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Essay
An Age of Rights?

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Abstract

Rights seem to occupy a prominent place within the moral and political lexicon of modernity. But is this truly an age in which the idea of individual rights has flourished? Or might the frequency with which we *speak* of rights reflect a failure to appreciate the stringent demands that genuine rights would inevitably place upon us? Does our willingness to frame so many moral issues in terms of rights simply illustrate our failure to take the idea of rights seriously? Does our monocular focus upon rights lead us to ignore the broader context of law, virtue, and civility that is necessary if rights are to be a reality? These are the questions forming the background to my discussion in this essay.

Keywords: *Rights discourse; Rights versus Interests; Mutual civility*

Human societies are made by language, and the political languages that we create shape the character of those societies fundamentally. The language of rights is drawn from the law, and the dominance of rights discourse within modern society perhaps reflects a broader vision: the idea that a community of great diversity and intense individualism can be held together by the rule of law. By placing law at the centre of its idea of political association, and neglecting all the non-juridical forms of association on which both law and polity ultimately depend, this vision causes the language of rights to proliferate and to intrude into almost every context, transforming the way in which we live together. But this is not the extension to new realms of an idea that itself remains constant. For the rule of law cannot sustain itself independently of an appropriate background culture. Properly understood, the concept of rights is one part of a complex eco-system of ideas, and is fully dependent upon the different life forms making up that system. Thus, as the discourse of rights smothers and extinguishes alternative moral conceptions, it also destroys its own natural habitat and must transform itself into something quite different. The onward march of rights discourse ultimately leads to the triumph of technocracy where rights (the substance as opposed to the word) no longer exist.

Maitland once remarked that "nothing that we can do will ever deprive the word 'rights' of its legal savour."[1] But what does this association with law really amount to? The answer seems to be that rights have usually been understood to possess peremptory force; peremptory force is the product of binding rules; and

1. Frederic William Maitland, *A Historical Sketch of Liberty and Equality (*Liberty Fund, 2000) at 90.

law is pre-eminently a form of governance by binding rules. Typically, rules specify a determinate set of conditions for the applicability of the rule's prescriptions or prohibitions: they do not simply identify considerations which are relevant to decision without being decisive. If I have a right to perform an action (or a right to demand that you perform an action), the existence of my right seems to be conclusive of the permissibility of my action (or of the impermissibility of your failure to act). We will see in due course that the peremptory force of rights is closely related to their status as one aspect of the bonds of mutual recognition that are the basis of civility. Rights should not be understood as simply important individual interests or goals featuring upon the state's policy agenda.

The peremptory force of rights contrasts with the way in which other goods (values and interests) feature within moral reason. We often speak of such factors as needing to be balanced against one another. The metaphor of 'balancing' may be misleading in so far as it may exaggerate the independence of different values, while suggesting a degree of commensurability between them.[2] But whether we employ the metaphor of 'balancing' or not, it remains the case that values and interests seem to qualify and limit each other in ways that can only be addressed in specific contexts of application. Thus, the fact that it would be good for me to be allowed to speak freely (for example) is not conclusive of the permissibility of my free speech, for my freedom may compete with other values or interests that must also be considered. If, on the other hand, I have a *right* to speak freely, my speech must be permitted. The right is not to be weighed against, or qualified by, competing considerations. The determining factor in the permissibility of my action is the location of the action within the perimeter of the relevant right. This distinction between rights and goods is, of course, not a metaphysical truth but a product of human artifice: the artifice whereby we construct our political life by means of language. To insist on the distinction, in the face of challenges to it, is not linguistic dogmatism, but the reflective defence of a form of association.

Of course, law is not the only source of binding rules, and is therefore not the only source of rights. Some moral requirements may be reasonably simple, well-settled, and uncontentious, so that they may adequately be expressed in the form of rules, and may give rise to corresponding rights. The rule that promises ought to be kept is an example. There may also be some other moral requirements that embody stringent prescriptions or prohibitions not open to extensive circumstantial qualification: here too the language of 'rights' can be appropriate. But there are many moral and political issues that cannot without distortion be analysed in terms of the clear boundaries that rights require. Such issues may be better addressed in the language of 'goods', or

2. The identity of each value is often dependent upon respect for other, seemingly distinct, values: thus, justice and mercy can be distinguished, but justice must be tempered by mercy if it is not to become cruelty or vindictiveness. Similarly, ordinary civility could be a bitter mockery if the conventions of civil conduct are meticulously observed in contexts of oppression and exploitation; legality is hollow when combined with gross injustice; etc. Interests differ from values, and here the metaphor of 'balance' may seem more appropriate. The task of balancing, however, is not aimed at some aggregate (such as maximal happiness) but involves the tacit invocation of a broad conception of the part that such interests should play in a fully flourishing life.

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'values', or 'interests'. They require the open-ended forms of deliberation that lie behind the metaphor of weighing and balancing: sensitivity to circumstance rather than a resolute adherence to rules. Wise and benevolent governance needs to exhibit a nuanced concern for such goods.

It is a common mistake to equate rights with interests, and the peremptory force of rights with the importance of the interests that rights are thought to protect. But this is an error. Rights are not interests (although they may protect interests) and peremptory force is not a matter of registering a high score in some calculus of overall importance. Nor can the importance of an interest somehow, in itself, trigger a transformation into a right which operates by peremptory force rather than by weight or importance.[3] Rights with peremptory force are the product of constraining rules rather than a calculus of importance.

Good governance requires legitimacy as well as benevolence, and legitimate governance must acknowledge, or confer, a framework of rights extending well beyond those that citizens might possess independently of law. Rights are significant because they give the citizen options that are not at the discretion of those in authority. They should not be treated as simply interests which figure in the state's deliberations. Rights must be *respected* or *honoured*, rather than added to the state's agenda of policy goals: they can constrain the state's pursuit of benevolent aims. By creating such rights, the state acknowledges the independence of the citizen and the consequent dependence of its own legitimacy upon respect for that independence. Furthermore, rights entail duties which are correlative to those rights, or which provide a "protective perimeter"[4] for rights; and the resulting fabric of jural relations gives rise to bonds of mutual compliance and respect. In this way, the law becomes an expression of the ties of justice and civility that obtain between all citizens, and not simply between the citizen and the state. Understood in this way, rights are central to the rule of law.[5] When the distinction between 'rights' and 'goods' is eroded, the state departs from the mutual civility which must be the basis of any legitimate polity.

The separation between rights and goods has now been endangered by much of the current discourse of rights, and by some developments within both law and legal theory. In the context of constitutional law, many rights now function simply as factors within a doctrine of proportionality.[6] One theorist treats rights as 'optimisation requirements', an approach which seems fundamentally to overlook the difference between rights and goods.[7] Another theorist suggests that we need to abandon the idea that rights have some special importance.[8] The

3. This seems to be a problem inherent in Raz's influential account of rights. See my remarks in NE Simmonds, "The Puzzle of Rights" (2020) 65:2 Am J Juris 181 at 192-93.
4. HLA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Clarendon Press, 1982) at 172.
5. See NE Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) at 104-09.
6. See NE Simmonds, "Constitutional Rights, Civility and Artifice" (2019) 78:1 Cambridge LJ 175.
7. See Robert Alexy, *A Theory of Constitutional Rights,* translated by Julian Rivers (Oxford University Press, 2002) at 47ff.
8. See Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).

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distinctive hallmark of rights, however, is not their importance but their peremptory force. Practical requirements governing our conduct must sometimes be honoured even though the particular interest which the requirement protects is, in itself, relatively unimportant. This is especially true of some legal rights, which can derive their force not from their particular content but from the value of respect for governance by law.[9] Once one has conflated the force of rights with 'importance', one is already on the road to an instrumentalist undermining of legality and legitimacy. The denial that rights have any special importance is merely one further step along that road.

Within the jurisprudence of rights more generally, including private law rights, there has been a tendency to detach the right from its direct juridical consequences (such as duties and liberties) so that, in this realm as well as in constitutional law, the peremptory force of rights is endangered, and the distinction between rights and goods (or interests) is undermined. At the same time, the jural relationships obtaining between right-holders and duty-bearers are portrayed as merely instrumental to the effective protection of the interest which the right is said to represent. But this is a great misunderstanding which ignores the centrality of the relational and recognitional aspect of rights. Rights are not self-standing factors in a calculus of interests, but are constitutive of relationships of mutual recognition that obtain between individual citizens, as well as between the citizen and the state.

Later in this essay I will return briefly to consider some of these developments. Collectively they form part of a dangerous dynamic whereby the state's concern with legitimacy and mutual civility is eroded, and the state becomes an instrument of technocratic management. Technocratic governance of that sort can effectively marginalise questions of legitimacy so long as material standards of living are rising, and the populace is encouraged to focus upon issues of material well-being to the exclusion of everything else. But harder times can cause the question of legitimacy to become prominent once more.

Governance by law, properly understood, is not technocratic management. It is not simply a means to the advancement of desirable goals. Rather, it creates a distinct form of moral association, separable from (although in mutual dependence with) the more nuanced and fluid concerns of the ethical realm. The juridical form of association, embodied in a long tradition of legal thought and scholarship, has always attached great importance to the development and articulation of rules. The core value of the rule of law is normally thought to require close adherence to rules, and an avoidance of extensive discretionary powers. Without the spheres of independence created by clearly articulated laws, the private realm of ethical reflection and decision could not exist. The independence of individual moral decision requires general compliance with a firm framework of law. This helps to explain the differences in form between law and morality.[10]

9. See Simmonds, *supra* note 3 at 199-201.
10. See NE Simmonds, "Kletzer's Direttissima" (2021) 66:2 Am J Juris 339.

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The rule-based character of legal thought does not mean that law is a self-contained formal system that can be applied without regard to circumstances that are not specified in the enacted rules. We do not need to be reminded that rules must be applied by humans, and therefore require for their stability an appropriate context of virtue and of shared understanding. Adjudicative reasoning acknowledges that rules may be subject to implied exceptions that could not be exhaustively stated in advance (such exceptions being justified by the assumption that the law is attempting to articulate the requirements of justice).[11] But such qualifications to rules must themselves be articulated in rule-like form, and they then become features of any relatively complete statement of the relevant rule. At some point, the qualifications to a rule may become so numerous and endlessly proliferating that the rule is said to have broken down.[12] The possibility of such breakdown in consequence of the proliferation of exceptions, combined with the difficulty of expressing exceptions in rule-like form, serve to discipline and constrain the law's sensitivity to variable circumstances. Sound legal thought always involves an attempt to create and sustain a just and coherent body of law that serves the common good, and this enterprise is always endangered by the diversity and particularity of moral considerations that might be considered to be of relevance. In this sense, doctrinal legal thought is an attempt "to 'create a juridical order' ... under conditions that threaten anarchy."[13] This is one reason why, even if the principal sources of law can usefully be thought of as identified by a basic rule of recognition, that rule should not be thought of as the outer bounding limit of juridical thought: the judge's duty of fidelity to law is best understood as requiring the pursuit of a complex aspiration, not the application of a rule supplemented by unregulated political decisions.[14]

The tradition of legal thought has attracted hostility, however. It has often been portrayed as creating an artificial and alienated realm of illusory equalities, which serves only to obscure and mystify the true character of social relationships and of the human situation. Or it has been viewed as a morally neutral instrumentality without intrinsic moral value. Much twentieth-century legal scholarship was aimed at criticising the allegedly unresponsive character of traditional legal thought, and at encouraging a more fluid and policy-based approach. Unwittingly, this posed the risk that governance by law will be transformed into pure technocracy, where binding rules and rights are replaced by an agenda of goals and interests endorsed by the state. More recently there has been a tendency to celebrate the way in which the law of human rights can be employed to disrupt

11. See HLA Hart, *The Concept of Law,* 3rd ed, (Oxford 2012) at 139; Simmonds, *supra* note 5 at 195-98.

12. This was, for example, the fate of the so-called 'parol evidence rule' in English contract law, which is now widely regarded as an easily rebuttable presumption rather than a rule.

13. Tracy B Strong, "Foreword" in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (University of Chicago Press, 2005) vii at xx.

14. See H.L.A Hart's view that, in some penumbral judicial decisions concerning the rule of recognition, "all that succeeds is success." Hart, *supra* note 11 at 153. *Cf* NE Simmonds, "Reflexivity and the Idea of Law" (2010) 1:1 Jurisprudence 1.

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settled and reliable legal rules in favour of a concern with fundamental values, expressed in a currently popular idiom. But all of this dangerously neglects the importance of firm rules to traditional legal thought. And that tradition of legal thought, with its emphasis upon clearly articulable rules, is the tradition within which the idea of individual rights was born.

Rights and Relations

Most of us would acknowledge the existence of a distinction between rights and goods. When we assert a right to act in a certain way, or a right to have someone else act towards us in a certain way, we do both more and less than claim that the action in question would be a good or valuable one to perform. We do less than this because I may have a right to do things which are wholly lacking in value: I may, for example, have a right to drink myself into oblivion on every occasion that presents itself. Or I may have a right that you should pay me a sum of money, even though I am immensely rich and you are desperately poor, so that the money would do far more good in your hands than in mine. On the other hand, in claiming a right, I do more than assert that the act in question is valuable. For values must compete with other values, good things with other good things. Consequently, the mere fact that the performance of the action would be good does not entail the conclusion that the act ought to be performed. Perhaps performance of this good action would preclude the performance of other, even better, actions. When I have a right to perform the action, however, my right seems virtually conclusive of the permissibility of my action. When I have a right that you should act in a certain way, my right seems to entail your duty so to act.

However, even though we may ascribe peremptory force to rights, we may hesitate before ascribing to rights an *absolute* force that can override all other considerations. Perhaps such an absolute force may attach to certain narrowly defined fundamental rights, such as the right of an innocent person not to be intentionally killed. But it is certainly not true of the majority of rights. There are surely circumstances, for example, where established legal and moral rights may justifiably be overridden or encroached upon: e.g., when it is necessary to trespass upon someone's property in order to save a life; or necessary to break a promise in order to help at an emergency. This may at first seem to undermine any clear distinction between the realm of rights (the realm of practically determinative boundaries and peremptory force) and the realm of goods or interests (a domain of open-ended balancing). Consequently, any complete theory of rights needs to explain how rights can possess peremptory force (thereby distinguishing rights from values or interests that merely form part of a general process of balancing goods one against another) while nevertheless admitting of justifiable infringement in certain extreme situations. I do not propose to offer a full solution to this problem in this essay. But it is worth pointing out that any solution

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is likely to draw upon the recognitional, or relational, aspect of rights.[15] Rights are not the self-contained possessions of detached individuals, but are merely one face of a bilateral bond: e.g., they mark out the right-holder as the party to whom a duty is owed. They are grounded in the relationship of mutual recognition and, when they are respected, are amongst the constituents of mutual civility or civic friendship. It is this recognitional or relational aspect that enables us to understand how a right-holder may be *wronged* by a violation of a right, even though the violation was justified in the circumstances.[16] In such circumstances, the violation of the right must be acknowledged, perhaps by the payment of reparation. Theories that fail to acknowledge the relational aspect of rights have difficulty in explaining how the possibility of rights being overridden in certain circumstances is compatible with the peremptory force of rights. The solution that such theories usually adopt simply equates peremptory force with weight, thereby presenting the difference between rights and other goods as one of degree rather than kind. In this way, the denial of peremptory force to rights is closely connected with the failure to grasp the relational aspect of rights, resulting in the portrayal of rights as self-standing individual interests.

The basis of rights in relationships of mutual recognition is essential to an understanding of how the great majority of rights can combine peremptory force with a non-absolute character that leaves them open to being overridden in certain circumstances. But it is also essential to an understanding of absolute rights that cannot be overridden. If there are some rights which are absolute (i.e., rights correlative to duties which must in no circumstances be violated) those rights must be defined in part by reference to intention. It would be implausible, for example, to suggest that innocent people have an absolute right not to be killed, since many entirely justifiable projects involve a risk (which will sometimes approach certainty) of people being killed. If there is an absolute right in this vicinity, it is a right not to be killed *intentionally*, where 'intention' is understood narrowly, as encompassing consequences desired as an end or as a means, but as excluding mere foresight. In other words, a project intends the death of an innocent only if the project would necessarily fail should the innocent survive. Such a focus upon intention is sometimes thought to sit uncomfortably with the idea of the right, in so far as it seems to be unduly concerned with the virtue of the duty-bearer rather than the interests of the right-holder. After all, someone's interest in life is negated by their death, and, from that point of view, it does not matter whether they were killed intentionally or as a foreseen but unintended side-effect of another's action. Properly to understand the concern with intention, however, we must see the relevant right as arising, not from the interests of the right-holder considered in abstraction, but from some relationship of mutual recognition, such as the civic friendship that exists between citizens in a good polity, or the mutual concern that might be said to be a moral requirement for all the humans upon the

15. See e.g. Rowan Cruft, *Human Rights, Ownership, and the Individual* (Oxford University Press, 2019); Simmonds, *supra* note 3.
16. See Simmonds, *supra* note 6 at 183 n 13.

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Earth.[17] The intentions with which our (real or supposed) friends act towards us are often much more important to us than are the consequences of their actions, for those intentions reveal their attitude towards us, and so the true nature of our relationship. It is a mistake to assume that the only alternative to a narrow concern with personal virtue is an instrumental concern for the effective protection of individual interests. The nature of our relationship with others is central to the flourishing of our lives together, and this gives great importance to intentions. Once again, we see that rights cannot be understood apart from the moral relationships in which we stand towards one another. The value and significance of rights consists, not in the securing of particular benefits for individuals, but in the right-respecting relationship itself.

More broadly, we may say that rights must be treated, not as entirely self-standing, but as one distinctive facet of a complex array of diverse but mutually dependent moral conceptions, including conceptions of flourishing and virtue, of the common good, and of mutual civility. But the current discourse of rights neglects the dependence of genuine rights upon this broader framework of ideas. There is a desire in some quarters to treat rights as fundamental to the entire moral and juridical structure. In this way, the language of rights can at times seem to be in danger of becoming a toxic monoculture which threatens the richness and diversity of moral debate. An older and perhaps more subtle discourse, structured around notions of virtue and the common good, has been largely eclipsed.

Where that older discourse makes a reappearance, it is viewed by many with suspicion. A long-prevailing individualistic outlook obscures the possibility of goods which, by their very nature, can be realised only in common. Consequently, the notion of the common good is either reduced to a consequentialist conception that simply aggregates individual interests, or it is dismissed as an ideological myth which attempts to conceal the clash of competing interests. This failure to understand the idea of the common good as a good that can only be realised in common (and not simply an aggregate of goods that can be enjoyed by individuals in isolation) is associated in turn with an inability to understand the significance of virtue. The invocation of virtue as a political value is now often viewed as merely a step on the road towards an intrusive concern with the private realm. Rights themselves (in particular, human rights) are now often equated with important individual interests. All of this neglects the fact that the common good is not some sort of aggregation of interests, but a structure of rights and virtues. The common good encompasses values which must be *honoured* or *respected*, along with interests that should be protected or advanced. Rights are fundamentally relational, depending upon the mutual recognition of persons. Genuine rights cannot be self-sustaining, but are in general made possible only by a

17. For present purposes I set on one side many important questions that arise at this point. For example, we might ask whether moral relationships framed in terms of rights and justice require what Mathias Risse calls a "practice-mediated" relationship, and whether such practice-mediated relationships now exist globally. Mathias Risse, *On Global Justice* (Princeton University Press, 2012) at 7.

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community's faithful adherence to established laws, an adherence which requires citizens who exhibit the virtues of civility and mutual respect.

Rights offer each of us a realm of options which enjoy a significant degree of independence from the will of others.[18] For this reason, rights must have boundaries which are, so far as possible, defined by rules, and identifiable in advance of those particular situations where the right must be invoked and relied upon. By contrast with this, most moral issues are too complicated and multifaceted to admit of reduction to simple dispositive rules. To recognise the importance of rights is therefore to ascribe decisive significance to what may seem to be only a very narrow aspect of the moral situation. From the viewpoint of a theory that sees rights as fundamental and self-standing (rather than as one facet of a complex eco-system of moral conceptions), an insistence upon the peremptory character of rights can appear to commit one to an implausible moral fanaticism. Thus, the idea that rights stand alone as the supreme moral considerations fosters the tendency to collapse the distinction between 'rights' (on the one hand) and 'goods' or 'interests' (on the other).

This general tendency to erode one of the key separations on which liberalism depends is itself encouraged by a broad diversity of social and intellectual trends. One such trend, for example, is the dominance of instrumental conceptions of reason: we tend to think of practical reason as concerned with the advancement of desirable states of affairs, and we find it hard to grasp the idea that some values are to be *respected* or *honoured* rather than *advanced* or *promoted*. Closely related to this is the extreme individualism which seeks to judge situations by the individual benefits which people within those situations enjoy, while neglecting the intrinsic importance of the types of relationships within which they stand. Rights are important as an aspect of relationships of mutual recognition or mutual civility, and the dimension in which they exist is one of respect rather than instrumental optimisation.[19]

The idea, widespread in modern culture, that moral issues are entirely 'subjective' plays an even more damaging part. In a world that denies the existence of objective values, there can be a tendency to weigh demands by the intensity with which they are asserted, rather than by any independent standard. In framing one's demand as a matter of 'rights', one indicates a strategically useful refusal to consider compromise or moderation in the pursuit of the demand. In this way, we have all grown familiar with a world where passionate intensity (often closely associated with the vociferous assertion of rights) is deployed as an instrument of political struggle. In this way, liberalism can become "a seminary of intolerance."[20] We noted earlier how governance by legal rules, and rule-based rights,

18. See Simmonds, *supra* note 5.

19. Writing in 1957, Bertrand de Jouvenel spoke of "the tendency of the modern mind to think entirely in terms of consequences—never of conditions. People never say, 'This is impossible because a prior right stands against it'; what they say is 'This must be done to bring about some result or other'. The idea of result holds the entire field." Bertrand de Jouvenel, *Sovereignty: An Inquiry Into the Political Good*, translated by JF Huntington (Liberty, 1957) at 9.

20. Leo Strauss, *Natural Right and History* (University of Chicago Press, 1953) at 6.

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can come to be replaced by an array of policy goals and approved interests. Here we see how the passions (real or simulated) that a sound polity should discourage can be deployed as weapons in a struggle for control of the state's policy agenda. The relative inflexibility of rules, and the rigorous forms of argument required for sound rule-application, can constrain the violent expression of passions, whereas an overly flexible attempt to accommodate loudly voiced interests can inflame and encourage them.

The late medieval and early modern period saw a gradual transformation wherein the older idea of right ordering (objective right) gave rise to the idea of individual rights. The idea of right ordering focused attention upon the relationships obtaining between individuals. It embodied the Aristotelian thought that human nature can be realised only in community: human flourishing depends upon the forms in which we associate together. This dependence of flourishing upon the form of association was not viewed as an instrumental matter. It did not rest upon the idea that, in consequence of contingent features of the world, individual interests could be effectively secured only within a particular type of social situation. Rather, life within a certain set of social relationships was seen as itself a major constituent of a flourishing life. Within this way of thinking, political philosophy took as its central concern an understanding of human excellence: the fundamental question was one concerning the nature of a truly excellent, flourishing life. The institutions of the polity were considered in the context of their capacity to foster excellent lives for human beings. Law played an important part in this: it was regarded as inculcating virtuous habits; as protecting the virtuous from the predations of the wicked; and as helping to sustain other institutions (such as property, and the family) which in turn fostered virtuous and excellent lives. Respect for law was an expression of civic friendship. But positive law was seen as only one important institution within a much more complex fabric: it did not and could not stand alone, but itself depended upon the broader form of association that it helped to sustain.

From the early modern period, a rather different way of thinking about law and politics began to emerge. Within this outlook, the polity was no longer viewed as a form of association that itself embodied civic friendship, a core constituent of a fully flourishing life. Rather, it was seen as an institutional structure that facilitated the attainment by individuals of goods which could in principle be possessed and enjoyed independently. The object was to establish a framework of entitlements within which choices could be made and desires could be pursued. Whereas, within the older view, law had been but one important element within a more complex fabric of civility, law now came to assume great centrality, for it was law that had the task of demarcating the bounds of individual entitlements. It was as the result of this centrality that juridical ideas, such as the idea of rights, came to dominate. But the new scheme of thought contained potential problems. For the focus upon goods which could be independently enjoyed by individuals had come to replace the idea of a good which could only be realised in common. And, with the loss of that understanding of the common good, the basis of rights in relationships of mutual civility also became obscured. Rights are now

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commonly understood as expressions of individualism and are often contrasted with the common good, rather than being seen as constituents of the common good. The common good itself is now seen as (at best) an aggregate of individual interests, or (at worst) an ideological myth. But the specific identity of rights (such as the contrast between rights and individual goods, and the relational aspect of rights) can properly be understood only when rights are located within contexts of mutual recognition and mutual civility that are themselves aspects of the common good.

Almost to the exclusion of everything else, the assertion of rights has now become the favoured expression of human hopes and aspirations. Yet the enthusiasm for rights is not matched by a commensurate degree of clarity concerning the nature of rights. Indeed, precisely the opposite seems to be the case. Far from representing a myth-busting liberation from supposedly illusory or oppressive ideas of virtue and the common good, 'rights' have come to be the repository of our greatest illusions and political fantasies. And yet, when properly understood, rights are genuinely important. Indeed, they are amongst the basic building blocks of any political association that embodies the values of civilization. It is therefore imperative that we arrive at a fully coherent and adequate account of the nature of rights.

The individualism that found expression in the idea of rights was eventually to distort and endanger that very idea. By a process of intellectual development, one aspect of which this essay will sketch, rights have become, in many contexts, virtually indistinguishable from individual interests or goods. If rights are to retain their distinctive importance, we must restore our sense of their dependence upon values of civility and mutual recognition. Rights are indeed the great defence of the importance of the individual. But the individual can possess and enjoy that special significance only as a participant in a complex social fabric of relationships that confer and sustain the individuality of each of us. Rights protect us. But they also bind us one to another. And the binding is at least as important as the protection.

The peremptory force of rights in private law is perhaps one reason why A.V. Dicey took it to be a virtue of the English constitutional law of his period that it consisted fundamentally of "the principles of private law."[21] But, although characteristic of private law, peremptory force of this sort is not limited to rights in private law. Many public law rights also exhibit the same feature. But other public law rights, notably constitutional rights subjected to the test of proportionality, seem to lack it. Furthermore, even within private law, the demands of doctrinal system have encouraged an account of rights that presents them as broad seminal ideas from which the fine detail of legal doctrine can evolve. But this account of rights proves to purchase the supposed generative properties of rights only by sacrificing their peremptory force.

21. AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed (Liberty Classics, 1982) at 121.

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In their book *Human Rights on Trial,* Justine Lacroix and Jean-Yves Pranchère speak of human rights as "the normative and legislative corpus … that forms the basis for the rule of law in democratic states."[22] It is certainly true that a growing number of jurists would like to portray both democracy and the rule of law as finding their foundation in the idea of human rights. An enthusiasm for human rights can indeed seem to be a natural expression and extension of the very high aspirations that we invest in democracy and the rule of law. The rule of law makes possible a degree of independence from the power of others that is attainable in no other way. Democracy, in turn, can be viewed as an extension and deepening of that same value: we deepen our independence from the power of others when, not only are we governed by general rules, but we ourselves have participated in the creation of those rules. Extending the idea of independence still further, human rights can be viewed as an attempt to confer on the individual certain basic guarantees which entirely remove the most fundamental interests or liberties from the hazards of political debate and the authority of the majority will.

But the development of human rights, in at least some of its many aspects, can also pose significant problems for both democracy and the rule of law. Many lawyers who are enthusiastic about human rights prove to be cynical about democracy, and prefer to place their trust in the judiciary. And many are content to see traditional rule-based forms of legal doctrinal argument eroded by the balancing test of proportionality. They view the hard carapace of rules, which forms the core of traditional doctrinal legal analysis, as failing to capture the fundamental concern with human well-being that should inform law at every point. They find in the law a technical discourse which is inaccessible to most people, and which therefore gives rise to vast inequalities of power. The need to question virtually every law by reference to the proportionality test is seen as a desirable overturning of legal technicalities in favour of currently popular idioms, focused on matters of obvious and immediate concern, with debate conducted in the somewhat vaporous but easily intelligible form of a concern for the balancing of broadly defined values. All of this neglects the fact that clearly defined, and reliably enforced, rules and rights are vital constituents of any adequate conception of the common good for a modern society.

Peremptory Force and Internal Complexity

If we are to preserve the distinction between 'rights' and 'goods' we need to sustain the idea that rights have peremptory force. In other words, rights must feature in practical reason not simply as weighty considerations that are to be balanced against other competing factors, but as entailing practical conclusions on the issues that they govern. Thus, my right to speak freely must be conclusive of the permissibility of my speaking freely; my right that you should pay me a sum of money must be conclusive of your duty to do so; and so forth.

22. Justine Lacroix & Jean-Yves Pranchère, *Human Rights on Trial: A Genealogy of the Critique of Human Rights*, translated by Gabrielle Maas (Cambridge University Press, 2018) at 2.

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As explained earlier, the great majority of rights may, in certain circumstances, justifiably be infringed, as when I must trespass on your property in order to save a life. But, in such cases, although the right-violator acts justifiably, the right-holder is nevertheless wronged and the wrong must be acknowledged in some way, such as by reparation. There may also be some instances of rights where the right may in no circumstances be infringed. Such rights are defined by reference to the intention of the right violator, as is the case with the absolute right of innocent persons not to be intentionally killed. In relation to such rights, intention must be understood narrowly: as encompassing consequences desired as an end or as a means, but as excluding consequences that are merely foreseen as unavoidable side effects.[23] It is sometimes suggested that such a narrow understanding of intention can have no place in an account of rights, because it appears to be more concerned with the virtue of the right-violating actor than with the interests of the right-holder. But the need for intention, like the requirement of compensation for the victim of a justified rights-violation, in fact arises from the important recognitional or relational aspect of rights. Rights are not self-standing individual interests, but one aspect of relationships of mutual recognition. They are an aspect of the jural or moral relations which should obtain between members of a polity, and ultimately between all human beings. Such relations are analogous to, or even instances of, the relationship of civic friendship. When we consider the actions of our friends, the intentions with which they act are as important to us as the effects of their actions upon our interests.

Combining these two points (the need for reparation when rights are justifiably violated, and the role of intention within rights that do not admit of any justifiable violation) we can see that the peremptory force of rights is dependent upon the fact that rights are not self-standing individual interests, but are essentially relational: the bond created by the right is at least as important as any interest protected by the right. We will now see how this connection between relational status and peremptory force plays out in the analytical jurisprudence of rights.

One influential way of thinking about rights treats rights as involving both peremptory force and internal complexity. The internal complexity of a right consists in its ability to ground a number of different practical conclusions. This was the case with the conception of rights prominent within the Kantian jurisprudence

23. The requirement of intention understood in this way may sometimes be implicit in the substance of the right: e.g., the right not to be tortured. The notion of 'torture' involves the infliction of pain as a means to a desired goal, or as itself the desired goal. *ECHR* Article 3 appears to establish an unqualified right not to be subjected to torture or to "inhuman or degrading treatment." *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223 (entered into force 3 September 1953) [*ECHR*]. Although the prohibition can encompass conduct the "inhuman or degrading" aspects of which are unintended side effects, it has been held that the question of whether the conduct was "inhuman or degrading" cannot be assessed independently of the circumstances, including the purpose offered in justification of the treatment. The same point applies to some other *ECHR* rights which are drafted in absolute form, but which have been construed as qualified in substance. See Julian Rivers, "Translator's Introduction" in Alexy, *supra* note 7 at xxix-xxx.

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that became so influential in the nineteenth century. Rights were thought of as marking domains within which the individual will was sovereign. As a consequence of that sovereignty, a right entailed a number of distinct juridical conclusions. Thus, an individual's right to act in a certain way entailed both the permissibility of that action and its inviolability, in that others were under a duty not to interfere with the action in question. Similarly, the right-based sovereignty of the will might in some cases be thought to entail powers to transfer rights to others, as well as immunities protecting the right from transfer or extinction by the acts of third parties. Rights were in this way conceived of as complex nodal points around which a variety of legal rules and institutions could be systematised.

In an important and enlightening essay, Hillel Steiner approached rights on the basis of the Kantian assumption that rights entail both permissibility and inviolability: rights on this approach guarantee the permissibility of some action of the right-holder, and also protect that action from interference. Steiner raised an interesting question concerning the features that would be required by a system of such rights if those rights were to be jointly possible ("compossible," as he put it).[24] For, suppose that X has a right to perform action A, while Y has a right to perform action B. Suppose further that actions A and B are incompatible. What follows is that action A is both permissible (as an exercise of X's right) and impermissible (as an interference with Y's right). But, Steiner argued, the proposition that an action is both permissible and impermissible is contradictory, and a system of rights that can generate such a contradiction is therefore logically impossible. Steiner concludes from this that the only rights which can co-exist in a compossible set are rights to the exclusive use of objects and spaces.[25] For rights to the exclusive occupation or use of distinct objects or spaces cannot conflict. They are as clearly separable as the objects and spaces themselves. But all other rights contain the potential for conflict, and therefore (in Steiner's view) for contradiction.

We might question Steiner's assumption that a conflict between rights generates a logical contradiction, so that a 'compossible' set for rights must consist of rights between which conflict is impossible. But, even if we rejected his position in that respect, the Kantian analysis of rights as entailing both permissibility and inviolability does mean that systems of rights are likely to generate normative conflicts, if the rights are not limited to the exclusive use of objects and spaces. It is obviously important and desirable for systems of rights to avoid or minimise such normative conflicts between rights, in the interests of overall coherence. For conflicts between rights, even if they do not give rise to contradictions, cannot be resolved without moving beyond the system of rights in order to invoke other,

24. Hillel Steiner, "The Structure of a Set of Compossible Rights" (1977) 74:12 J Phil 767.

25. In a later work, Steiner explores the same inquiry on the basis of different assumptions. See Hillel Steiner, *An Essay on Rights* (Blackwell, 1994). For analysis of the argument in Steiner's book, see NE Simmonds, "The Analytical Foundations of Justice" (1995) 54:2 Cambridge LJ 306.

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broader, considerations, such as considerations of general social policy. Such invocation of broader considerations would undermine the peremptory force of rights, since rights would no longer entail their consequences, but would be subjected to qualifications based upon the particular circumstances and the policy implications.

Like Steiner, the American jurist Wesley Newcomb Hohfeld was concerned with the coherence of systems of rights, although Hohfeld's focus was exclusively upon legal rights.[26] Like Steiner, he treats rights as possessing peremptory force: neither Hohfeld nor Steiner thinks of rights as weighty factors that are to be balanced against each other when they conflict. Hohfeld's aspiration is to show that a sound analysis of rights will reveal "fundamental unity and harmony" in the existing law.[27] Since that body of law is not exclusively, or even largely, a set of rights to the exclusive use of objects and spaces, Steiner's solution is not open to Hohfeld. The peremptory force of rights must be preserved, and the pervasive clash of rights avoided, in some way that accommodates the great complexity of legal systems. Hohfeld's approach proceeds by questioning and abandoning the assumption that rights exhibit internal complexity by, for example, entailing the properties of permissibility and inviolability. He realised that what at first appeared to be a single idea with diverse entailments ('right' as entailing permissibility, inviolability, power, immunity) was in fact a number of entirely distinct concepts referred to by a single word. In the Hohfeldian scheme, rights are not the internally complex molecular structures portrayed in the Kantian view, but four different types of simpler entities, all commonly but misleadingly subsumed under the same word. Thus, Hohfeld pointed out that lawyers often tend to employ the word 'right' as what he called a "chameleon-hued" word, which takes its precise meaning from its context.[28] This was "a peril both to clear thought and to lucid expression" and was best rectified by distinguishing four different concepts, implicit within established usage, all of which could, on occasion, be referred to as 'rights'.[29] The four different concepts identified by Hohfeld are now generally referred to as 'claim-rights', 'liberties' (here Hohfeld preferred the term 'privilege'), 'powers', and 'immunities'.

Hohfeld's analysis invites us to reject the idea that rights entail both permissibility and inviolability. By rejecting that idea, and by carefully distinguishing the four different concepts often subsumed under the idea of a right, Hohfeld's analysis enables us to retain the idea that rights possess peremptory force, while preserving the possibility that the complex systems of rights embodied in most modern legal systems are capable of what Steiner calls 'compossibility'. For example, if X has a right to perform action A, and Y has a right to perform action B, and A and B are incompatible, there is a practical clash of permissible actions,

26. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* edited by David Campbell & Philip Thomas (Ashgate, 2001).
27. *Ibid* at 31.
28. *Ibid* at 11.
29. *Ibid*.

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but no clash of normative requirements. This is because the relevant rights secure the permissibility of the actions in question, but not their inviolability. In this way, the Hohfeldian analysis is able to accommodate many complex configurations of rights which would be incompatible with more Kantian ideas of rights as internally complex, multifaceted, protections of the will.

It is significant that Hohfeld, in addition to seeking to preserve in his analysis the peremptory force of rights, was also concerned to emphasise the status of rights as essentially relational: individual rights are for him but one aspect of jural relations. Consequently, rights must be understood as being relative to other persons. For example, relative to you I may possess a right to wear any hat that I choose, or no hat at all. But relative to someone else, I may have no such right: I may, for example, have contracted to wear a particular kind of hat whenever I appear in public. Similarly, I may have a right that people generally should not assault me. But I may have no such right as against you if we have agreed to fight a boxing match. Rights for Hohfeld cannot be understood apart from such relationships. As explained above, the relational or recognitional aspect of rights is important to a proper understanding of their role and significance.

The analytical separation that Hohfeld establishes between permissibility and inviolability can be grasped relatively easily. It is embodied in the distinction between claim-rights and liberties. Liberties are rights that relate to an action of the right holder and they consist simply in the absence of a duty. I have a liberty to perform an action when (in relation to some other person) I am under no duty not to perform that action. Claim-rights, on the other hand, relate to actions of some person other than the right-holder, and they involve duties, incumbent on that other person and owed to the right-holder, to perform an action of some sort. But liberties do not themselves entail claim-rights. Thus, I may have a liberty to speak in so far as I have no duty not to speak. But my liberty to speak does not, in itself, entail any duty on your part not to interfere with my speaking. If there is such a duty not to interfere with my speech, it will be the consequence of a claim-right that is logically separable from the liberty. Thus, I may have a right to speak freely and a right that you should not assault me. Perhaps the only effective way of preventing me from speaking freely is to assault me, in which case my right not to be assaulted may be an effective protection of my right of free speech. But, in some circumstances, there may be other ways of preventing me from speaking freely (e.g., drowning out my speech by lawfully playing very loud music). Thus, the impermissibility of an interference with free speech is not guaranteed by the Hohfeldian liberty to speak freely: the permissibility conferred by such a right does not entail inviolability. The extent to which a liberty is inviolable is a function of distinct claim-rights that are logically separable from the liberty itself.

An important supplement to Hohfeld's analysis was offered by H.L.A Hart. Critics of Hohfeld had sometimes rejected the idea that the bare absence of a duty (a liberty) could constitute a right. In order to constitute a right, they argued, the liberty would need to be protected by some duty on other persons not to interfere with the exercise of the liberty. Hart pointed out that, in most legal systems, forms of interference involving assault or trespass to property will be civil or criminal

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wrongs. The existence of such laws on trespass and assault therefore provides a 'protective perimeter' for liberties, since the most obvious ways of interfering with the liberty will involve a trespass or an assault.[30] But Hart's view provides no justification for the familiar criticism of Hohfeld. There are many contexts where I have a liberty to do something, but where you might be able, without any assault or trespass, to prevent me from doing that thing. For example, in operating a commercial business, I have a right to make a profit. But you have a right to prevent me from making a profit: you might set up a rival business which is much more efficient, and which attracts all of my customers away from me.

Of course, in a world where there are no duties of any sort (a Hobbesian state of nature) it would make little sense to speak (as Hobbes does) of 'rights'. But Hohfeldian liberties are not surviving elements of such a Hobbesian state of nature where there are no duties at all. We should not think of each Hohfeldian liberty as an island of freedom that has survived the incoming tide of legal regulation. Hohfeldian rights are part of a general system of what Hohfeld calls "jural relations" produced by the governance of law.[31] The introduction of law changes the status even of those areas of conduct that are not directly subjected to legal regulation by the imposition of duties. Indeed, the inseparability of rights (including liberties) from that general structure of jural relations is perhaps the major insight of Hohfeld's analysis.[32]

Hohfeld's analysis has frequently come under attack. But, in recent decades, the attacks have tended to coalesce around a rival account of rights developed primarily by Raz and McCormick.[33] The Raz/McCormick view offers two main ideas. The first is that Hohfeld is mistaken in portraying claim-rights as correlative to duties: rather than being *correlative* to duties, rights serve to *justify* duties. Having, on this basis, rejected the Hohfeldian account of correlativity, the Raz/McCormick position then suggests that Hohfeld has confused rights with the various instrumentalities by which rights may be protected. Thus, a right relating primarily to the right-holder's own action (such as a right of free speech) may be protected by a variety of Hohfeldian elements, such as claim-rights against interference, liberties to speak, and perhaps powers and immunities as well (as circumstances render such protections appropriate).

Matthew Kramer quite rightly pointed out that the correlativity of rights and duties is in fact entirely compatible with the thought that rights are the justification for duties.[34] But this argument, although sound in itself, does not wholly dispose of the Raz/McCormick position, the appeal of which lies elsewhere. For Raz and McCormick are really suggesting that the significance of a

30. See Hart, *supra* note 4 at 171-74.
31. Hohfeld, *supra* note 26 at 11.
32. See Simmonds, *supra* note 5 at 104-09.
33. See Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at ch 7; DN MacCormick, "Rights in Legislation" in PMS Hacker & J Raz, eds, *Law, Morality, and Society,* (Clarendon Press, 1977) at 189.
34. See Matthew Kramer, "Rights Without Trimmings" in Matthew Kramer, NE Simmonds & Hillel Steiner, *A Debate Over Rights* (Clarendon Press, 1998) 7 at 35-40.

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claim-right is not fully captured by the idea of its correlativity to a duty, but has a wider significance. They are seeking to restore to rights the internal complexity that they were thought to possess prior to Hohfeld's analysis. That internal complexity can seem important if we wish to portray the law as capable of a kind of organic internal development, and we wish to see that organic development as stemming from the idea of rights. The general guiding idea is that rights represent important interests that are capable of justifying the imposition of duties, but which can also, in appropriate circumstances, justify the establishment or recognition of powers, immunities, and liabilities. On this approach, rights are not to be identified with the individual elements identified by Hohfeld's analysis, but are rather the underlying goods secured by those elements.[35]

In Hohfeld's analysis, the peremptory force of rights is equated with the power of a right to entail its juridical consequences. Thus, a claim-right entails the existence of a duty on some other person; a power entails the existence of a liability; an immunity entails the existence of a disability; etc. Hohfeld's denial of the internal complexity of rights consists in his denial of relationships of entailment between the different forms of right. Thus there is no general idea of 'a right' which entails both permissibility and inviolability. The Raz/MacCormick analysis simply proposes that a more general notion of right can be sustained, at a slightly higher level of abstraction, by recognising reasoned connections (between interests and different facets of right) which fall short of entailment. The right of free speech, for example, is on this analysis not to be equated with the mere permissibility of the right holder's speaking freely. Rather, we speak of an individual as possessing a right of free speech when the individual has an important interest in free speech which could in principle justify the imposition of duties on other persons, recognition of the permissibility of the right-holder's action in speaking freely, and so forth. But we should not fail to notice that, precisely in failing to entail their juridical consequences, these interests lack the peremptory force that rights possess in the Hohfeldian scheme.[36] They also lack the relational quality of Hohfeldian rights. For, in the Raz/MacCormick view, the jural relation between claim-right holder and duty bearer is merely an instrument which serves to protect the underlying 'right', but is not constitutive of the right. Specific jural relations are not entailed by the right: which jural relations are justified by the right depends upon all of the circumstances.

Irony

I began by noting that the prominence of rights within our discourse may betoken, not that this is an age when rights are triumphant, but that it is an age when

35. MacCormick and Raz develop their analyses as a version of the 'interest' theory of rights. But it is also possible to develop a theory of internally complex rights as a version of the 'will' theory. Such a theory is much closer to the original Kantian view which was influential prior to Hohfeld's analysis. For an excellent illustration of this approach, see Pavlos Eleftheriadis, *Legal Rights* (Oxford, 2008).

36. See NE Simmonds, *Central Issues in Jurisprudence,* 5th ed (Sweet & Maxwell, 2018) at 311-23.

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we no longer take the idea of an individual right seriously. We fail to grasp the stringent requirements that must be satisfied if rights are to be something other than important interests subject to the state's social policy decisions. The discourse of rights has become a toxic monoculture which obscures the diversity of values. Since that diversity is itself essential to the distinctive character of rights, the spread of rights-talk transforms rights into factors which may feature in a favoured policy agenda, but which lack the peremptory force of rights.

The main driving force behind these developments has without doubt been relatively simple. All too frequently, the special peremptory force of rights has been confused with the idea of their importance. Rather than being thought of as values which possess a highly distinctive form, rights have come to be thought of as especially *important* values. As a consequence of this confusion, the language of 'rights' comes to be extended to any good or interest which is being pressed as of considerable importance. An inflationary competition emerges, wherein advocates of specific interests insist that those interests are 'rights'. Anyone resisting such an extension of the notion of 'rights' is treated as refusing to take the relevant interest sufficiently seriously. This feature of ordinary moral and political discussion at the present day has formed the backdrop to the present essay, rather than being its focus. For the relatively crude dynamic of popular discussion, although hugely significant, is not the whole story. There is an aspect of the story which is of particular concern to lawyers, for it concerns some of their core values. Within the more specifically juridical (and less populist) aspect of rights discourse, there has been irony and even tragedy, as well as crude confusion. For the intellectual developments by which we have collapsed the distinction between rights and goods have themselves sometimes been driven, at least to some extent, by an attempt to protect and secure the idea of the special peremptory force of rights.

The peremptory force of rights is intimately linked with the rule of law. For, as I have argued elsewhere, the rule of law is fundamentally a matter of governance by rules.[37] But any finite body of determinate rules gives rise to penumbral cases which cannot be decided simply by applying a rule. How, then, can the judge's duty of fidelity to the idea of the rule of law offer guidance in such cases? One tempting possibility is the thought that the various rule-conferred rights (Hohfeldian jural relations) are themselves merely the superficial manifestations of deeper rights: rights which provide the justifications for a variety of Hohfeldian protections, and which thereby reveal the deep coherence underlying the complex and varied surface of the legal rules. If such underlying rights are to be found, they would provide a way of extending the rule of law into the domain of penumbral cases. Unfortunately, precisely in departing from the Hohfeldian model of rights, these supposedly deeper rights do not entail their juridical consequences, but merely offer non-conclusive reasons for those consequences. They therefore lack peremptory force. Furthermore, in constituting reasons for

37. See Simmonds, *supra* note 5.

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the creation of jural relations, they stand independent of such jural relations. The various Hohfeldian jural relations are viewed, from this perspective, not as part of the essential character of rights, but simply as instrumentalities whereby rights may be protected.

The central fallacy here is the assumption that the values giving unity, determinacy and coherence to a body of rights-conferring law must themselves be rights. This is wrong. Law must be understood by reference to the common good: law might be said to be a plan for the common good. But, while the common good requires the recognition and creation of rights, it is not itself a structure of rights. As Leo Strauss points out, a coherent whole need not be conceived of as a unity which is hidden behind the variety of appearances, but as a unity which is "revealed in the manifest articulation of the completed whole."[38] In cases which cannot be decided by the straightforward application of a well-established legal rule, the judge honours their duty of fidelity to the idea of law in two ways: firstly, by treating the existing legal rules as good faith attempts at articulating the requirements of justice and the common good, to be interpreted in the light of that assumption; and, secondly, by ensuring that whatever modification of the existing rules is required by the judge's decision (a decision guided by the prior interpretive requirement) shall itself be articulated in a rule-like form capable of application to future cases.

There is irony also underlying another significant development in our thinking about rights. Constitutional rights in many jurisdictions are now intimately bound up with a doctrine of proportionality. That doctrine involves a fundamental abandonment of any ascription to rights of peremptory force. For rights, within the doctrine of proportionality, function simply as interests that must be balanced against the policy objectives pursued by legislation. Furthermore, rights conferred by the *ECHR* have been construed by the courts very broadly, so that large swathes of the law can be subjected to challenge on the basis of those rights. In this way, the balancing process inherent in proportionality doctrine comes to mediate the application of a great deal of the law. This means that the governance of general binding rules (so central to the rule of law) is extensively replaced by the balancing of values. Thus, it is not only constitutional or human rights that lose their peremptory force and become integrated into the process of balancing interests: virtually all legal rights suffer the same weakening. A polity departs from the rule of law not only when judges and other officials fail to apply the law, but also when the law that they apply confers upon them extensive discretionary powers. The doctrine of proportionality confers such powers across areas of law that were once governed by clear and reliable rules. Yet the idea of constitutional rights can itself be viewed as an attempt at extending the value of the rule of law.

I have argued elsewhere that the value of the rule of law is to be found in the form of freedom called "freedom as independence from the power of another."[39]

38. Strauss, *supra* note 20 at 123.
39. Simmonds, *supra* note 5 at 141.

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This consists, not in the extent or value or variety of one's available options, but in the independence of those options from the will of other persons. My thesis is that, if one is governed by the rule of law, one enjoys a degree of freedom as independence which is attainable in no other way, while living in a human society.[40] The rule of law consists, essentially, in the governance of binding rules with peremptory force. It can be contrasted with (among other things) governance by managerial discretion, where values are weighed and balanced one against another, and decisions are shaped by a policy agenda rather than by settled rules. However, rules must be created either by consensus or by authority, and this means that the independence from the will of others conferred by the rule of law is always less than complete. Such independence can be extended, to some extent, by the institutions of democracy. For democracy enables the individual to participate in the formation of the collective will that determines the law's content. Thus, far from democracy and the rule of law being values that compete with each other (as some theorists, such as Carl Schmitt, appear to suggest), democracy represents an extension and a deepening of the same value that is advanced by the rule of law.

It is tempting to view judicially protected human rights, or constitutional rights, as further extensions of the same value. For the judicial protection of such rights can be portrayed as an attempt entirely to remove certain core interests from the agenda of political debate and collective decision, thereby protecting those interests from the will of others in the most fundamental way possible. This tempting vision can even lead some to identify such rights with the rights that, under the Raz/MacCormick analysis, pervade the whole of the law, being located on a more abstract level than the level of Hohfeldian jural relations. Still more ambitiously, this understanding of domestic legal systems as grounded in a range of basic rights, can be taken as suggesting that those domestic legal systems are but regional concretisations of the requirements of the international law of human rights. The vision is an intoxicating one which can inspire an uncritical idealism in many quarters.

But against this type of vision must be weighed the picture that I have tried to present in this essay. Rights are distinguished from goods by their peremptory force. To collapse the distinction between rights and goods is to remove an important basis for the state's legitimacy, and to convert the state into a technocratic instrument for managerial social policy. To collapse that distinction is also to detach rights from the bilateral relationships of mutual recognition which help to integrate rights into the fabric of a polity. This, in turn, isolates them from the eco-system of moral conceptions upon which they ultimately depend. When rights are treated as fertile nodal points for the systematisation of legal doctrines, rather than as the determinate upshot of particular legal rules, they lose their peremptory force. When rights are presented as

40. See *ibid*.

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constitutional constraints, they do so only subject to a doctrine of proportionality which replaces rules by the balancing of values.

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