHAM, *LAWS*, *supra* note 53, at 97; Lysaght, *supra* note 56, at 394-95; Lyons, *supra* note 59, at 345-51; James, *Bentham on the Individuation of Laws*, 24 *N. IR. L.Q.* 357, 360 (1973).

Unlike Hohfeld, Bentham carefully distinguished between negative and positive duties and liberties. Thus, the first lesson of his logical system is that a consistent body of law cannot have both a negative and a positive duty, i.e., a duty to do X and a duty not to do X. Second, unlike Hohfeld, Bentham pointed out that a duty (command) to do X must include a legal liberty (permission) to do it. This point is really the same as the first, since a command to do X without a legal liberty to do it, would be tantamount to contradictory duties to do X and not to do X.

The second independent lesson of Bentham's system is the opposition of liberty and duty. A permission excludes a prohibition. A noncommand excludes a command. This expresses the underlying premise of his view of legal rights which focuses on a single unitary relation of liberty and restraint. If one has no duty, then one has a legal liberty, and vice versa. This part of Bentham's logic is identical to Hohfeld's "opposites."

In summary, Bentham included in his system two logical relations: (1) the distinction between positive and negative duties and liberties (prohibition v. command; permission v. noncommand); and (2) the contradiction of liberties and duties (prohibition v. noncommand; command v. permission). By contrast, Hohfeld did not include the positive/negative distinction, but made the liberty/duty relation one of his central premises. Unlike Bentham, Hohfeld further distinguished between liberties and powers, and between rights and immunities.

lowed people to affect others and those that permitted merely self-regarding acts.

2. LIMITED EXCEPTION FOR POWERS

Just as Mill argued that harmful other-regarding acts might sometimes be legitimate because of their tendency to promote the general welfare, Bentham also stated that certain permissive laws allow citizens to inflict damage on others. Bentham discussed in detail this special kind of permissive law, which he labeled a "power."

The simplest kind of power is the power of "contractation"—the power to interfere physically with things or other people's bodies.⁶⁵ Powers of contractation are exerted only over "passive" or "corporeal faculties" of individuals.⁶⁶ Examples of powers of contractation are the police officer's right to arrest or shoot someone and the parent's right to spank her child. Bentham defined this concept as an exceptional legal liberty to do something generally prohibited in physically handling people or property.⁶⁷

Powers of "imperation," on the other hand, concern control over the "active" or mental faculties of persons. They include the power to use reward and punishment to induce people to act in conformity with a command.⁶⁸ Examples of powers of imperation are the power to alienate land or make contracts.⁶⁹

Powers are permissive laws because they are exceptions to generally imposed duties. They establish freedom of action.

When the law exempts a man from punishment in case of his dealing with your person in a manner that either stands a chance or is certain of being disagreeable to you, it thereby confers on him a *power*: it gives him a power over you; a power over your person. Now this is what it may find necessary to do for various purposes: for the sake of providing for the discharge of the several functions of the husband, the parent, the guardian, the master, the judge, the military officer, and the sovereign: not to mention those extraordinary and accidental cases in which for the sake of averting some calamity or other mischief more serious than any which would probably be occasioned by the exercise of the power, it may be expedient to entrust a power of the like stamp to individuals at large. These powers then form so many exceptions to the gen-

65. J. BENTHAM, *LAWS*, *supra* note 53, at 137-38 n.h.; Hart, *Legal Powers*, *supra* note 14, at 801-05; Hart, *Legal Rights*, *supra* note 54, at 178.

66. J. BENTHAM, *LAWS*, *supra* note 53, at 137-38 n.h., 258-59.

67. Hart, *Legal Powers*, *supra* note 14, at 803-05; J. BENTHAM, *LAWS*, *supra* note 53, at 200-01.

68. Hart, *Legal Powers*, *supra* note 14, at 805; J. BENTHAM, *LAWS*, *supra* note 53, at 137-38 n.h., 259.

69. Hart, *Legal Powers*, *supra* note 14, at 810-13.

eral rule that no man has the right to meddle with the person of another.⁷⁰

Powers describe pockets of liberty within a scheme of generally imposed duties.⁷¹ Bentham's category of powers is characterized as an exception to the rule that other-regarding harmful acts are presumptively invalid. Like Mill, Bentham justified liberties generally by the self-regarding theory. Also like Mill, Bentham created a limited exception for acts that, although harmful to others, are nonetheless justified by their overriding social utility.

3. CORROBORATION

a. Liberties

The final component of Bentham's theory is his assertion that liberties are, or should be, accompanied by duties on others not to interfere with the permitted acts. This parallels Mill's assumption that such duties logically follow from liberties.

If permissive laws merely declare what freedom of action people already possess by virtue of their natural liberty, what good are they other than to revoke previously imposed legal duties? "Of themselves, it is manifest, they can have none."⁷² But Bentham argued that enactment of a permissive law does more than merely clarify that an action is unregulated. "Command, prohibition, and permission, all of them point at punishment."⁷³ A legal liberty "point[s] at punishment" because according to Bentham, legal liberties contain implied duties on others not to interfere with the acts permitted by the liberty:

They may be of use, for the purpose of removing doubts: where the subject, having seen his liberty infringed in any point or seen cause to apprehend its being infringed, stands in need of an express declaration, an assurance on the part of the law to ease him of his fears. *In this case*

70. J. BENTHAM, *LAWS*, *supra* note 53, at 200-01.

71. Bentham did not separate liberties and powers as fundamentally distinct legal entitlements. Both powers and other types of permissive laws simply ratify one's natural liberty. Thus Bentham characterized the power to eject a trespasser as a legal permission by the sovereign to a subject to issue commands which would otherwise be illegal to issue. Hart, *Legal Powers*, *supra* note 14, at 814-16. From a Hohfeldian perspective, the crucial point is not the permission to issue the command, but the fact that the state will enforce it. Bentham's category of "powers" is thus fundamentally different from Hohfeld's category of "powers."

72. J. BENTHAM, *LAWS*, *supra* note 53, at 119.

73. *Id.* at 134.

indeed the effect is produced not so much from the literal import of the mandate itself, as from another mandate which is so connected with it that if not expressed it may of course be looked upon as implied. I mean a mandate which in the form of a prohibition is addressed to subordinate power-holders in general restraining them from breaking in upon the liberty of the party whom the uncoercive mandate in question is meant to favour. . . . It is easy to see that some of the most important laws that can enter into the code, laws in which the people found what are called their liberties, may be of this description.

. . . .
 . . . For whatever the law permits a man to perform or to abstain from, it inhibits all others from compelling him to abstain from or to perform. The latter prohibition indeed is not the work of the same law as the former permission but it is the work of a law which *never fails to be annexed to the former* by the customary if not by the statute law.⁷⁴

Bentham distinguished between naked rights or uncorroborated liberties, on the one hand, and vested, established or corroborated rights on the other.⁷⁵ A permissive law is uncorroborated if a law states that something may be done, but no coercive law imposes duties on others not to interfere with the exercise of the liberty.⁷⁶ In modern Hohfeldian analysis, uncorroborated liberties form a central role in the analytical system of legal rights. Although Bentham recognized the possibility of enacting uncorroborated liberties, he did not accord them *legitimacy*, as Hohfeld was to do.

Bentham's statement of the status of corroboration of liberties by duties was both descriptive and prescriptive. First, he asserted that legal liberties (permissive laws) were in fact accompanied by implied corroborative duties on others not to interfere with the permitted acts.⁷⁷ Such an assertion purported to describe the reality of the legal rules in force. Second, Bentham argued that as a matter of theoretical justification, liberties *should* be corroborated by accom-

74. *Id.* at 99, 131-32 (emphasis added); James, *supra* note 64, at 363-64. Lyons has argued that Bentham did not say that prohibitions (rights against interference) were implied in permissive laws, but that they were always added as a matter of fact. Lyons, *supra* note 59, at 352-53. While it is true that Bentham distinguished between rights and liberties, it is also true that he sometimes asserted that liberties were of necessity accompanied by duties on others. See J. BENTHAM, LAWS, *supra* note 53, at 131-32.

Another example of Bentham's idea that laws may imply other laws as a matter of common law policy is his discussion of sanctions. Laws have two parts: the "directive" part relating the command of what should or should not be done and the "incitative" or "sanctional" part imposing a sanction for disobedience. Bentham assumed that a law did not have to include an express sanction to be valid, but a sanction was assumed to accompany the law since the absence of a sanction would remove any powerful motive for compliance. *Id.* at 134.

75. Hart, *Legal Rights*, *supra* note 54, at 181.

76. *Id.*

77. J. BENTHAM, LAWS, *supra* note 53, at 99, 131-32; Lyons, *supra* note 59, at 352-53.

panying duties on others to give adequate protection to the freedom of action permitted by the legal liberty.⁷⁸ Corroboration was thus both a factual assertion and a norm.

The modern Hohfeldian critique would fault Bentham on both counts. It is in fact not true that every time the legal system creates a legal liberty that the liberty is accompanied—explicitly or implicitly—by duties on others not to interfere with the free exercise of the legal liberty. Liberties may be, and purposely are, left uncorroborated by the lawmaker.⁷⁹ The modern view also does not see such liberties as inherently illegitimate or unjustified. In particular instances, however, policy considerations may lead the lawmaker to favor corroboration of liberties by rights.

b. Powers

Because powers are simply special cases of permissive laws, Bentham applied the theory of corroboration to powers as well as liberties:

The law having given you the power . . . prohibits me and others from doing such and such acts in consideration of the tendency which they appear to have to annihilate or at least diminish the benefit which you might reap from the exercise of your power over the person in question.⁸⁰

He gave a policy argument for corroboration of powers which is equally applicable to the corroboration of liberties:

When the acts you are left free to perform are such whereby the interests of other individuals is liable to be affected, you are thereby said to have a power over those individuals. In this case in as far as you possess the power in question you possess an exemption from the duty of *abstinence* as far as concerns the acts to the performance of which your power extends. This exemption then on your part may either stand single or it may be coupled with an assistant duty (subservient to the same design) on the part of other men. In the first case it may be styled a *naked* or *uncorroborated* power; in the other case it may be styled a *corroborated* power. This assistant duty will either be a duty of forbearance, viz: the duty of abstaining from all such acts as may tend to prevent you from exercising the power in question, or 2. a duty of perform-

78. J. BENTHAM, *LAWS*, *supra* note 53, at 99, 276-77.

79. H.L.A. Hart wrote:

The fact that a man has a right [liberty] to look at his neighbor over the garden fence does not entail that the neighbor has a correlative obligation to let himself be looked at or not to interfere with the exercise of this specific liberty-right. So he could, for example, erect a screen on his side of the fence to block the view.

Hart, *Legal Rights*, *supra* note 54, at 176.

80. J. BENTHAM, *LAWS*, *supra* note 53, at 261.

ance, viz: the duty of performing such acts as may enable you to overcome any obstacle that may oppose itself to the exercise of that power. Power over persons may accordingly be considered as susceptible of three degrees of perfection. Power in the first, lowest, or least perfect degree, is where it is not made any body's duty to oppose you, in case of your going about to exercise it. Power in the second or middle degree is where not only it is not any body's duty to oppose you in case of your going about to exercise it, but it is made every body's duty not to oppose you in case of your going about to exercise it. Power in the third, highest, or most perfect degree is where not only it is made every body's duty not to oppose you in case of your going about to exercise it, but in case of your meeting with any obstacle to the exercise of it whether from the party over whom it is to be exercised or any other person or in short from any other cause, it is made the duty of such persons to enable you to overcome such obstacles. . . .

. . . .
 In point of fact it is not always that where power over persons is given it is given in the highest degree. *In that degree however it ought always to be given where it is given at all, since upon no other terms can a man be assured of the enjoyment of it.* Power and the benefits for the sake of which it is conferred are left in a very precarious state where the enjoyment of it is made to depend upon the physical strength of the person on whom it is conferred or on the caprice of those who may happen to be around him.⁸¹

Just as Bentham recognized the possibility of uncorroborated liberties, he recognized the possibility of uncorroborated powers. In both cases, he argued that as a matter of public policy, permissive laws should always be accompanied by corroborative duties on others. Liberties are corroborated since they concern merely self-regarding acts that others have no legitimate interest in preventing. Powers are granted by the sovereign to allow individuals to affect others prejudicially because these actions tend to increase the general welfare. Bentham assumed that in all such instances the policy arguments for allowing one person to harm the other would also justify requiring the victim to submit to the harm and preventing others from interfering. He did not see that there could be any policy arguments *against* corroboration either of powers or of liberties.

81. *Id.* at 290-91, 291 n.a (emphasis added).

C. John Austin

1. CORROBORATION

John Austin's lectures were first published in full in 1863.⁸² He also invented an analytical system based on the meta-theory of self-regarding acts. He presented what appears to be a unitary picture of legal rights based on the idea of sovereign commands. "Right, like Duty, is the creation of Law, or arises from the Command of the Sovereign in a given independent society."⁸³ The command imposes a duty. "A person or persons are commanded to do or forbear *towards*, or with regard to, *another* and a *determinate* party. . . . The party *towards* whom the duty is to be observed, is said to have a *right*, or to be invested with a right."⁸⁴ Duty is the basis of right. "[T]he term 'right' and the term '*relative duty*' are correlating expressions. They signify the same notions, considered from different aspects, or taken in different series."⁸⁵ Rights imply that the sovereign has issued a command on others to act in a way that benefits a person and gives her the capacity to bring a civil suit to vindicate that legal right.

However, Austin did recognize the existence of "liberties." He defined political or civil liberty as the "liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects."⁸⁶ Like Bentham, Austin defined liberty as the absence of legal duty. Also like Bentham, Austin recognized that liberties could be granted without corroborative duties on others. However, the status of liberties was somewhat different for Austin than it was for Bentham.

First, according to Austin, uncorroborated liberties are secured only by positive morality. This takes them out of the realm of jurisprudence and positive law altogether:

Political or civil liberties are left or granted by sovereigns, in two ways: namely, through permissions coupled with commands, or through simple permissions. If a subject possessed of a liberty be clothed with a legal right to it, the liberty was granted by the sovereign through a permis-

82. J. AUSTIN, LECTURES ON JURISPRUDENCE (1861-1863) [hereinafter cited as J. AUSTIN, LECTURES].

83. 2 *id.* at 61.

84. *Id.*

85. *Id.* at 66; *see also id.* at 59 ("In short, the term 'right' and the term '*relative duty*' signify the same motive considered from different aspects. . . . Whenever a right is conferred, a relative duty is also imposed.").

86. J. AUSTIN, PROVINCE OF JURISPRUDENCE, *supra* note 24, at 287 n.*; *see also id.* at 288 n.*, 279-80 n.3.

sion coupled with a command: a permission to the subject who is clothed with the legal right, and a command to the subject or subjects who are burthened with the relative duty. But a political or civil liberty left or granted to a subject, *may be merely protected against his fellow by religious and moral obligations*. In other words, the subject possessed of the political liberty may not be clothed with a legal right to it. And, on that supposition, the political or civil liberty was left or granted to the subject through a simple permission of the sovereign or state.⁸⁷

Although Austin recognized that a legal liberty could be granted by the state without being coupled with a legal right, such a "simple permission" is not a law. If a person has a *legal* liberty at all, it must mean that others have duties not to interfere with the permitted acts. "I *have* no [legal] right, independently of the injunction or prohibition which declares that some given act, forbearance or omission, would be a violation of my right. . . ."⁸⁸

Second, the above passage demonstrates that Austin assumed that uncorroborated liberties would be secured by moral rather than legal sanctions. He did not see that the sovereign might want to allow freedom of action without intending *either* a moral or a legal sanction against interfering with the permitted acts.

Third, Austin presented a policy argument for corroboration which is similar to the argument advanced by Bentham. Austin asserted that "political or civil liberties rarely exist apart from corresponding legal restraints."

Where persons in a state of subjection are free from legal duties, their liberties (general speaking) would be nearly useless to themselves, unless they were protected in the enjoyment of their liberties, by legal duties on their fellows: that is to say, unless they had legal rights (importing such duties on their fellows) to those political liberties which are left them by the sovereign government. I am legally free, for example, to move from place to place consistently with my legal obligations: but this my political liberty would be but a sorry liberty, unless my fellow subjects were restrained by a political duty from assaulting and imprisoning my body. Through the ignorance or negligence of a sovereign government, some of the civil liberties which it leaves or grants to its subjects, may not be protected against their fellows by answering legal duties: and some of those civil liberties may perhaps be protected sufficiently by religious and moral obligations. But, speaking generally, a political or civil liberty is coupled with a legal right to it: and, consequently, political liberty is fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse.⁸⁹

87. *Id.* at 290 n.* (emphasis added).

88. 2 J. AUSTIN, LECTURES, *supra* note 82, at 457.

89. J. AUSTIN, PROVINCE OF JURISPRUDENCE, *supra* note 24, at 289-90 (emphasis added).

Like Bentham, Austin did not see that there could be policy arguments *against* corroboration of liberties by rights. Both of them used their analytical schemes to obscure the extent to which the legal system allows people to interfere with the permitted acts of others.

2. THE SIC UTERE DOCTRINE

Austin advanced a version of the meta-theory of self-regarding acts in his discussion of the doctrine that one should use one's rights (liberties) so as not to injure the rights of others: *sic utere tuo ut alienum non laedas*. In discussing the right of user associated with property ownership, Austin wrote:

[T]he right of user (with the implied or corresponding right of excluding others from user) is restricted to such a user, as shall be consistent with the rights of others generally, and with duties incumbent on the owner.

For example: . . . [i]f I am the absolute owner of my house, I may destroy it if I will. But I must not destroy it in such a manner as would amount to an injury to any of my neighbors.⁹⁰

One may destroy one's own house but not in a manner that adversely affects the legally protected interests of others. The idea of limiting freedom of user to such uses as did not invade the rights of others gave the impression that the indefinite freedom of action associated with property ownership was not incompatible with security.

The theory of corroboration stated that one should not interfere with the legal liberty (legitimate freedom of action) of others. The *sic utere* doctrine stated that one should not interfere with the legal rights (legitimate security) of others. Both corroboration and the *sic utere* doctrine were part of the self-regarding/other-regarding meta-theory that mediated the contradiction between freedom of action and security. As long as an act was conceived to be self-regarding, it was lawful, regardless of its consequences to others, and the theory of corroboration would justify the imposition of duties not to interfere with the self-regarding acts. As soon as an action was conceived to be harmful to the legally protected interests of others, the doctrine of *sic utere* would justify rendering the action unlawful.

From a modern Hohfeldian perspective, the *sic utere* doctrine

90. 3 J. AUSTIN, LECTURES, *supra* note 82, at 6.

may be criticized on two counts. As an explanation of the rules in force, it is either wrong or circular. First, it is wrong because it denies the existence of both *damnum absque injuria* and uncorroborated liberties. To the extent the doctrine implied that one could not interfere with the liberties of others it was mistaken. Uncorroborated liberties do exist in the legal system and for good reasons. One can interfere with the liberties of others by engaging in economic competition with them which hinders their ability to exercise their liberty to produce and sell in the marketplace. To the extent that the doctrine implied that legally protected interests must never be adversely affected by the free actions of others, it was also mistaken. One can adversely affect the legally protected interests of others as long as one does not breach any legal duties. By competing to drive down the price of a competitor's goods, one may decrease her profits or even put her out of business. Such acts are permitted by legal liberties and clearly have an adverse impact on the legally protected property interests of the competitor. Yet no legal duty has been violated and the competitor's legal property right has not been invaded.

Second, the *sic utere* doctrine fails as a rationalizing principle because it is circular. In Hohfeldian language, it states that one should not use one's liberties in a way that invades the rights of others. This simply means that to the extent others have rights, I do not have a legal liberty to act to harm them. The doctrine gives no argument for the *legitimacy* of the existence of those rights or the restriction on my liberty since it merely states a tautology. The *sic utere* doctrine was superficially plausible only as long as one believed that the self-regarding/other-regarding distinction was an adequate justificatory explanation of the rules in force. The existence of a large sphere of *damnum absque injuria* in the legal system creates severe doubt about the adequacy of such a rationalizing principle.

D. The Problem of Economic Competition

The classical analytical schemes described a legal system which had wide liberties with minimal duties to protect people and their property from injury. Based on the theory of self-regarding acts, the classical system minimized the role of *damnum absque injuria*, damage against which the victim has no protection and no redress. By this technique, the classical jurists obscured crucial aspects of a liberal legal system. Their descriptions of the legal system were mystifications. The classical system's major fault was its truncated recognition of *damnum absque injuria*.

Consider the problem of economic competition. Bentham did not identify the liberty to engage in economic competition as an example of a power to meddle with the interests of others. Yet this is an example of a permissive law that allows the infliction of harm. The marketplace is predicated on the systematic infliction of harm by some actors on others. Inefficient businesses are driven out of the marketplace by their competitors. Workers are fired to make way for machinery. Companies relocate, moving jobs along with them. Families are scattered and uncertainty abounds.

When one considers the reality of a market system, it is evident that the legal system allows a great deal more *damnum absque injuria* than Bentham or Mill would have us believe. And when their descriptions of the legal system are set alongside the reality of economic competition, one can see the extent to which their schemes are fantasies. First, economic competition is a crucial aspect of the liberal legal system. It is composed of acts that are often harmful to the interests of others. The theory of self-regarding acts loses a great deal of its powers of legitimation when one notices that it obscures one of the central aspects of the legal system.

Second, not only does competition create much damage for which there is no legal recourse, but it also contradicts Bentham's and Mill's idea of corroboration. The liberty to compete is the freedom to interfere with the permitted acts of others. X's liberty to sell shoes does not imply that Y has a duty not to open a shoe store that will take away some of X's business. Not only are uncorroborated liberties present in the legal system, but there are good policy reasons to allow certain liberties to interfere with the permitted acts of others. The classical treatment of *damnum absque injuria* is problematic both in its descriptive and its normative aspects. The theory of self-regarding acts simply cannot be used either to describe or to justify the existence of economic competition.

E. The Problem of Nonnegligent Injuries

Austin did recognize that some injuries might be inflicted for which there would be no legal recourse: specifically, injuries inflicted in the absence of intent or negligence. He argued strenuously against the principle of strict liability.⁹¹ The issue of negligence and strict liability is segregated from Austin's discussion of the defini-

91. 2 J. AUSTIN, LECTURES, *supra* note 82, at 136. But compare Austin's justification of the rule that ignorance of the law is no excuse. *Id.* at 171-74. ("But if ignorance of the law were a ground of exemption, the administration of justice would be arrested.")

tions of rights and liberties, the principle of corroboration, and the *sic utere* doctrine. Austin did not see a connection between the argument against imposing liability for nonnegligently inflicted injuries and the argument that other-regarding prejudicial acts were presumptively invalid. Just as Bentham obscured *damnum absque injuria* by his treatment of liberties and powers, Austin obscured the existence of *damnum absque injuria* by not relating the discussions of negligence and the definitions of rights and liberties. From a Hohfeldian perspective, the failure to impose strict liability means that one can act in complete liberty to injure others as long as one acts reasonably. The *sic utere* doctrine obscured the reality of the legal system by implying that people were entitled to far greater security than they in fact received.

F. Conclusion

The meta-theory of self-regarding acts advanced by Bentham, Mill and Austin to rationalize and legitimate the legal system was a mystification because it obscured the existence of *damnum absque injuria* and uncorroborated liberties and because it failed to rationalize these major aspects of the legal system. The self-regarding theory was based on the liberal idea that government and the rule of law provided the security that was absent in the state of nature while allowing wide liberty to act in ways that did not prejudice the security of others. Such a theory did not account for the competing spheres of conflict in the legal system where social life was not completely harmonized but was perilously close to the state of nature itself. It also failed to account for the extensive harms inflicted by people who have acted nonnegligently and without specific intent to harm. Finally, it obscured the intentional inflictions of damage for which the victim had no legal recourse. This failure of the self-regarding theory to describe the legal system adequately would be its undoing.

IV. THE DEVELOPMENT OF CONCEPTUALISM

The first target of Hohfeld's criticism was the classical confusion of rights and liberties. He sought to correct the erroneous belief that liberties were necessarily accompanied by duties on others not to interfere with the permitted acts. The second major target of Hohfeld's criticism was the practice of conceptualism as a method of legal reasoning. I will begin by discussing the meaning of conceptualism, and then trace the development of various conceptualist errors in the analytical discussions that preceded Hohfeld.

A. Nominalism and Conceptualism

In legal reasoning, two distinct logical processes must be distinguished. The first is the identification and elaboration of first principles. Such a process relies on subjective judgments based on value-laden theories such as rights analysis or utilitarianism. The second process is the deduction of consequences from first principles. For example, if one decides, on the basis of rights or utility analysis, that landlords have a continuing duty to repair the premises and provide heat to their tenants, it follows as a matter of logical deduction that when the landlord has failed to repair a defective boiler in the leased premises, she has breached a legal duty.

These two logical processes must be distinguished to demonstrate that there are two very different relationships possible between general concepts or principles, on the one hand, and specific subrules related to them, on the other. General concepts may be convenient devices to categorize disparate principles that are thought to have important attributes in common but are not logically entailed in any deductive system to each other. Such a general concept is not itself a first principle from which subrules may be derived. In this case, arguing against one of the subrules will not necessarily be experienced as an attack on any of the others in the category. One could reject a single subrule without the general category necessarily losing its utility in cataloging or describing the rest.

On the other hand, general concepts may be thought themselves to be first principles from which each of the subrules are thought to be logically deducible. Duncan Kennedy has used the word "operative" to describe the subjective feeling that a number of concrete subrules are somehow implicit in a more general legal principle or concept.⁹² A concept is operative if it is possible to infer the existence of a more concrete subrule from the more abstract whole and the abstract principle from the subrule. The principle and the subrule are thought to entail each other logically so that rejection of one would necessarily mean a rejection of the other. In that case, attacking a subrule would be equivalent to rejecting the concept as a whole and would be seen as an attack, not only on the subrule but on the abstract principle from which it is thought to be derived, and the other subrules connected with it.

Different people may experience concepts to be operative at

92. D. Kennedy, *The Rise and Fall of Classical Legal Thought 1850-1940*, V-8 (Harvard Law School, 1975) (unpublished manuscript); see also Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH L. & Soc'y 3, 19-21 (1980).

widely varying degrees of generality. Kennedy has used the term "blocking level" to identify the level of generality and abstractness at which concepts are thought to be operative.⁹³ The higher the blocking level, the higher the level of generality and the greater the abstractness of concepts thought to have operative consequences.

At a low blocking level, many more rules are experienced as first principles derivable only from subjective judgments based on rights or utility theories. Thus, at a low blocking level many more first principles must be chosen on the basis of subjective judgments since general concepts are thought merely to catalogue first principles in convenient categories. At a higher blocking level, rules that were thought to rest on their own rights or utility foundation, are perceived to be implied in an overriding conceptual principle from which they can be derived by logical deduction. Thus fewer first principles are required, since many more subrules can be deduced from the more operative concepts in an objective manner. Further, at a higher blocking level the choice of first principles in effect obviates choice at the level of the various subrules deduced from the abstract concept. This is because the process of deriving subrules from operative principles is experienced as compulsory; that is, one is bound to accept one if the other is also accepted and to reject both if either is rejected. Disagreement cannot be explained by varying subjective judgments of first principles, but "can reflect only bad faith or error on one side or the other."⁹⁴

Conceptualism is the belief that concepts at a high level of generality and abstractness are operative, in the sense that they correspond to elements of the real world and are the basis of numerous and concrete subrules that can be deduced from them. Austin and Mill were conceptualists in this sense. Nominalism is the belief that concepts at only a very low level of generality and abstractness are operative. Thus general concepts, such as "law" or "property" or "rights," are seen merely as convenient categorizations of experience. We put into those categories the rules and meaning we choose to put into them. They do not of themselves determine their scope or consequences. This perspective is characteristic of Bentham and Hohfeld.

Nominalists as well as conceptualists claim that at *some* level, words and concepts correspond to objects or experience in the real world. The difference is the *level* of generality at which concepts are thought to be "real." Whether one is a nominalist or conceptualist

93. *Id.* at V-10.

94. *Id.* at V-11.

depends on a comparative judgment of the level of generality of operativeness of concepts.

1. JEREMY BENTHAM

Bentham stated that he was an extreme nominalist. He did not believe that concepts like "property" or "right" had any inherent implications or limitations. For example, he claimed that property was only what the state declared it to be: "Now property before it can be offended against must be created: and the creation of it is the work of the law."⁹⁵ General terms like property and right were "fictions," in Bentham's view, in that they were human creations and subject to human control and definition.⁹⁶ The solution was to analyze these fictions down into their "real entities," by which Bentham meant things that could be detected by the senses.⁹⁷

Bentham offered a *policy* argument for corroborating liberties and powers by duties on others not to interfere.⁹⁸ However, Bentham sometimes assumed that liberties and powers are corroborated as a matter of *definition*.

Power over things is constituted then by the imposing of duties of abstinence on other persons . . . For such species of property as consist in a power over things, the protection it gives in the first instance is afforded by prohibition: by the prohibition of any acts by which the possession or the exercise of such power would be disturbed. . . . For whatever the law permits a man to perform or abstain from, it inhibits all others from compelling him to abstain from or to perform.⁹⁹

To assume that powers are *constituted* by the corroborative duties is a logical error since to do so implies not only that uncorroborated powers do not or should not exist, but that they could not exist. Yet one can conceive of a Benthamite power to throw off a trespasser coexisting with a liberty to resist on the part of the trespasser. It is

95. J. BENTHAM, *LAWS*, *supra* note 53, at 255.

96. Power, right, prohibition, duty, obligation, burthen, immunity, exemption, privilege, property, security, liberty—all these with a multitude of others that might be named are so many fictitious entities which the law upon one occasion or another is considered in common speech as creating or disposing of. Not an operation does it ever perform, but it is considered as creating or in some manner or other disposing of these its imaginary productions.

Id. at 251. Thus, Bentham wrote: "These words have been the foundation of reasoning as if they had been external entities which did not derive their birth from the law but which on the contrary had given birth to it." See Hart, *Bentham*, in *JEREMY BENTHAM: TEN CRITICAL ESSAYS* 73, 85 (B. Parekh ed. 1974).

97. J. BENTHAM, *LAWS*, *supra* note 53, at 293-94; see also *id.* at 251-52.

98. *Id.* at 99, 290-91.

99. *Id.* at 131-32; see also *id.* at 276-77, 290.

simply not true that one *necessarily* follows from the other.

Bentham's policy argument for corroboration is not a logical error since it may be countered by a contradictory policy in favor of uncorroborated permissive laws. We may have good reasons not only to allow a property owner to eject a trespasser but also to allow the trespasser to resist. However, to the extent Bentham sought to *define* powers by reference to the accompanying duties, he was engaging in the logical error of failing to distinguish rights and liberties conceptually. This mistake was to be a central element of the Austinian paradigm of legal rights and an object of attack by Hohfeld.

2. JOHN AUSTIN

Austin argued that concepts at a high level of generality are clearly distinguishable and that it is possible to deduce numerous particular consequences from the general concepts. This is what made him a conceptualist.

The high level of abstractness of concepts Austin thought to be operative can be illustrated by his argument that the concept of "law" negates any adherence to strict liability. From the highly abstract concept of law Austin deduced that courts should only impose liability when "fault" is involved. Austin argued that positive law constitutes commands of the sovereign to do or forbear, enforced by sanctions in cases of disobedience. Since law is commands, it is addressed to changing behavior. But if an act was not intentional or negligent, the sanction could have had no effect on changing the defendant's behavior. This is because the defendant could not have known that she was violating a legal duty. We can induce people not to harm others intentionally. We can also induce them to act reasonably. But we cannot prevent people absolutely from harming others unless we forbid them from doing anything at all. Others may be hurt even if one acts as a prudent person. Therefore, Austin concluded majestically, there can be no liability without fault since such liability would have no effect, and could have no effect, on altering behavior.¹⁰⁰ No rational person who favored the rule of law could possibly favor the imposition of strict liability under any circumstances.

[W]e cannot be obliged to *that* which depends not on our desires, or which we cannot fulfill by desiring or wishing it. A stupid and cruel legislator may affect to command *that*, which the party cannot perform,

100. 2 J. AUSTIN, LECTURES, *supra* note 82, at 136.

although he desire to perform it. But though he inspire the party with a wish of fulfilling the command, he cannot attain his end by inspiring those wishes.¹⁰¹

Once the concept of law is correctly understood, only a “stupid” or “cruel” legislator or judge—or presumably, someone who does not purport to favor the rule of law—would impose strict liability. The general concept of “law” is operative in the sense that Austin believed that the concept necessarily decided the issue of whether strict liability is ever warranted.

Austin, like Bentham, gave a policy argument for corroboration of liberties.¹⁰² To the extent that Austin believed that the connection between liberties and corroborative rights was based on policy considerations, he was echoing Bentham’s earlier argument. Yet Austin had a tendency to use the conceptualist technique of deducing the existence of corroborative rights from the mere existence of liberties.

Austin later advanced a conceptualist link between liberties and rights. In a series of fragments collected by his wife, Sarah Austin, and published after his death, Austin argued that “Freedom, Liberty, are negative names, denoting absence of Restraint. . . . Civil, Political, or Legal Liberty, is the absence of Legal Restraint, whether such restraint has never been imposed, or, having been imposed, has been withdrawn.”¹⁰³ Such freedom of action may be general and extend to all, as a legal liberty, or it may be particular and be an exception from a generally imposed duty, as a legal privilege. However, Austin argued that “Law, considered as a rule of conduct prescribed by the Legislator or Judge, is necessarily imperative, since it imposes an obligation to act or to refrain from acting in a given manner.”¹⁰⁴ Austin noted that this definition of law seems to be contradicted by the existence of permissive laws. “Sanction is not of the essence of permissive law. For, by such a law, an obligation, instead of being imposed, may be simply removed (*Sed quaere*).”¹⁰⁵ But Austin concluded that such a contradiction is only apparent since liberties are always by definition accompanied by rights:

It has hitherto been assumed that every law imposed an Obligation. Apparent exception in the case of Permissive Laws. The exception only apparent. Taking off an Obligation, it confers a Right, and so im-

101. *Id.*

102. J. AUSTIN, PROVINCE OF JURISPRUDENCE, *supra* note 24, at 289-90.

103. 2 J. AUSTIN, LECTURES, *supra* note 82, at 15-16.

104. *Id.* at 15.

105. *Id.*

poses an obligation corresponding to that right.

With reference to such parts of conduct as the positive law of the community does not touch, the members of a political society are in a state of nature. (*Sed quaere*: For they are protected in that liberty by the State. Such liberty would seem to consist of rights conferred in the way of permission.) . . .

. . . .
Liberty and Right are synonymous: since the liberty of acting according to one's will would be altogether illusory if it were not protected from obstruction. There is however this difference between the terms. In Liberty, the prominent or leading idea is, the absence of legal restraint; whilst the security or protection for the enjoyment of that liberty is the secondary idea. Right, on the other hand, denotes the protection and connotes the absence of Restraint.

. . . .
On the whole, Right and Liberty seem to be synonymous;—either of them meaning, 1st, permission on the part of the Sovereign to dispose of one's person or of any external subject (subject to restrictions, of course); 2nd, security against others for the exercise of such right and liberty.¹⁰⁶

In this passage Austin made a conceptualist nexus between rights and liberties. Such a nexus is a logical error. However often liberties may be corroborated by duties on others not to interfere with the permitted acts, the connection between them is not one of logical entailment. Logically, one must distinguish between the decision not to place a duty on someone, thereby granting her a liberty, and the decision to put duties on *other* people. This is the clarification made by Hohfeld.

3. JOHN STUART MILL

Like Austin, Mill was a conceptualist. He did not give a policy or rights argument for legalizing alcohol consumption. He gave a rights and utility argument for "liberty." He then asserted that anyone who is in favor of liberty *must* be against prohibition. Conversely, anyone who favors prohibition must be someone who is an opponent of "liberty."¹⁰⁷ Mill applied the same conceptualist technique in defining legal liberty to contain inherent corroborative duties. He defined liberty as "doing as we like . . . *without impediment from our fellow-creatures*, so long as what we do does not harm them."¹⁰⁸ Such a *definitional* connection between rights and liberties is a logical error.

106. *Id.* at 15-17 (footnote omitted) (emphasis added).

107. *See supra* note 46 and accompanying text.

108. J.S. MILL, *supra* note 5, at 13 (emphasis added).

4. AUSTIN'S FOLLOWERS

The Austinian school of jurisprudence centered around his definition of laws as commands. This may explain why they perpetuated the logical error of assuming that liberties were constituted by corroborative duties or that liberties were logically entailed by rights and vice versa. In 1880 Thomas Holland wrote, "[t]he most obvious characteristic of Law is that it is coercive . . . Even when it operates in favour of the legitimate action of individuals, it does so by restraining any interference with such action."¹⁰⁹ On that basis, Holland incorrectly inferred rights from liberties. "Every one is entitled without molestation to perform all lawful acts. . . ."¹¹⁰ This is simply not true and has never been true.

Frederick Pollock repeated this mistake in 1896 by declaring that "[i]t is the duty of all of us not to interfere with our neighbour's lawful freedom."¹¹¹ Austin's logical error—the confusion of rights and liberties and the logical entailment of one with the other—was also followed by Sheldon Amos (1872), Henry Terry (1878), Christopher Columbus Langdell (1900), John Chipman Gray (1909), as well as Pollock and Holland, within the analytical school of jurisprudence.¹¹² It was a tenacious mistake.

The persistence of Austin's error is illustrated by an astonishingly recent repetition of it in John Rawls's much touted *Theory of Justice*.¹¹³ Writing in 1971, Rawls asserted:

Thus persons are at liberty to do something when they are free from certain constraints either to do it or not to do it *and when their doing it or not doing it is protected from interference by other persons*. If, for example, we consider liberty of conscience as defined by law, then individuals have this liberty when they are free to pursue their moral, philosophical, or religious interests without legal restrictions requiring them to engage or not to engage in any particular form of religious or other practice, *and when other men have a legal duty not to interfere*. A rather intricate complex of rights and duties characterizes any particular liberty. Not only must it be permissible for individuals to do or not to do something, but government and other persons *must have a legal duty not to obstruct*.¹¹⁴

109. T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 52 (1880).

110. *Id.* at 120.

111. F. POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 62 (5th ed. 1923).

112. See S. AMOS, *A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE* 76, 79, 144 (1872); S. AMOS, *THE SCIENCE OF LAW* 95-97 (1874); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 9, 19 (1909); Langdell, *Classification of Rights and Wrongs* (pt. 1), 13 *HARV. L. REV.* 537, 538, 542 (1900); Langdell *Classification of Rights and Wrongs* (pt. 2), 13 *HARV. L. REV.* 659, 661-62 (1900); F. POLLOCK, *supra* note 420, at 61-62. On Terry's position, see *infra* notes 163-64 and accompanying text.

113. J. RAWLS, *A THEORY OF JUSTICE* (1971).

Rawls repeated, almost verbatim, Mill's definition of liberty as freedom to act without interference. Rawls entertained some doubts about this definition, but they were quickly thrust aside in a footnote.¹¹⁵

Again, however true it may be that liberties are actually accompanied by some rights against interference, Rawls's characterization of legal liberty greatly distorts reality. This is because even if the legal system imposed one duty and no others—for example the duty not to punch other people in the face—then all legal liberties could be said to be corroborated by this duty. In other words, for every legal liberty, there would be at least one duty against interference. But this way of describing the legal system is seriously misleading.

First, the Rawls/Austin/Mill definition of legal liberty makes the legal protection of permitted acts appear to be far greater than it in fact is or ever could be. Second, it obscures the conflicting liberties of economic and political life. Third, it speaks on such a general level that it is totally divorced from particular legal issues faced by lawmakers. If confronted with numerous particular cases in which an actual or an imagined legal system legitimately allowed individuals to interfere with the permitted acts of others, the definition would simply not be plausible. Fourth, the definition gives absolutely no guidance to the rulemaker. Just because some acts of interference are prohibited does not mean that all such acts are prohibited.¹¹⁶ The very problem is to decide which acts of interference to allow and which to prohibit.

In summary, Austin's followers, including Rawls, perpetuated the mystification against which Hohfeld fought. By including this error in his theory, Rawls made his system of justice appear to be far

114. *Id.* at 202-03 (emphasis added).

115. Rawls wrote:

Liberty, as I have said, is a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere.

It may be disputed whether this view holds for all rights, for example, the right to pick up an unclaimed article. See Hart in *Philosophical Review*, vol. 64, p. 179. But perhaps it is true enough for our purposes here. While some of the basic rights are similarly competition rights, as we may call them—for example, the right to participate in public affairs and to influence the political decisions taken—at the same time everyone has a duty to conduct himself in a certain way. This duty is one of fair political conduct, so to speak, and to violate it is a kind of interference.

Id. at 239, 239 n.23.

116. See Cook, *supra* note 21, at 788.

more wonderful than it could ever be. His system, like ours, allows people to interfere with each other. It is best to recognize this; otherwise people will be convinced of the beauty of Rawls's system simply because they are ignorant of its true nature. The fact is that if people were truly prohibited from interfering with the legal liberties of others, no one would be free to do anything. We want people to be able to interfere in some ways with others, and we want to stop them from interfering in other ways. The point is to choose, not to lull people into believing that the problem does not exist.

Rawls, like all of Austin's followers, minimized the extent to which politics and morality and law involve difficult choices and sacrifices. He made his theory seem attractive by wishing away basic problems. Who could be against liberty and security? In the real world, however, we must choose between contradictory goals in the particular situations of social life. Rawls tried to make us believe it is unnecessary to do this. He thus did us a disservice. His theory makes it more difficult, rather than less, to do the things we must do.

B. The Underlying Linguistic Ambiguity

One possible explanation for the failure of the Austinian school to recognize the existence of uncorroborated liberties in the legal system is an underlying ambiguity in the meaning of the word "liberty." Since a legal right places duties on other people not to interfere with some legally protected interest, it is often understood to create a sphere of "freedom" for the rightholder that consists of *security*. Knowing that others have duties not to assault me, I am more likely to go outside to take a walk than if I were completely bereft of legal protection. My right of bodily security might be characterized as creating a sphere of "liberty" for me. The problem arises when the jurists fail to distinguish between this meaning of liberty and the Hohfeldian privilege.

Bentham used the concept "civil liberty" to mean security of this type. He distinguished between natural liberty and civil liberty. Natural liberty means that there is no restriction on freedom of action and therefore no legal protection from harm. He noted that in such a state of natural liberty your neighbor may decide to tie you to a tree. Bentham stated that you are free "as against the law" since it restricts neither you nor your neighbor, but you are not free "as against [your neighbor]." Then the legislator steps in. "He must either command or prohibit: for there is nothing else that he can do: he therefore cuts off the one side or the other a portion of the sub-

ject's liberty."¹¹⁷ When the legislator intercedes to coerce your neighbor into setting you free, we say your "liberty" is restored. Thus there is an inverse relation between liberty as against the law and liberty as against wrongdoers.¹¹⁸ Law adds restrictions to natural liberty to achieve civil liberty, which is both security from harm and freedom to act without impediment by others.

Austin made the same argument:

[My natural liberty would be but a] sorry liberty, unless my fellow subjects were restrained by a political [legal] duty . . . [S]peaking generally a political or civil liberty is coupled with a legal right to it: and, consequently, political liberty is fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse.¹¹⁹

Like Bentham, Austin argued that, even though law is nothing but imposition of duties—restrictions on natural liberty—it in fact fosters liberty by providing security from having one's free actions impeded by others.

To the extent that the jurists were thinking of this kind of liberty, i.e., security, they were correct to assume that it was constituted by duties on others. Such a sphere of freedom is brought into existence by the imposition of duties on others. Without those duties, there could be no security at all. This may partially account for the logical error of the Austinian school. They failed to distinguish between two fundamentally distinct types of liberty: security—freedom from fear of having others damage one's interests—and the Hohfeldian privilege—freedom to act without anyone else being able to summon state power to forbid one from so acting.

C. Summary of the Classical School

The analytical schemes of Bentham, Austin and Mill form a more or less coherent school of jurisprudential thought. From the standpoint of a Hohfeldian perspective, that school may be characterized by three basic features. First, it represents the high point of the meta-theory of self-regarding acts as a legitimating principle for the rules in force. Second, it contains at best a truncated recognition of the existence of *damnum absque injuria* in the legal system. All these writers failed to see the extent to which the legal system al-

117. J. BENTHAM, *LAWS*, *supra* note 53, at 253.

118. *Id.* at 254.

119. J. AUSTIN, *PROVINCE OF JURISPRUDENCE*, *supra* note 24, at 290 (footnote omitted). Blackstone made the same argument. See Kennedy, *Blackstone's Commentaries*, *supra* note 6, at 378-79.

lows people to hurt each other. Finally, the classical school made broad assertions about the corroboration of liberties by duties on others not to interfere with the permitted acts. Some of these jurists were better at recognizing the existence of uncorroborated liberties in the legal system than others. But even those who recognized their factual existence minimized the extent of it. Their arguments for corroboration were sometimes utilitarian and sometimes conceptualist. Those who made utilitarian arguments failed to recognize the possible utility of uncorroborated liberties. Those who used the technique of conceptualism to link liberties and duties definitionally perpetuated a logical error.

V. DAMNUM ABSQUE INJURIA

A. *The Problem of Damnum Absque Injuria*

The classical theory of self-regarding acts represented an effort to both describe and legitimate the legal rules in force, and in so doing it minimized and obscured the existence of rules that allowed some people to inflict harm on others without the victims having legal recourse of any kind. In the classical analytical schemes, the category of *damnum absque injuria* was partially excluded, sometimes ignored and always obscured by the jurists. Further, *damnum absque injuria* was always somewhat anomalous to the classical schemes. After all, the very concept of damage for which the legal system provided no remedy seemed to contradict the theory that other-regarding harmful acts were presumptively invalid. As an anomaly, it did not threaten the reigning meta-theory as long as it was perceived to be a minor or infrequent occurrence in the legal system. But once the self-regarding theory was firmly established, attention turned, as it naturally does in intellectual history, to the anomaly.¹²⁰ From approximately 1880 to 1920, *damnum absque injuria* emerged as the central issue of theoretical concern for critical analytical jurists; its effect was to shatter the self-regarding theory and to expose a series of conceptualist errors.

This happened in three steps. First, empirical observation of the legal system led to the recognition of the extent of the factual existence of *damnum absque injuria* in the legal rules in force, which the classical jurists had severely underestimated. Second, analytical jurists began to see policy arguments for the existence of *damnum absque injuria* on such a wide scale. Finally, they appro-

120. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52-65 (1970).

priated those policy arguments and incorporated *damnum absque injuria* into the analytical schemes, no longer as an anomaly, but as a fundamental component of the new paradigm.

The theoretical incorporation of *damnum absque injuria* revolved around three major areas of inquiry. They were: (1) the emergence of the concept of legally protected interests; (2) focus on economic competition as an alternative model to the self-regarding acts theory; and (3) the problem of uncorroborated liberties generally. The end result of the theoretical incorporation of *damnum absque injuria* was Hohfeld's category of "no-right." To the extent others have the legal liberty to act or not to act, the damage they inflict on us violates "no [legal] rights" of ours, and we have no claim on the legal system to protect us from such harms or to provide us with remedies. I will now trace the history of that theoretical incorporation.

B. Factual Recognition of *Damnum Absque Injuria*

In 1879 Edward Weeks published a remarkable book entitled *The Doctrine of Damnum Absque Injuria Considered in its Relation to the Law of Torts*. He sought to illustrate "those cases of loss and damage for which the law provides *no* remedy."¹²¹ Weeks argued that "[e]very invasion of a legal right, such as the right of property, or the rights incidental to the possession of property or the right of personal security, constitutes a tort. . . . To constitute a tort, two things must concur—actual or legal damage to the plaintiff, and a wrongful act committed by the defendant."¹²² Weeks defined *damnum* or damage as "the loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident."¹²³ *Injuria* on the other hand is a "wrongful act or tort, that relates to the defendant."¹²⁴ *Damnum absque injuria* therefore is damage without legal wrong. "The wrong or injury [*damnum*], however great, is not one in the eye of the law—not recognized as such by the law."¹²⁵

Beginning around the time of Weeks's treatise, critical analytical jurists became preoccupied with the existence of *damnum ab-*

121. E. WEEKS, *THE DOCTRINE OF DAMNUM ABSQUE INJURIA CONSIDERED IN RELATION TO THE LAW OF TORTS* vii (1879). See also *id.* at 2 n.1.

122. *Id.* at 2.

123. *Id.* at 7.

124. *Id.*

125. *Id.* at 8. Weeks also identified *injuria sine damno*. One may breach a legal duty, but if there is no damage to another, there can be no compensation or liability. *Id.* at viii, 3, 9.

sque injuria in the legal system. To simplify the task of exposition, I will rely primarily on examples given by Edward Weeks and Oliver Wendell Holmes. I will present the examples of *damnum absque injuria* in categories that will be useful in understanding the process by which *damnum absque injuria* was incorporated into the later analytical schemes of rights and liberties. The three basic categories of *damnum absque injuria* are: (1) absence of legal protection for some interests; (2) general limits to the legal protection of all interests; and (3) varying extent of protection for different interests.

1. ABSENCE OF LEGAL PROTECTION FOR SOME INTERESTS

Weeks recognized that certain interests are not granted any legal protection whatsoever. For example, Weeks noted that in some jurisdictions of the United States there is no easement for light and air. "So, it is held that a person may legally erect a building on his own land, immediately adjoining the land of another, and put out windows overlooking the latter's, and although he use them for twenty years, he will have no redress."¹²⁶ The interest in unobstructed light and air is not granted legal protection. Thus, the harm to these interests is *damnum absque injuria*.

Another example is the interest in emotional security. The law generally provides no redress for mental distress caused by another:

In another case one church member brought an action against a brother member for disturbing him during religious services in church by making loud noises in singing, reading, and talking. "In the first place," said the court, "the injury alleged is not the ground of an action. He (the plaintiff) claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation, or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse or any other mental exercise (and it must be the same, whether in a church or elsewhere) by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature; it is altogether of a spiritual character, for which no action at law lies."¹²⁷

Oliver Wendell Holmes also addressed the problem of *damnum absque injuria* in his essay *Privilege, Malice, and Intent*

126. *Id.* at 60.

127. *Id.* at 59-60 (footnote omitted).

in 1894.¹²⁸ In certain cases, Holmes wrote, the "defendant is privileged knowingly to inflict the damage complained of."¹²⁹ No legally protected interest has been recognized in esthetic enjoyment. A person "has a right to build a house upon his land in such a position as to spoil the view from a far more valuable house hard by."¹³⁰

The recognition that certain interests of consequence to individuals are devoid of legal protection is not, by itself, enough to cast doubt on the self-regarding theory. Most major interests are granted some level of legal protection. Yet it is an important step on the road to recognizing that there might, in some instances, be good reasons to leave citizens vulnerable to harm.

2. GENERAL LIMITS TO LEGAL PROTECTION OF INTERESTS

Weeks's introductory chapter contains a list of generalized limits that are applicable to many, if not all, legally protected interests. Recovery is denied in cases of contributory negligence,¹³¹ "trifling injuries,"¹³² and injuries committed through necessity.¹³³ Consent is also generally a valid defense: "That to which a person assents is not usually esteemed in law an injury."¹³⁴ Finally, injury may be legally justified on grounds of public policy:

That regard be had for the public welfare is the highest law. *Salus populi suprema lex*. There is an implied assent on the part of every member of society, that his own individual welfare shall in cases of necessity yield to that of the community, and that his property, liberty, and even his life shall, under given circumstances, be jeopardized or sacrificed for the public good.¹³⁵

This is similar to the utilitarian arguments advanced by Bentham and Mill for sometimes allowing harms to be inflicted. The difference in Weeks, however, is that Weeks noticed that these limits to legal protection pervaded the legal system. Granting legal protection to an interest did not necessarily mean that one would obtain legal redress if the interest were invaded. This realization led them to consider the *extent* to which an interest would be protected by the law.

128. Holmes, *supra* note 10.

129. *Id.* at 3.

130. *Id.*

131. E. WEEKS, *supra* note 121, at 14-15.

132. *Id.* at 15.

133. *Id.* at 17.

134. *Id.* at 22.

135. *Id.* at 17-18.

3. VARYING EXTENT OF LEGAL PROTECTION OF INTERESTS

The organization used by Weeks follows that of a treatise on torts. Each chapter contains sections on related legally protected interests and the ways in which those interests can be invaded without resulting liability. He discussed every major tort recognized by the legal system at the time, including: injuries to the person, false imprisonment, nuisance, slander and libel, malicious prosecution, injuries to personal and real property, negligence, deceit, fraud and misrepresentation. The structure of his presentation conveys the message that there are limits to the legal protection for virtually every legally protected interest, and that the extent to which each interest is protected varies according to the interest involved and the manner of the invasion. Weeks did not advance a general principle to describe the limits of legal protection. Rather, he presented a detailed collection of examples from actual cases in which judges denied recovery for invasions of interests.

In addition to the message that the extent of legal protection varies with the interest involved, Weeks also noted that even within a particular legally protected interest, liability might vary depending on the circumstances and policies involved. In those jurisdictions that recognize an easement for light and air, for example, the interest only extends "to a reasonable distance, so as to give to the tenement entitled to it such an amount of air and light as is reasonably necessary to the comfortable and useful occupation of the tenement for the purposes of habitation or business."¹³⁶ The same is true for riparian rights:

In the case of water running in defined channels upon the surface of the earth, the rule is that riparian proprietors have no absolute right to the water of the streams flowing by them, but merely the usufruct thereof. They may make a proper use of the water, and a party is not liable to a lower proprietor for abstracting water from the stream if no actual damage has been done. What is a reasonable use is to be decided from the facts—considering the size of the stream, and the amount abstracted.¹³⁷

Holmes also noted that "[n]ot only the existence but the degree of the privilege [to inflict harm] will vary with the case."¹³⁸ Whether one is liable for the tort of interference with contractual relations depends on the "particular means employed."¹³⁹ Depend-

136. *Id.* at 61.

137. *Id.* at 193 (footnote omitted).

138. Holmes, *supra* note 10, at 4.

139. *Id.* at 4.

ing on the circumstances and policies involved, there may be "no privilege," an "absolute" privilege, or a "qualified" privilege.¹⁴⁰

The recognition of the existence of uncorroborated liberties is closely associated with the recognition that interests are granted varying levels of legal protection. Weeks discussed various *corroborated* liberties in which the legal liberty to inflict damage is accompanied by a duty on the other party not to resist. Such corroborated liberties include: the right to act in self-defense,¹⁴¹ the right of parents to discipline their children,¹⁴² lawful arrests by a police officer or a private citizen,¹⁴³ and the right of self-liberation from false imprisonment.¹⁴⁴ In all these cases, someone is given the legal liberty to inflict harm on another on whom a duty is imposed to submit to the harm.

Weeks also recognized the existence of *uncorroborated* liberties in the legal system. One example is the case of riparian rights to the reasonable use of streams:

The defendant, for instance, is the owner and occupant of a mill standing on his land above the land of plaintiffs, who are riparian owners on the same stream, and has, in operating his mill and the works contained in it, used the water of the stream by means of a dam erected across it. The dam is of a magnitude adapted to the size of the stream, and the mode of using it is usual and reasonable according to the custom of the country. The defendant is not liable, though the plaintiffs are prevented from deriving benefits they might otherwise enjoy from the stream.¹⁴⁵

In this case, each party has a legal liberty to use the stream. Neither has a duty not to use it in a way that interferes with the use of the other as long as the use is "reasonable" and therefore within the scope of the legal liberty.

Another example of an uncorroborated liberty is the easement for light and air. One has the liberty to enjoy light and air from one's property, as does one's neighbor. However, neither has a right that places a duty on the other not to interfere with such enjoyment:

In Vermont, it has been held that long continued use of light for the windows of one's building, standing on or near the line of his land, raises no presumption of a grant from the adjoining owner, and no action lies in favor of the former against the latter for obstructing the light by an erection upon his own premises.¹⁴⁶

140. *Id.* at 6.

141. E. WEEKS, *supra* note 121, at 37.

142. *Id.* at 38.

143. *Id.* at 54-55.

144. *Id.* at 120.

145. *Id.* at 193-94 (footnote omitted).

146. *Id.* at 61 (footnote omitted).

An easement of light and air is not recognized. Each has the legal liberty to act in ways that interfere with the enjoyment of light and air of the other.

4. ECONOMIC COMPETITION AND NONNEGLIGENT INJURIES

Just as it had been for Weeks and Holmes, the later jurists' awareness of *damnum absque injuria* was intertwined with the recognition of uncorroborated liberties and the recognition that interests are granted varying extents of legal protection. The prime example of *damnum absque injuria* in later analytical discussions is damage inflicted in the course of economic competition. In *First Principles of Law*, published in 1878, Henry Terry dealt extensively with the problem of *damnum absque injuria*:¹⁴⁷

If one tradesman sets up his shop so near to the shop of another as to draw away his trade and ruin him by competition, he does him a great damage but no injury, since he is doing no more than what he has a right to do. . . . Damage without injury is called in law *damnum absque injuria*.¹⁴⁸

Weeks included it in his treatise:

Interference with another's trade by fair competition is never actionable. The loss in such a case, though a damage, is not considered to be caused by a wrong. It is the exercise of a right, causing no more detriment than is necessarily the result of artificial society and legitimate business enterprises.¹⁴⁹

In *First Principles of Jurisprudence*, published in 1893, John Salmond, like Terry, raised the issue of *damnum absque injuria*.¹⁵⁰ "It must now be . . . noticed," Salmond writes, "that not every act which is hurtful in fact is recognized and remedied as such by law. . . ." ¹⁵¹ Acts that are injurious to individuals may be lawful for overriding policy reasons. "Hence competition, though hurtful to individuals, is not wrongful."¹⁵² Finally, Holmes noted it in 1894. "For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there al-

147. H. TERRY, *FIRST PRINCIPLES OF LAW* 430 (1878) [hereinafter cited as H. TERRY, *FIRST PRINCIPLES*].

148. *Id.*

149. E. WEEKS, *supra* note 121, at 16 (footnote omitted).

150. J. SALMOND, *FIRST PRINCIPLES OF JURISPRUDENCE* (1893) [hereinafter cited as J. SALMOND, *FIRST PRINCIPLES*].

151. *Id.* at 160-61.

152. *Id.* at 161.

ready.”¹⁵³

Liberal political and economic philosophers had always made powerful justificatory arguments for the harms inflicted in the course of economic competition. However, when the early jurists constructed the self-regarding theory to describe and justify the legal rules in force, they asserted that *damnum absque injuria* was a minor part of the legal system. The later jurists recognized that such a theory was incompatible with the existence of *damnum absque injuria* on as large a scale, and in as central a sphere of social life, as the economic realm. The early jurists had also not seen that there could be good reasons to leave liberties uncorroborated by either legal or moral duties on others. The later jurists developed a growing awareness of the policy arguments for both *damnum absque injuria* and uncorroborated liberties. The centrality of economic competition in the liberal legal system and the recognition that the policy arguments that justified it were in conflict with the prevailing meta-theory caused the later analytical jurists to change the theory in a way that incorporated these policy arguments.

Along with the existence of economic competition, the jurists began to recognize that *damnum absque injuria* would result when the requisite mental element was missing. For example, Holmes's 1894 essay discussed the difference between negligence, intent and malice. In some cases, liability attaches if the defendant acted negligently.¹⁵⁴ In other cases, “a man is not liable for a very manifest danger unless he actually intends to do the harm complained of.”¹⁵⁵ And in still other cases, there is no liability unless he acted out of malice or a “malevolent motive.”¹⁵⁶ What is important is not so much that Holmes noticed the varying levels of duty imposed on individuals, but that he associated those varying duties with *varying levels of vulnerability* of other citizens to harm.

This point is further illustrated by Terry's later discussion of the various levels of protection associated with the various legal duties. Terry explained that there are three kinds of legal duties, which correspond to the modern categories of strict liability, negligence and intent.¹⁵⁷ Depending on the duty imposed on the defend-

153. Holmes, *supra* note 10, at 3.

154. Holmes, *supra* note 10, at 2.

155. *Id.*

156. *Id.*

157. In cases of “peremptory duties,” the defendant is liable to the plaintiff if by her actions she has caused the plaintiff harm. In other cases, the defendant is not liable unless she intended to achieve the harmful consequences. And in still other cases, liability attaches only if harm was likely to result from defendant's actions.

ant, the harm may or may not be *damnum absque injuria*:

For the law never forbids the violation of rights *per se*. The simple fact that A by his conduct has caused a change for the worse in B's bodily condition is not enough to fix a liability upon A. It may be *damnum absque injuria* merely. The violations of rights which are forbidden by law, which amount to actionable wrongs, are those which are caused by acts or omissions which are pointed out and legally described as wrongful by reference to some other circumstance than the mere fact that they are followed by consequences violative of right, for instance the state of mind of the doer, the probability at the time of doing them that they would be followed by such consequences, etc.¹⁵⁸

Thus, if a negligence standard is employed, a defendant who exercises due care "has done his whole duty and is not responsible for what actually happens. . . ." ¹⁵⁹ The harm is *damnum absque injuria*. However, legal redress would be available under the same circumstances if the courts imposed a strict liability standard.

Like Terry, Salmond associated the problem of nonnegligent injuries with the category of *damnum absque injuria*. Like Austin, Salmond assumed that no liability attached in the absence of intent or negligence. Anyone harmed by a person who had acted reasonably would have no legal redress. Such a person is the victim of "inevitable accident." Unlike Austin, Salmond identified "inevitable accident" as an example of *damnum absque injuria*.¹⁶⁰

To summarize, the critical analytical jurists of the late nine-

Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 186-87 (1903) [hereinafter cited as Terry, *Legal Duties*].

158. H. TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW 331 (1884) [hereinafter cited as H. TERRY, LEADING PRINCIPLES]. "An act *per se*, a mere bodily movement, is never either commanded or forbidden by the law. There is no conceivable bodily movement which a person in some circumstances might not lawfully do or omit." Terry, *Legal Duties*, *supra* note 157, at 186.

Weeks also stated that the harms committed without the requisite element of negligence—lack of due care—were examples of *damnum absque injuria*:

Use of one's own property.—An owner of land made an excavation therein within a foot or two of a public street, and used no precaution against the danger of passers falling in. A person passing in the night time went over the line of the street, fell into the excavation, and was injured. It was not disputed that the defendant had the right to excavate the earth for the purpose of making cellar rooms under that portion of the estate where the accident happened. There was no pretense that the defendant was actuated by malice, and the only question was whether he was guilty of such negligence as to expose him to the plaintiff's demand for damages by reason of the injury sustained, on the application of the maxim, *sic utere tuo ut alienum non laedas*. . . . Where neither party is at fault, and an accident takes place, it is equally an instance of *damnum absque injuria*.

E. WEEKS, *supra* note 121, at 13-14.

159. Terry, *Legal Duties*, *supra* note 157, at 187.

160. J. SALMOND, FIRST PRINCIPLES, *supra* note 150, at 164.

teenth century recognized the existence of vast spheres of *damnum absque injuria* contained in the legal rules in force. As long as *damnum absque injuria* was seen as a minor element of the legal system, the self-regarding theory was a persuasive way to legitimate the rules. But when the jurists focused on the crucial spheres of economic competition and injuries committed without the requisite element of intent or negligence, they saw that the legal system contained a great amount of *damnum absque injuria* which could not be described or justified by the prevailing theory. It also became clear that there were good policy reasons both for allowing *damnum absque injuria* to exist on such a large scale and for granting varying levels of protection for different interests. The jurists responded to these revelations by attacking the self-regarding theory itself and constructing an analytical system that could describe the legal system as the modern jurists perceived it.

C. Incorporation of Damnum Absque Injuria into the Analytical Schemes

1. HENRY TERRY

a. Awareness of damnum absque injuria

Henry Terry was the first analytical jurist to focus on the problem of *damnum absque injuria*. Terry's first treatise of analytical jurisprudence, written in 1878, is a fairly standard version of the analytical writings of the Austinian school.¹⁶¹ It is unusual because Terry discussed *damnum absque injuria*, a topic ignored by the Austinian jurists. Moreover, Terry considered *damnum absque injuria* to be so important that it caused him to re-evaluate the traditional analysis. He invented an entirely new scheme which he laid out in his second treatise of analytical jurisprudence in 1884.¹⁶²

Terry published *First Principles of Law* in Tokyo in 1878. In this treatise Terry restated the two elements of the self-regarding theory. The law requires individuals not to interfere with either the freedom of action or the security of others. First, Terry failed to describe uncorroborated liberties. Like Austin, Terry asserted that every legal right is associated with a corresponding duty on someone else. He did not distinguish rights from liberties. He did not recognize that one may have a legal liberty without corresponding duties

161. Terry, *FIRST PRINCIPLES*, *supra* note 147.

162. H. TERRY, *LEADING PRINCIPLES*, *supra* note 158.

on others not to interfere with the permitted acts. "Law commands persons to do or abstain from doing acts. A person so commanded is under a duty or obligation to do or not to do the act."¹⁶³ Because he did not distinguish between freedom to act and freedom to act without interference, Terry did not accord any legitimacy to uncorroborated liberties. All legal rights—and liberties—imply duties on others.

Second, Terry obscured *damnum absque injuria* by implying that the exercise of legal liberties does not threaten the security of others. He did this by restating the *sic utere* doctrine. "[E]very owner of a thing is bound by certain duties to all other persons not to use it so as to injure them."¹⁶⁴ At the same time that Terry reasserted the self-regarding theory, he explicitly discussed the phenomenon of *damnum absque injuria*. Unlike Austin, Terry contended that when someone breaches a duty, she is not automatically liable to a sanction. Terry explained that a tort "consists of a breach of duty followed by damage" and that "[d]amage without injury is called in law *damnum absque injuria*."¹⁶⁵ Terry used economic competition as his prime example of *damnum absque injuria*.¹⁶⁶ The distinction between damage and injury is surprising in an otherwise classical treatise. Terry dealt with the distinction at some length,¹⁶⁷ and by recognizing *damnum absque injuria*, Terry implied that the self-regarding theory did not adequately describe the rules in force.

b. Liberties

Terry's 1884 treatise, *Some Leading Principles of Anglo-American Law*, was substantially different from the lesser-known 1878 treatise. Terry's preoccupation with *damnum absque injuria* led him to create two major innovations. First, Terry abandoned the *sic utere* doctrine and with it the definition of legal liberty as freedom to do self-regarding acts. Second, Terry accorded independent legitimacy to uncorroborated liberties. Both of these changes represented attacks on the adequacy of the self-regarding theory as a description of the legal rules.

First, Terry recognized that many instances of *damnum absque injuria* had been neither analyzed nor described in previous jurisprudential discussions. He also saw that there were good policy

163. H. TERRY, *FIRST PRINCIPLES*, *supra* note 147, at 199.

164. *Id.* at 300.

165. *Id.* at 430.

166. *Id.*

167. *Id.* at 203-04.

reasons to allow such harms to be inflicted. He therefore concluded that it did not make sense to treat *damnum absque injuria* as an anomaly.

Once Terry fully accepted the idea that much of the legal system was composed of rules that allowed people to harm each other, he rejected the premise that the realm of legal liberty encompassed only self-regarding acts. Terry recognized that *damnum absque injuria* is inflicted by the exercise of a legal liberty. If I can hurt you without your having legal recourse of any kind, I must have no duty not to harm you in that manner. If I have no duty, I must have a legal liberty. "A man may exercise his right of free speech, in a case that falls within its scope, without any regard to how much mischief he may do thereby or to whom. . . ." ¹⁶⁸ Because he no longer conceptualized legal liberties to encompass only self-regarding acts, Terry abandoned the *sic utere* doctrine that he had advocated in 1878. "There cannot be said, I think, to be any general rule forbidding a person to cause damage to another by the manner in which he exercises his own rights." ¹⁶⁹

Second, Terry defined liberties to exist independently of any corroborative duties on others not to interfere with the permitted acts. Because he saw that there were sometimes good policy reasons to leave liberties uncorroborated, Terry was the first analytical jurist to grant legitimacy to uncorroborated liberties. Permissive rights can be exercised but cannot be violated. "[T]he act is one to be done by the holder of the right rather than the person subject to a corresponding duty." ¹⁷⁰ Liberties merely define whether one is legally entitled to act in a given manner, not whether others are subject to legal duties not to interfere with one's freedom.

Terry described and accepted uncorroborated liberties because he recognized them to be a special case of *damnum absque injuria*. To the extent one may interfere with the permitted acts of another, one has a legal liberty to inflict damage for which the victim has no legal redress. For example, a heckler may interfere with the ability of a public speaker to exercise her freedom of speech. Since both have the freedom to speak, each may legally interfere with the liberty of the other. Terry gave an example similar to this:

Thus it is generally not legally wrongful, not a violation of any legal right, to prevent a person from saying something which he wishes

168. Terry, *Legal Duties*, *supra* note 157, at 190.

169. H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 8.

170. Terry, *Legal Duties*, *supra* note 157, at 189; *see also* H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 90.

to say, from exercising his right of free speech, by threatening to give him a thrashing next week. But it would be to stop him by actually beating him on the spot, because thereby his right of bodily security would be violated, which is a very different right from that of free speech and is not a mere permissive right. But the one mode of prevention, so far as freedom of speech goes, might be as effectual as the other, and would equally be a violation of the right of free speech, if that right could be violated.¹⁷¹

The classical jurists had asserted that people were never justified in interfering with the legal liberties of others. Terry recognized the existence of uncorroborated liberties in the legal system. He also saw that at times there were good reasons to allow individuals to interfere with the legal liberties of others. He thus rejected the assumption that liberties implied duties on others not to interfere with the permitted acts. To the extent that others have conflicting legal liberties, they may interfere with one's own exercise of her liberty and the harm is *damnum absque injuria*.¹⁷²

Finally, it is important to notice that although Terry's permissive rights closely resemble Hohfeld's privileges, Terry did not invent a correlative for legal liberty. The absence of a correlative meant that Terry failed to incorporate *damnum absque injuria* completely into the analytical scheme. The next section describes the ways in which he failed.

c. Correspondent and protected rights

Terry distinguished "correspondent" rights from "protected" rights. Correspondent rights can be understood only in relation to duties.¹⁷³

171. Terry, *Legal Duties*, *supra* note 157, at 189.

172. Terry also identified "facultative rights," which are akin to Hohfeld's "powers." For the sake of clarity, I will use Hohfeld's terms here. Terry understood that it was as important to distinguish privileges from powers as it was to distinguish privileges from rights. Privileges are mere liberties to act; if one has a liberty to make a contract, for example, one is not liable to another for having done the act of making an agreement and one will not be liable to criminal punishment for having done so. Powers, on the other hand, represent the capacity to call on the aid of the state to enforce such an agreement. Terry, *Legal Duties*, *supra* note 157, at 196; H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 100-01. Thus, a power is the ability to change legal rights of other kinds with the cooperation of the state. Like privileges, powers can only be exercised, not violated; unlike privileges, powers may be exercised with the aid of the state.

Terry also recognized that powers, like privileges, were not necessarily accompanied by duties on others not to interfere with the exercise of the power. Powers cannot be violated; only rights and immunities can be violated. H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 100-01.

173. "The person to whom a duty is owed has a right to have the acts which compose the content of the duty done or omitted. A right of this kind is the condition of having a duty

The duty and the right may be said to correspond to each other; rather they are two names for different aspects of the same thing, i.e., of a certain legal relation between the parties, which looked at from the standpoint of one is a duty owed him by the other, and from the latter's standpoint is a right which he has against the former.¹⁷⁴

Since correspondent rights are enforced by coercing compliance with the duty, they "can not be exercised, but can be violated."¹⁷⁵

Correspondent rights are akin to what Hohfeld called "rights" or "claims." However, they differ from Hohfeld's rights in that Terry distinguished correspondent rights from what he called "protected rights." A protected right is:

the condition of a person for whom the State protects a certain condition of facts by imposing corresponding duties upon others, the content of those duties consisting in acts or omissions of acts which if done would cause or impair the protected condition of facts, and the duties being enforceable at the option of the person having the right.¹⁷⁶

Protected rights correspond to duties on others not to act in ways that will disturb the protected "condition of fact."¹⁷⁷ "The protected state of fact, not any act, is the content of the right. Therefore a right of this sort cannot be exercised, but can be violated."¹⁷⁸

Terry's definition of protected rights shows that he was groping for the idea of legally protected interests. The "condition of fact" means the interest which is granted "protected" status by the law. By defining "protected rights" as legally protected interests, Terry hoped to offer a more accurate description of *damnum absque injuria*. "The true distinction is not between wrong and damage, but between breach of duty and violation of protected right."¹⁷⁹ Breach of duty necessarily meant invasion of the correspondent right. However, one is liable to another for breach of a legal duty only if one has also invaded a protected right. "In fact," Terry explained, "there are four elements which may be theoretically discerned, that is to say, the breach of duty, the violation of the correspondent right, the violation of the protected right, and the actual appreciable damage."¹⁸⁰ The separation of duties—correspondent rights—from legally protected interests—protected rights—could be used to de-

owed to one's self." H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 87. Terry criticized Austin and Holland for accepting this type of legal right as the only kind. *Id.* at 88.

174. Terry, *Legal Duties*, *supra* note 157, at 188.

175. *Id.*

176. H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 97.

177. *Id.* at 96.

178. Terry, *Legal Duties*, *supra* note 157, at 194.

179. H. TERRY, *LEADING PRINCIPLES*, *supra* note 158, at 539.

180. *Id.* at 354.

scribe cases of *damnum absque injuria*. Since the legal system does not absolutely protect every interest, one may harm the legally protected interests of others as long as one does not breach any legal duties owed to them:

A civil injury . . . necessarily consists of two elements, which are theoretically distinct though not always, particularly in the breach of obligations, practically separable. There must be (1) a breach of duty, followed or accompanied as a consequence of the act or omission by (2) a violation of a protected right, i.e., an impairment of the protected condition of facts which are forms of the content of such a right. A breach of duty as such is not by itself a civil injury. One may carry dynamite carelessly through a crowded street, may negligently sell a deadly poison for a harmless medicine, may issue a false and fraudulent prospectus to induce purchasers to take shares in a bubble company, or may publish a vile slander—not a kind actionable *per se*—against another, all of which acts are forbidden by law, are violations of legal duties, without being guilty of any actionable tort, if only no harm comes of it. On the other hand a person's conduct may be such as to cause ruinous pecuniary loss to another or such harm to his person or property as amounts to a serious impairment of the state of facts that forms the content of his protected right of personal security or property and yet be free from liability, if the conduct was not a breach of any legal duty. The damage is *damnum absque injuria*.¹⁸¹

Terry described *damnum absque injuria* as invasion of a protected right—a legally protected interest—without breach of a corresponding duty.

From a Hohfeldian standpoint, the concept of “protected rights” has two basic problems. First, protected rights are merely legally protected interests and not legal rights at all. For example, bodily security is an *interest* that is granted a certain amount of legal protection by the imposition of duties on others not to invade the interest. The legal *right* of bodily security is constituted by the correlative duties. Rights are nothing but duties imposed on others. Rights define the *extent* of the legal protection that is granted to the interest. To the extent that others do not have a duty, they have a legal liberty to act to damage the interest. The concept of protected rights appears to describe the legal right, but in fact it merely describes the interest that is granted protection. The term thus obscures the fact that there are limits to the protection granted the interest.

Instead of illuminating *damnum absque injuria*, the concept of protected rights hopelessly obscures it. Invasion of an interest—a “protected right”—sometimes results in liability and sometimes

181. *Id.* at 538-39.

does not. It only results in liability if a duty has been breached, in other words when a correspondent right has been invaded. Protected rights thus describe both a protected segment—legal right—and an unprotected segment—*damnum absque injuria*. *Damnum absque injuria* is a subset of the category of protected right.

Second, Terry obscured not only *damnum absque injuria*, but the relationship between liberties and rights. Terry failed to identify a correlative for legal liberty. Terry rejected the definition of liberties as permissions to engage in self-regarding acts. Instead, he suggested that the exercise of legal liberties could result in damage to others for which the victims would have no legal recourse. However, by hiding *damnum absque injuria* as a segment of protected rights, Terry failed to see the logical connection between liberties and the unprotected segment of protected rights which represented *damnum absque injuria*. Terry mystified what Hohfeld made plain. To the extent others have legal liberties, *you have no legal right*, meaning no legal protection and no legal redress for damage.

If Terry had seen the connection between liberties and the unprotected segment of protected rights, then he would have invented a separate term to describe the unprotected segment in order to represent *damnum absque injuria* clearly. This term would have been a correlative to legal liberty. Without a correlative to legal liberty, Terry's terminology makes the legal protection of interests appear to be absolute when in fact it is not. Such an analytical system retains overtones of the meta-theory of self-regarding acts. To the extent that it does, it is a mystification.

2. OLIVER WENDELL HOLMES

In his famous 1894 article *Privilege, Malice and Intent*,¹⁸² Holmes suggested a straightforward analysis that incorporates *damnum absque injuria* into the underlying justificatory theory. He argued that damage is forbidden unless it is privileged. "The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as it is consistent with paramount considerations to be mentioned."¹⁸³ Citizens are generally forbidden to harm others but they may harm them if they are legally privileged to do so.¹⁸⁴ Whether or not a privilege will excuse the defendant from liability depends on the factual circumstances, the mental element re-

182. Holmes, *supra* note 10.

183. *Id.* at 1.

184. *Id.* at 1-6.

quired for liability, and the policies involved.¹⁸⁵

Like Terry, Holmes offered a transitional version of the self-regarding theory. Holmes retained the central premise of the old theory. Damage inflicted by one person on another is presumptively invalid. However, by this time the theory was substantially modified by the recognition of *damnum absque injuria*. Although he began by asserting that the purpose of the law is to prevent damage, Holmes focused his discussion on the concept of privilege. In this manner, he pointed out that the law has purposes other than the prevention of damage. There might be good reasons to allow people to inflict damage on each other, and "in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."¹⁸⁶ Such a view asserts that the legal system has *contradictory* purposes. In many instances the goal of security would have to be sacrificed to achieve other goals.

Holmes restated the self-regarding theory only to refute it. The law forbids people to hurt each other—unless it allows them to hurt each other. This statement of the theory demonstrated the circularity of the *sic utere* doctrine. People are legally free to act—even if their acts harm others—unless other people have the legal right not to be hurt in that way. Holmes asserted that legal liberties must be justified by policy considerations precisely because he understood that the *sic utere* doctrine was a tautology.

By connecting the phenomenon of *damnum absque injuria* to the concept of "privilege," Holmes implicitly rejected the idea that legal liberties could be justified by the fiction that they involved merely self-regarding acts. He assumed that people are free to do anything that does not harm others. However, he found such acts uninteresting—so much so that he did not even discuss the concept of self-regarding acts which had been crucial to the classical jurists. Holmes asserted that individuals have legal duties not to harm others unless they are privileged to do so. He therefore used the term "privilege" exactly as Hohfeld was to use it almost twenty years later. Instead of defining legal liberty as freedom to do acts that do not affect others, he implicitly defined legal liberty as freedom to inflict *damnum absque injuria*.

While Bentham, Austin and Mill all carefully distinguished between liberty to do self-regarding acts and liberty to hurt others, Holmes completely ignored the first. The only legal liberties of in-

185. *Id.*

186. *Id.* at 9.

terest to him were acts that made other people vulnerable to harm.

3. JOHN SALMOND

John Salmond was the first analytical jurist to invent an analytical scheme that clearly described *damnum absque injuria*. In so doing, he was the first theorist to reject the self-regarding theory completely as a means of legitimating the rules in force. Salmond's famous *Jurisprudence* was published in 1902. Like Terry's *Leading Principles*, it was a substantially revised version of an earlier, little-known work. The parallels between Terry and Salmond are striking. Both wrote early, quasi-classical treatises that explicitly deal with the anomaly of *damnum absque injuria*. Both revised those early works in attempts to incorporate *damnum absque injuria* into their analytical schemes. Both of them grappled with *damnum absque injuria* as the central theoretical issue. Both considered it important enough to attempt major revisions of the earlier works. This demonstrates the extent of the disillusionment with the classical self-regarding theory. The old theory could not rationalize what had come to be seen as a major aspect of the legal system. Terry's failure to devise a coherent alternative demonstrates how painfully difficult it was for these theorists to invent a new justificatory theory. I will begin by discussing Salmond's early work and the ways in which it obscured *damnum absque injuria*. I will then discuss the major revisions that are the focus of the later treatise.

a. Mystification of damnum absque injuria

In John Salmond's *First Principles of Jurisprudence*, published in 1893, he recognized the existence of *damnum absque injuria*. However, he used two different methods to lessen the sense of contradiction between *damnum absque injuria* and the classical theory of self-regarding acts. First, he used definitions of rights and liberties that obscure *damnum absque injuria* by relying on the old self-regarding/other-regarding distinction. The self-regarding theory was retained as a means of describing and justifying the rules in force. Second, Salmond used the structure of the book to present a coherent classical exposition in the Book I and to segregate the discussion of *damnum absque injuria* to Book II. This structural segregation implies that the existence of pockets of *damnum absque injuria* does not threaten the viability of the self-regarding theory.

(i) Definition and categorization

(a) optional and obligatory rights

Salmond's distinction between "obligatory" and "optional" rights is similar to Terry's distinction between permissive and correspondent rights. Obligatory rights correspond to duties on others to act or not to act in certain ways.¹⁸⁷ Optional rights are similar to Terry's permissive rights. They are permissive rules declaring certain conduct to be unregulated by the sovereign.¹⁸⁸ Salmond stated that liberties were not necessarily accompanied by corroborative duties:

It is true that a right to act is usually accompanied and supported by a right not to be prevented from acting; but the two rights are distinct, and not invariably coexistent. . . . Thus we shall say that I have liberty to express my opinions (meaning that by doing so I do no wrong), and that I have a right not to be prevented from expressing them (meaning that anyone who prevents me does me wrong).¹⁸⁹

Even in his early treatise, Salmond clearly distinguished between rights and liberties and offered a qualified endorsement of the legitimacy of uncorroborated liberties.

Salmond's discussion of optional rights, however, is firmly grounded in the classical self-regarding theory. Salmond asserted that legal liberties concern "indifferent actions [which] have no effect on human welfare, either beneficial or detrimental—acts of such a nature that, so far as welfare is concerned, there is nothing to choose between them and their opposites."¹⁹⁰ Salmond thus defined liberties as permissions to engage in self-regarding acts. The exercise of such liberties, by definition, could not adversely affect the interests of others.

(b) property and obligations

In addition to the distinction between optional and obligatory rights, Salmond listed a series of other categories that purport to distinguish different types of obligatory rights. All these categories revolve around the self-regarding/other-regarding distinction. Salmond's categorical system is incompatible with *damnum absque injuria*. To the extent that it is, it is a misdescription of the rules in

187. J. SALMOND, *FIRST PRINCIPLES*, *supra* note 150, at 16-17, 27.

188. *Id.* at 15-17.

189. *Id.* at 28.

190. *Id.* at 16-17.

force.

First, Salmond distinguished between real and personal rights. Traditionally, rights *in rem* were rights against the whole world while rights *in personam* were rights against specific individuals. Salmond rejected this traditional distinction and replaced it with another that revolves around the concept of self-regarding acts. "A real right is a right to the maintenance of the present position of things; a personal right is a right to the improvement of such a position. The former is a right not to be positively damaged; the latter is a right to be positively benefitted."¹⁹¹

If one has an obligatory right at all, it is either a right to be left alone or it is a right to be made better off. A Hohfeldian conclusion would be that if one does *not* have an obligatory right, either real or personal, then one is vulnerable to harm inflicted by the acts of others. However, Salmond defined legal liberties to encompass only acts that did *not* adversely affect the interests of others. Thus, the combined definitions of liberties and rights obscured the existence of harms for which there is no legal redress.

Salmond's other categorical distinctions have the same effect. His second basic division is between rightful interests in possession and rightful potential interests. Rightful interests in possession are interests protected by law that others have current duties not to invade. Rightful potential interests are things one has the right to receive from others.¹⁹² Salmond also distinguished between positive and negative duties. Positive duties are duties to do an act—presumably to benefit another—while negative duties are duties to refrain from acting—presumably from acts that harm others.¹⁹³ Finally, Salmond divided the entire common law into a unified scheme of property and obligations. Property rights consist of negative duties and real rights; others have duties not to act in ways that worsen your position. Obligations are positive duties and personal rights; others have duties to act to help you achieve what is rightfully yours.¹⁹⁴

Salmond's overall division of the law into the categories of property and obligations obscures the existence of *damnum absque injuria* since he viewed rights from the point of view of the persons benefited by them. The point of view of the victims of the legal system is systematically ignored. The distinction between property

191. *Id.* at 173

192. *Id.* at 177-78.

193. *Id.* at 172.

194. *Id.* at 178-79.

and obligations, when combined with the definition of legal liberties as permissions to do self-regarding acts, conveys the ideological message that under the rule of law, one is not vulnerable to harm inflicted by the acts of others. One either has the right to be helped by others or the right not to be harmed by them. To the extent others are permitted to act, they cannot affect your interests since optional rights only extend to acts which are indifferent to human welfare. Salmond's categorical scheme obscures *damnum absque injuria* by implying that there are rights against all kinds of affirmative acts by others when in fact the legal system does not forbid all injurious acts.

Salmond further obscured *damnum absque injuria* by making it seem as if the *failure* of others to act has no implications for human welfare. Salmond mentioned the general rule that one has no duty to act to help a stranger in distress. He then characterized it in a way that follows the self-regarding theory:

Every man has a right against every man that the present position shall not be interfered with to his detriment; whilst it is only in special cases and on special grounds, that any man has a right as against any other that the present position shall be altered for his advantage.¹⁹⁵

Salmond expressed the general rule against imposing duties to help others as a duty not to worsen their condition. He again made it appear that the realm of legal liberty—which includes the freedom not to act—has no effect on the interests of others. “Speaking generally, it may be said that the law preemptorily forbids the harmful interference of one man with another, but leaves the terms of active cooperation to be settled by mutual consent.”¹⁹⁶ Yet it is simply not true that one cannot be injured by the omissions of others. A parent can commit murder through failing to feed his baby. No one would claim that his failure to act did not worsen the baby's condition. Contrary to what Salmond claimed, injuries through omissions are cases of *damnum absque injuria*.

Despite these brave distinctions that suggest that the law prevents harm inflicted by others, Salmond in fact recognized that certain acts do inflict injury on the interests of others and yet are not forbidden by the legal system. Damage caused by competition is *damnum absque injuria*: “This form of damage is a consequence of the fact that men's interests are partially conflicting. That is to say, the interest of one may be detrimentally affected by the act of an-

195. *Id.* at 174.

196. *Id.* at 192. For a lucid critique of the harm/omission distinction, see Kelman, *Choice and Utility*, 1979 Wis. L. Rev. 769, 790-93.

other in establishing, maintaining, or taking advantage of a similar interest in his own case."¹⁹⁷ Salmond's recognition of the legitimacy of such damage, in effect, contradicts the implicit message of his entire classificatory scheme.

(ii) Structural segregation of *damnum absque injuria*

The definitions and classifications discussed in the previous section are segregated from Salmond's discussion of *damnum absque injuria*. He treated *damnum absque injuria* in a separate chapter at the beginning of Book II of the 1893 treatise. This separation characterizes *damnum absque injuria* as an anomalous category whose existence in no way affects the basic definitions of rights and liberties in Book I. Salmond claimed that Book II was merely "filling in the necessary details."¹⁹⁸

The chapter dealing with *damnum absque injuria* is entitled "Of the Limits of Liability."¹⁹⁹ Salmond was the first jurist since Mill to give an explicit policy argument supporting the *damnum absque injuria* associated with economic competition:

That in respect of good and evil, the general may differ from the particular consequences of an act, and that an act is to be judged as right or wrong from its general, not from its particular results, are facts which we have already had occasion to notice. The purpose of the administration of justice is to put down that which is absolutely evil, not that which is merely relatively so; and hence there results an important instance of *damnum absque injuria*. . . . Thus the special result of competition in trade may be ruin to individual traders, but the general result is a gain to society at large. Hence such competition, though hurtful to individuals, is not wrongful.²⁰⁰

Salmond's 1893 treatise is peculiar because even though he clearly understood that the legal system allowed large pockets of *damnum absque injuria* and that there were excellent policy reasons for this, he nevertheless defined legal liberties in a way that denied these insights. The model of self-regarding acts was presented alongside the model of the marketplace. Salmond's analytical system was internally contradictory in a way that was inherently unstable. Such instability was the harbinger of further theoretical development.

197. *Id.* at 183.

198. *Id.* at 159.

199. *Id.* at 159.

200. *Id.* at 161. *See supra* note 51 and accompanying text.

*b. Incorporation of *damnum absque injuria**

Salmond's 1902 treatise represents a remarkable innovation in analytical discussions of legal rights.²⁰¹ It was the first complete rejection of the classical meta-theory of self-regarding acts. At the same time, it was the first work to incorporate fully the category of *damnum absque injuria* into the analytical description of legal entitlements. The factual recognition of *damnum absque injuria* had progressed to such an extent that Salmond actually reversed Holmes's maxim. Holmes had stated that all damage was forbidden unless privileged, thus making protection the rule and *damnum absque injuria* the exception. Salmond reversed the relationship. He stated that all harms are allowed unless expressly prohibited.²⁰² This extreme sensitivity to *damnum absque injuria* led Salmond to invent an astonishingly innovative analytical scheme to describe the legal system.

Salmond distinguished "legal rights" from "rights in the strict and proper sense." Rights in the strict sense are the "interests which the law protects by imposing duties with respect to them on other persons."²⁰³ Salmond's rights in the strict sense are fundamentally different from Terry's correspondent rights since Salmond did not distinguish between correspondent and protected rights. Salmond recognized that Terry's protected rights were merely legally protected interests, i.e., the objects of correspondent rights:

[Protected rights] are, if I understand Mr. Terry correctly, not rights but the *objects* of rights *stricto sensu*; for example, life, reputation, liberty, property, domestic relations, & c. That is to say, they are the things in which a person has an interest, and to which therefore he has a right, so soon as, but not until, the law protects that interest by imposing duties in respect of it upon other persons. *There is no right to reputation apart from and independent of the right that other persons shall not publish defamatory statements.*²⁰⁴

Salmond understood the mystification involved in calling mere legally protected interests "protected rights." To the extent no duties are imposed to protect the interest, one has no legal right.

Salmond's definition of legal liberties in 1902 was a substantial revision of the 1893 definition of optional rights:

201. J. SALMOND, *JURISPRUDENCE, OR THE THEORY OF THE LAW* 231 (1902) [hereinafter cited as *J. SALMOND, JURISPRUDENCE*].

202. J. SALMOND, *THE LAW OF TORTS* 8-9 (2d ed. 1910) (first ed. pub. in 1907) [hereinafter cited as *J. SALMOND, TORTS*].

203. J. SALMOND, *JURISPRUDENCE*, *supra* note 201, at § 74, at 231.

204. *Id.* at § 76, at 197 n.2 (3d ed. 1910) (emphasis added).

[M]y legal liberties are . . . the benefits which I derive from the absence of legal duties imposed on myself. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone.²⁰⁵

Salmond abandoned the definition of legal liberties as permissions to engage in self-regarding acts. Legal liberties are simply "interests of unrestrained activity."²⁰⁶

By redefining legal liberty, Salmond granted full legitimacy to uncorroborated liberties as well as to *damnum absque injuria*:

[T]here is no doubt that in most cases a legal liberty of acting is accompanied by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. But in such a case there are in reality two rights and not merely one; and there are instances in which liberties are not thus accompanied by rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a license to go upon his land, I have a right to do so, in the sense in which a right means a liberty: but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The license has no other effect than to make that lawful that which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity.²⁰⁷

Salmond also supplied a correlative for legal liberty that he called "liability." If one has a legal liberty, it is possible that it will

205. *Id.* at § 75, at 231 (1st ed. 1902).

206. *Id.* at § 75, at 232.

207. *Id.* at § 75, at 232-33. Like Terry, Salmond distinguished between liberties and powers. Powers confer the right to act effectively as against others, meaning that the act will be enforced by a court. No such implication follows from a mere legal liberty. Powers include, for example, the right to make a will or alienate property, the landlord's right of re-entry, the right to rescind a contract for fraud. *Id.* at § 76, at 233.

Salmond likened powers to liberties. Neither has a correlative duty in anyone else. Thus, he gave them both the same correlative: "liability." *Id.* at § 78, at 236. Liberties and powers have correlative liabilities, and neither is necessarily corroborated by duties on others. Salmond derived immunities from powers by analyzing the relation between rights and liberties: "Just as a right in the strict sense is the benefit derived from the absence of liberty in other persons, so an immunity is the benefit derived from the absence of power in other persons. . . . Whenever A has no right (in the sense of power) against B, then B has a right (in the sense of immunity) against A." *Id.* at § 77, at 235-36. Examples of immunities are claims invalid because of the statute of limitations or a landlord's decision to give up the right of re-entry. The correlative of immunity is "disability." If A is immune from having her legal rights changed by B, then B has a disability regarding A.

be exercised in ways that impinge on the interests of others. The correlative of A's legal liberty is B's "liability" of having B's interests adversely affected by A's actions.²⁰⁸

This was a momentous change. Salmond had rectified the mystification involved in Terry's concept of protected rights. He split up protected rights into two segments: rights—the protected segment—and liabilities—the unprotected segment. He then associated *damnum absque injuria*—i.e., liability—with legal liberty as a correlative. The creation of a correlative redefined legal liberty as a relationship. To the extent one has legal liberties, others are vulnerable to harm.

This change was a decisive rejection of the meta-theory of self-regarding acts. Unlike Holmes, Salmond rejected the claim that damage inflicted by one person on another is presumptively invalid. By defining all legal liberties to be associated with liabilities, Salmond implied that the only legal liberties of interest to him concerned acts that were *not* self-regarding. Salmond reversed the classical premise. Unlike Bentham, Salmond did not create a term that describes permission to engage in self-regarding acts. Instead, he defined all liberties as permissions to inflict damage on others. Salmond completely rejected the self-regarding theory as a way to justify *any part* of the legal system. According to Salmond, all legal rules must be justified by some other theory.

4. WESLEY HOHFELD

Hohfeld based his analytical system on Salmond's earlier system. Salmond's "liberties" and "liabilities" became Hohfeld's "privileges" and "no-rights." Hohfeld advanced one major innovation. Alongside the table of "correlatives," Hohfeld gave a table of "opposites." Salmond had invented the table of correlatives but had merely mentioned the concept of opposites in passing.²⁰⁹ Hohfeld clarified the relations among the eight basic terms by inventing different terms for the correlatives of liberties and powers and setting out Salmond's "absences" in the table of opposites alongside the correlatives.

Hohfeld's opposites clarify the relationship between rights and

208. *Id.* at § 77, at 236; *see also id.* at § 78, at 238.

209. Salmond wrote: "A duty is the absence of liberty. A disability is the absence of power. A liability is the absence either of a right or of an immunity, and is the correlative either of a liberty or a power vested in someone else." *Id.* at § 78, at 236.

liberties.²¹⁰ To the extent the defendant has a liberty, the plaintiff has no right. To the extent the plaintiff has a right, the defendant has no liberty.²¹¹ The defendant's liberties and the plaintiff's rights are mutually limiting. The defendant's liberty ends where the plaintiff's right begins and the plaintiff's right ends where the defendant's liberty begins. The major contribution of Hohfeld's opposites was to make it plain that to the extent others have legal liberties, one has no legal rights. Liberties are not by definition limited to the extent necessary to prevent damage to others, as the *sic utere* doctrine misleadingly implied. Legally protected interests are not granted absolute protection, as the concept of protected rights had misleadingly implied. The *sic utere* doctrine had the ideological purpose of reassuring people that the exercise of legal liberties did not threaten their security. Hohfeld's concept of opposites was ideologically designed to demonstrate that to the extent individuals have freedom of action, *others have no security*. The modern ideological message was thus completely the reverse of the classical message.

D. Implications for Conceptualism

The factual recognition of *damnum absque injuria* and the need to justify it led to the gradual erosion and the final rejection of the self-regarding theory as a means of justifying the rules in force. It also led the modern jurists to reject various conceptualist errors of the Austinian school.

First, the classical jurists had assumed that invasion of legal right could be deduced from the mere fact of injury. According to the self-regarding theory, citizens were granted freedom of action only to the extent that they did not injure others. If an act caused damage to another, the victim had a *prima facie* case for legal redress. The modern jurists realized that this was not true. Not every

210. It may be argued that Salmond completely anticipated the system of legal rights described by Hohfeld. Nevertheless, there are indications that Salmond did not fully understand the significance of his creation. Most importantly, Salmond did not emphasize what Hohfeld was to call "jural opposites." Salmond only wrote a couple of sentences on "absences" and it is clear that the opposition of liberty and duty did not form a central role in Salmond's analysis. After the first edition of Salmond's *JURISPRUDENCE*, he reverted to rights, liberties and powers (with their correlatives) and relegated immunities to a footnote. See *supra* note 204 and accompanying text. In Hohfeld's system, leaving out immunities is an error of major proportions. It in effect ignores the legal entitlement that signifies the limit to legal powers; it therefore hides the fact that powers are limited to the extent others have immunities. For a defense of the view that Salmond completely anticipated Hohfeld, see Dickey, *Hohfeld's Debt to Salmond*, 10 U.W. AUSTRAL. L. REV. 59 (1971).

211. Hohfeld, *Legal Conceptions*, *supra* note 4, at 37.

injurious act is an invasion of the victim's legal rights. The right cannot be deduced from the mere fact of injury.

Second, the classical paradigm had also assumed that when a right was granted by the sovereign, the extent of the protection of the underlying interest would be determined automatically. For example, Austin had argued that invasion of a protected interest only led to liability if the defendant had acted intentionally or negligently. Observation of the legal system demonstrated that the standard varied wildly from malice to intent to negligence to gross negligence to strict liability. It became clear that the extent of the protection was not automatically determined once a right was conferred, but varied tremendously.

Third, the classical jurists had assumed that if a legal liberty was conferred by the sovereign, it was necessarily accompanied by duties on others not to interfere with the exercise of the liberty. It became clear over time that this simply was not true. Terry, Salmond and Hohfeld recognized that the legal system sometimes operated in this way and sometimes did not. It became clear that it was impossible to deduce such duties from liberties.

The very process of recognizing more and more instances of *damnum absque injuria* in the legal system demonstrated that a series of classical conceptualist deductions were logical errors. Conceptualism was a technique used to justify particular legal rules and outcomes. The accumulation of numerous attacks on different conceptualist deductions eventually led to a pervasive skepticism about conceptualism as a technique of legal reasoning. The result was a historical shift from conceptualism to nominalism which culminated in such figures as John Dewey, Roscoe Pound, Morris Cohen and (most emphatically) Felix Cohen.²¹²

The shift away from conceptualism is evident in the later analytical jurists. In 1893, Salmond had voiced Holmes's principle that "[s]peaking generally, it may be said that the law peremptorily forbids the harmful interference of one man with another. . . ."²¹³ However, by the time that he published his torts treatise in 1907, Salmond not only abandoned the self-regarding theory but asserted

212. See Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); M. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); M. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); F. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931) [hereinafter cited as F. Cohen, *Legal Criticism*]; F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) [hereinafter cited as F. Cohen, *Transcendental Nonsense*].

213. J. SALMOND, *FIRST PRINCIPLES*, *supra* note 150, at 192.

that it was unlikely that any single principle or set of principles could rationalize the legal rules:

Since, therefore, all harm is not actionable, it is necessary to ascertain whether liability for harm is the general rule, subject to specific exceptions based on definite grounds, or whether, on the contrary, the general rule is one of exemption from liability save in those specific instances in which the law declares that particular kinds of harm are wrongful. In other words: Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? It is submitted that the second of these alternatives is that which has been accepted by our law. Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. *Neither in the one case nor in the other is there any general principle of liability.*²¹⁴

Several years earlier, in 1903, Terry had put it even more emphatically:

There is no general rule for determining what legal duties exist, what acts are commanded or forbidden by law. Much labor and ingenuity have been expended in the attempt to find some general criterion of legal right and wrong, some general basis of legal liability. But in vain; there is none. Various acts are commanded or forbidden for various reasons, generally on grounds of expediency; and they are different in different places and periods. In this respect the law presents itself as having a purely arbitrary or positive character, and the duties that exist in any particular system of law must simply be separately learned.²¹⁵

These passages by Terry and Salmond demonstrate the disillusionment that developed about the possibility of discovering general principles that could rationalize the legal system as a whole. The earlier jurists had assumed that a small number of utilitarian arguments would be sufficient to develop principles that could justify the great bulk of the legal rules. Bentham, Austin and Mill were all staunch utilitarians who argued that a simple utilitarian calculus established the theory of self-regarding acts. Social utility would generally be maximized if people were free to do anything that affected only themselves and prohibited from doing anything that harmed others.

It is therefore incorrect to say that the conceptualists relied on

214. J. SALMOND, *TORTS*, *supra* note 202, at 8-9 (footnote omitted). *See also id.* at 9 n.7 ("It is difficult to see that English law contains any reasoned and exhaustive list of the grounds for exceptions from liability. The only adequate answer to many claims for damages is the mere *ipse dixit* of the law that no such cause of action is recognized.")

215. Terry, *Legal Duties*, *supra* note 157, at 187-88.

logic alone to justify the legal rules since their logical deductions were based on higher level considerations of utility. The shift away from conceptualism was not really a shift from logic to policy, but a shift from the belief that a small number of utilitarian calculi would be sufficient to rationalize the legal system to the belief that utilitarian considerations had to be used independently to justify particular rules.

Because the self-regarding theory was descriptively flawed, the jurists realized that they would have to use utilitarian arguments to justify particular instances of *damnum absque injuria* that could no longer be explained by the old theory. Policy arguments no longer had as wide a range of application. Each legal rule had to be decided on its own merits, rather than deductively from a generally determined utilitarian calculus. Holmes made this clear:

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair.²¹⁶

Hohfeld is properly understood as a participant in the anticonceptualist revolt, even though some participants in the Hohfeldian debate thought he was a neoconceptualist.²¹⁷ Hohfeld demonstrated that any supposed connection between liberties and duties did not result from logical necessity. "Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy: and it should be considered, as such, on its merits."²¹⁸

216. Holmes, *supra* note 10, at 3.

217. Page wrote: "We have been trying to get away from the jurisprudence of conceptions—from the rigid logical deductions made from assumed a priori rules. Shall we enter bondage anew, with a different set of terms and definitions?" Page, *supra* note 32, at 622.

218. Hohfeld, *Legal Conceptions*, *supra* note 4, at 36.

Hohfeld's supporter, Walter Wheeler Cook, made a similar argument. Cook argued in 1918:

Clearly from the propositions concerning any of these [privilege/no-right relations, right/duty relations, immunity/disability relations], no inferences can be drawn concerning the others by any logical process which is *merely deductive*, although the existence of one set of relations may in some cases furnish a strong reason for recognizing the existence of the other set as a *matter of policy*.²¹⁹

It is important to remember that policy arguments had always been involved in rationalizations of the legal system, even at the height of the conceptualist school. Hohfeld demonstrated that the policy that underlay the theory of self-regarding acts was incapable of justifying either uncorroborated liberties or *damnum absque injuria*. As such, Hohfeld's insight was crucial to legal realism. Precedential reasoning became far more problematic. Previously, a case holding that someone had a legal liberty would be good precedent for the proposition that other people had duties not to interfere with the acts permitted by the liberty. Similarly, a case establishing a property right would be good authority for all the liberties, rights, powers and immunities that make up the general right of property. After Hohfeld, a precedent establishing a legal liberty would not be relevant to a case in which the legal issue was whether to impose duties against interference. Thus, any old cases that relied on such faulty reasoning were wrong since they were decided on the basis of a logical error. Further, every case now had a much more limited range of application so many more cases would have to be decided on their merits as cases of first impression rather than by mechanically applying rules established in earlier cases.

It is now possible to clarify the general relationship between the attack on the self-regarding theory and the attack on conceptualism. Hohfeld attacked the Austinian school's logical error of deducing rights from liberties. Such an advance is easily comprehensible. Legal reasoning may not be logical, but it must at least not be illogical. The comparison between Bentham and Hohfeld, on the other hand, is not as simple because their analytical schemes were superficially similar. The difference between Bentham and Hohfeld can be expressed in part by comparing the ways in which their systems served the twin tasks of description and justification.

Bentham's theory mediated the contradiction between freedom of action and security through categorization of rights and lib-

219. Cook, *supra* note 19, at 789 (footnote omitted).

erties in a way that rendered the principles that justify them compatible with each other. He argued that the principles of freedom of action and security were *consistent* with each other. Liberties were rationalized as permissions to engage in merely self-regarding acts; rights, as protections from being harmed by others; powers, as limited exceptions from the duty not to hurt others justified by the overall advance of social utility. Bentham sought to *justify* the legal rules through elaboration of a logically consistent set of principles underlying the system of legal entitlements.

However, Bentham's system was not *comprehensive* since it excluded many situations of *damnum absque injuria*. Powers formed a small subset of legal permissions. Most of the legal rules that allowed some individuals to harm others were excluded from Bentham's rationalizing theory. His system was faulty in its *description* of the existing legal system. It was faulty also in its description of what Bentham would consider an ideal system since he clearly favored wide legal liberties that would include situations of *damnum absque injuria* such as economic competition.

Hohfeld's system, on the other hand, was comprehensive. Through the full incorporation of *damnum absque injuria*, Hohfeld's terms could describe virtually any factual and legal situation that existed or could be imagined to exist in a liberal legal system. But since the self-regarding theory had been abandoned, no rights-based meta-theory was left to mediate the contradiction between freedom of action and security.

The discovery of *damnum absque injuria* did not necessitate abandonment of the self-regarding theory. The jurists could have advocated regulating all cases of *damnum absque injuria*. But actually implementing the self-regarding theory would require permitting only those acts that are truly self-regarding and prohibiting *all* acts that adversely affect the interests of others. This would result in such a narrowing of liberty that it would be unacceptable to liberal jurists who had invented that formula to justify *decreasing* government regulation over the individual.

Since the modern jurists refused to countenance such a vast increase in regulation, they required a new meta-theory to replace the old self-regarding/other-regarding distinction. But no new rights-based meta-theory emerged that was not itself subject to the same contradiction between freedom of action and security. Rights theory had proved to be *indeterminate* since the legal rules were legitimated by a contradictory set of principles. Hohfeld argued that *rules could not be justified by resort to the logic of rights*. This logic was indeterminate since it encompassed contradictory theo-

ries and we had no meta-theories to help us choose between them. The only meta-theory left to resolve the contradiction and justify the legal rules was ad hoc appeals to policy considerations—in other words to justify each separate rule on the basis of an independent utilitarian calculus. Thus, the attack on the self-regarding theory was intimately connected with a general attack on conceptualism and an argument for case-by-case policy analysis.

VI. HOFELD'S SIGNIFICANCE

*So in all human affairs one notices, if one examines them closely, that it is impossible to remove one inconvenience without another emerging.*²²⁰

NICCOLO MACHIAVELLI

*Until now the philosophers had the solution to all riddles in their desks, and the stupid outside world simply had to open its mouth so that the roasted pigeons of absolute science might fly into it I am not for setting up a dogmatic standard. On the contrary, we must attempt to help the dogmatists make their dogmas clear to themselves.*²²¹

KARL MARX

Hohfeld refuted the proposition that there was a necessary logical connection between liberties and duties on others not to interfere with those liberties. When his article is placed in historical context, it becomes clear that Hohfeld's argument was more than this. First, his analysis represented the culmination of a long attack on the meta-theory of self-regarding acts as a means of describing and justifying the rules in force. The modern writers recognized the extent to which the legal system allows individuals to harm each other. While the classical writers thought that *damnum absque injuria* was almost always bad, the modern writers proclaimed that there were good reasons to allow it to continue in many instances. They therefore rejected the meta-theory of self-regarding acts as a means of justifying any part of the legal system. While the classical writers defined legal liberty as permission to do self-regarding acts, the modern writers redefined legal liberty as a relationship. Hohfeld

220. N. MACHIAVELLI, *THE DISCOURSES* 121 (Penguin ed. 1976).

221. K. MARX, *Letter to Arnold Ruge (September 1843)*, in *KARL MARX: THE ESSENTIAL WRITINGS* 41 (F. Bender ed. 1972).

and Salmond defined legal liberty to be associated with a correlative "liability" or "no-right" in others. The only liberties of interest to them were actions that made others vulnerable to harm. They asserted that legal liberties could not be justified by the fiction that they concerned self-regarding acts, but had to be justified by the policy conclusion that freedom to do the acts involved was more important than the good to be obtained by forbidding those acts in the interest of security. Whether to grant a liberty to do a specific set of acts began to be seen as a choice between competing interests and policies.

Second, the modern analytical writers demonstrated that the legal system did not completely abolish the insecurity in the supposed state of nature. The economic realm of competition between competing businesses, between competing workers, and between capital and labor is a central component of the liberal legal system. These spheres of competition and struggle demonstrate that the legal system did not completely replace the state of nature, but merely provided rules to define the areas within which the war of all against all could rage as an integral part of life under the rule of law. The self-regarding theory had misdescribed the legal system by failing to account for such areas of conflict and struggle.

Third, beginning with Hohfeld, the modern jurists struck a major blow against the technique of conceptualism as a means of justifying particular legal rules. In the course of criticizing the self-regarding theory, the modern jurists criticized a series of deductions that the classical jurists had made. It is not true that a legal right has been invaded merely because one has been injured by another. It is not true that all legally protected interests are protected to the same extent. It is not true that legal liberties are always accompanied by duties on others not to act in ways that interfere with the permitted acts.

The critique of the self-regarding theory and corroboration of liberties by duties was part of the general criticism of the conceptualist technique of claiming that specific rules were implicit in highly abstract concepts. Rather than justify legal liberties and legal rights by invocation of the self-regarding theory and the *sic utere* doctrine, the modern jurists claimed that rules must be justified by the underlying policy and moral considerations that would prompt the rulemaker to choose between the competing goals of liberty and security. They therefore rejected the need for, or the possibility of, a new noncontradictory rights theory that could rationalize the whole legal system.

It became necessary after Hohfeld to invent a theory other than

the self-regarding theory to explain why the legal system sometimes allows people to harm each other and sometimes does not. It also became necessary to invent a technique other than the conceptualist deduction of consequences from abstract concepts to justify the legal rules. However, no new rights-based theory emerged that is not itself prey to the same fundamental liberal contradiction between freedom of action and security. In the end, we are left with the admonitions of Salmond and Terry that deny the possibility of constructing a new noncontradictory theory.

But, after all, what is wrong with justifying the legal rules by a contradictory set of principles? We have contradictory purposes. We want freedom of action and we want security from harm. We want majority rule but we also want limits on what the majority can do to the minority. This is not surprising.

The real problem with the lack of a noncontradictory theory capable of rationalizing the legal rules is that the lack of such a theory undermines the sense of the objectivity of the judicial role. Hohfeld's attack on the link between rights and liberties represents a model of critique that was used by other legal realists in a general assault on a whole series of conceptualist errors. The destruction of the self-regarding theory represents an attack on the idea that any single principle or set of principles would be sufficient to rationalize the legal system. The contradiction between freedom of action and security could no longer be resolved at such a high level of generality that most judicial decisions could follow as a matter of course. The end result is that the basic contradiction emerges again and again whenever a judge has to decide what legal rule to apply. This would not be problematic if we had a relatively objective way to resolve the contradiction in particular instances. However, policy considerations at that level of particularity no longer have the appearance of objectivity. Holmes noted this:

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree.²²²

The Hohfeldian critique of the classical system demonstrates

222. Holmes, *supra* note 10, at 7.

that legal rights are justified by a fundamentally contradictory political and legal theory. Legal decisions are not determined, compelled, or rationally justified by the inherent logic of rights, since rights encompass the contradictory principles of freedom of action and security. Since every legal decision reverts to the fundamental contradiction, we have no alternative but to decide each case in the light of competing goals and interests. To make these decisions, nothing can aid us except the same moral and political arguments we use in other areas of ethical discourse. It is an illusion to think that legal reasoning is any less political and subjective than the reasoning used by legislators, voters and other political actors.²²³

The realization that legal decisions are politically motivated has undermined the sense of the legitimacy of judicial power. To some, the notion that legal reasoning is inherently political removes any constraints against judges doing as they please. The arbitrary exercise of power by unelected individual judges smacks of tyranny.

Nonetheless, I do not believe that the defeat of the self-regarding theory or of conceptualism represents a great tragedy for us. The loss of a belief in a determinative, objective legal logic should not undermine the sense that we can make rational choices. The reality is quite the opposite. We must in any case make the choices we have always made, but we do it consciously, without the illusion that choices are made for us by a reified logic. The *logic of rights* is a human invention whose purpose is to preserve us from the notion that we must make political and moral choices. To make conscious choices, it is necessary to realize that we are making a choice. To choose wisely, we must know who gains and who loses from the concrete legal rules and what values are thereby preserved or undermined. Once we know everything that is involved in the decision, and we have not arbitrarily constricted the alternatives available to us, then we make a choice. Those decisions may be difficult and they may be painful, but making choices is what human beings do. "You may think you have made the laws govern," Rousseau reminds us, "but people will do the governing."²²⁴

223. F. Cohen, *Legal Criticism*, *supra* note 212; F. Cohen, *Transcendental Nonsense*, *supra* note 212.

224. J. ROUSSEAU, *CONSIDERATIONS ON THE GOVERNMENT OF POLAND* 3 (Kendall ed. 1972). *See also* R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 373-79, 383-84 (1979).

