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# Some Professorial Fallacies About Rights

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## SOME PROFESSORIAL FALLACIES ABOUT RIGHTS

Why do students usually get into a muddle when analysing legal situations in Hohfeldian terms?

What is the use of trying to straighten out the muddles, and of teaching Hohfeldian analysis at all?

This little paper concerns solely these two pedagogical questions; it says nothing new or formally rigorous about the problems of legal analysis and structure.

The short answer to the first question is that Hohfeld was clear-headed in applying his scheme, but because of his writing style and his odd views about definition was regrettably gnomic about the meaning and inter-relations of the terms of that scheme—while the professors who have expounded him in students' textbooks are often quite muddled both in explaining and in applying the scheme.

The short answer to the second question is that clear-headed familiarity with Hohfeld's scheme can bring with it an awareness of the questions regularly begged when "claims of right" are raised in law, politics and moral debate, and thus some awareness of the ambiguity, evasion and overkill afflicting the Western debate since "rights" became the basic counter in discourse.

*Note on terminology:* By "Hohfeld's schema" shall be meant

- Claim-right
- Duty
- Liberty (= privilege)
- No-right

Thus, if A has a claim-right that B do (or not do) X, a correlative duty to A to do (or not do) X must inhere in B. If the rule (or inference) providing for the foregoing relation is negated (or the inference denied), the new (or asserted) situation will be such that B, not now having that duty to A, has a liberty not to do (or to do) X, while A now has [a] no-right that B do (or not do) X. I use "privilege" and "liberty" synonymously and indifferently throughout<sup>1</sup>.

### I

The student of Hohfeld who looks into Professor Stone's *Legal System and Lawyers' Reasonings* (1964), or into his *The Province and Function of Law* (1946), will read that

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1. I remain throughout within the Hohfeldian framework, treating legal relations as three-term relations between two persons and one *activity*. Thus I ignore rights to or in respect of *things*, as to which see Mr. Honoré's important critique of Hohfeld in "Rights of Exclusion and Immunities against Divesting" (1960) 34 Tulane L.R. 453. I also ignore the problems of Hohfeld's analysis of powers, liabilities, immunities and disabilities.

“in Hohfeld’s sense . . . it is improper to speak of A having a privilege *vis-à-vis* B unless it can be shown that B has a no-right to prevent its exercise”. (LSLR, 140; PFL, 117)

And further on:

‘For the ambiguously wide term ‘a liberty’, [Hohfeld] substituted the notion of ‘a privilege’ limited to those situations in which the law permits A to act as he wishes, but imposes no duty on B to permit him to do so, or in other words, leaves B also free to act as he wishes. B in this case has, in Hohfeld’s sense, ‘a no-right’ to prevent A, but he does also have a privilege (Salmond’s ‘liberty’) of preventing him, if he wishes. The correlative of this ‘privilege’ of A is B’s ‘no-right’ to legal redress when A exercises this terminating privilege’. (LSLR, 143)<sup>2</sup>

And again:

“The ‘privilege’ of Hohfeld is . . . that kind of ‘liberty’ which the law tolerates but does not support by imposing a duty on anyone else”. (LSLR, 143; PFL, 121)

Now our student will remain with Hohfeld on the straight and narrow path, only if he realises that Stone’s exegesis (a) is incompatible with Hohfeld’s text, and (b) ignores and defies three axioms essential to the comprehension of Hohfeld’s work.

(a) First, Hohfeld’s text, which is clear on the point in issue:

“If 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 . . . [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 . . . [T]he correlative of X’s privilege of entering himself is manifestly Y’s ‘no-right’ that X shall not enter”. (*Fundamental Legal Conceptions*, Yale U.P., 1923, 38-39)

This is Hohfeld’s introductory and principal illustration of his leading terms. It leaves rather little room for Stone’s exegetical claim that a Hohfeldian privilege exists only when the law allows others (“anyone else”: all others!) the privilege to frustrate the exercise of the first-mentioned privilege<sup>3</sup>. For Hohfeld’s privilege is paradigmatically the privilege of the landowner to walk on his own land; and, in all the legal systems familiar to Hohfeld’s readers, this is not a merely “tolerated” liberty, but is rather a liberty surrounded by a perimeter of supporting claim-rights of the land-owner against

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2. *Sic*. But what is “this terminating privilege”? I can make sense of the sentence (which appears, without the last nine words, in PFL, 120) only if “A” is substituted for “B”, and *vice-versa*, throughout the sentence. I forbear to ask whether Stone, by characterising B’s privilege (but not A’s) as “Salmond’s ‘liberty’”, intended to distinguish between two types of ‘privilege’ . . .
  3. Hohfeld’s n.59 on p. 48 is clear evidence that he recognised that Salmond’s “liberty” was, like his own “privilege”, “the mere negation of duty” (*cf.* p. 44). *Pace* Stone, Hohfeld was not substituting a narrower or more closely defined term (“privilege”) for an “ambiguously wide” Salmond-“liberty”. He simply preferred one word to the other.

attempted interference with him in the exercise of his liberty. The existence of such supporting claim-rights is not, of course, a condition of the existence of the liberty: Salmond and Hohfeld are both clear about this. But still less is the *absence* of such supporting claim-rights a condition (as Stone seems to claim) of the existence of the liberty<sup>4</sup>.

(b) The misreading of Hohfeld is only possible, and only significant, because of a neglect of basic principles. These principles overlap, but can be treated under three heads or axioms.

- (1) *Each Hohfeldian relation* (e.g. of claim-right: duty, or of privilege: no-right) *concerns only one activity of one person*. There is one complete Hohfeldian relation between X and Y (in Hohfeld's example) with respect to the topic of Y's going (or not going) on X's land. There is another complete and logically independent relationship between X and Y with respect to the topic of X's walking on his own land. There is yet another and again logically independent relationship between X and Y with respect to the topic of Y interfering with X's walking on his (X's) own land. And so on.

To sharpen the point, let it be particularly noted that, while somebody's activity is one topic for Hohfeldian relationships between that person and other persons, interference with that person's activity always another topic for other Hohfeldian relationships.

Thus the correlative of X's privilege is Y's no-right that X shall not exercise that privilege; and that is all that can be said about this relationship. The matter of Y's possible privilege (or even duty) to interfere with X's exercise of his (X's) privilege is always a further problem requiring a distinct solution by positive law; nothing can be asserted about it by inference from the first-mentioned relationship. Stone's attempt to link X's privilege, not merely with Y's no-right, but also (conceptually) with Y's privilege of interfering, is inconsistent with this first axiom of Hohfeldian method<sup>5</sup>.

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4. Hohfeld (p. 41) gives two analyses of Gray's shrimp salad affair. The primary analysis notes that the subject will "primarily" have "two classes of relations", viz. a privilege of eating the salad and a claim-right that others shall not interfere with this activity of eating. Hohfeld notes that "these two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not". The last-mentioned *secondary* possibility is reproduced by Stone (LSLR, 143; PFL, 121) as if it were *the* Hohfeldian analysis of a privilege and *the* Hohfeldian analysis of the shrimp salad imbroglio. Stone then feels free to say (LSLR, 144 n.22; PFL, 121 n.19) that in a case where there was a binding contract to allow the subject to eat the salad [i.e. Hohfeld's primary case], the subject would have a claim-right [!] to eat the salad. Stone's confusion of two "perfectly distinct" relations could not be more complete. Stone's criticism of Salmond (LSLR, 142 n.15; PFL, 119 n.13) is based on the same absurd notion that there can be a claim-right ("a 'right' in the strict sense") to *do* something. Salmond (*Jurisprudence*, 1902, 232) sees quite clearly (like Hohfeld) that where a liberty to act is protected by a claim-right "not to be hindered in so acting", then "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 protecting rights". The parallelism with Hohfeld, in emphasis as well as in conceptual structure, is complete.
5. Professor Paton makes the same mistake, but chooses the opposite conceptual link: "liberty represents what I can do for myself, free of the possibility of legal interference by others . . . Here no precise relationship to others is in question, save that the law will protect my liberty if others interfere with its exercise" (*Juris-*

- (2) *A Hohfeldian claim-right can never be to do or omit something: it always is a claim that somebody else do or omit something: A's claim-right is always to B's action or omission, never to A's.*

All Hohfeld's statements and examples take this for granted: would that he had somewhere said it explicitly! In any event, the axiom can readily be verified by asking oneself what could (logically) be the content of B's correlative duty if A had [*per impossibile*] a claim-right to do (or omit) something . . .<sup>6</sup>

It follows that a Hohfeldian "no-right" is equally incapable (logically) of being predicated of the actions (or omissions) of the bearer (subject) of the no-right. So it is strict nonsense to speak (as Stone does above) of B having both a privilege and a no-right to "prevent A" (or to do anything else). For B's "preventing" is an action, and thus can be for B the object only (within the Hohfeldian schema) of duties or privileges.

It is conceivable<sup>7</sup> that Stone's error at this point was not so much a failure to respect this axiom, but rather an equivocation on the notion of "preventing" or "interfering": such that, when thinking of B's privilege he was thinking of some action of B directly and personally interfering with A, while when thinking of B's no-right he was thinking of B's (not) having a "legal remedy" for A's action (as B would have had if A had been under a duty to him . . .). If so, the third axiom becomes relevant.

- (3) *The relevance of "legal remedies" to the defining terms of his schema is left entirely undetermined by Hohfeld.* Further stipulative definitions (which he never provided) are required before the schema can be applied to the analysis of any concrete legal situations; in particular, answers must first be stipulated for the following requests for clarification:
- (i) If B has a duty (say) not to walk on Whiteacre, does A have the correlative claim-right
    - if and because he (A) has an interest in Whiteacre; or
    - if and only if he (A) has a "legal remedy" to "enforce" B's duty?
  - (ii) If the latter, has A got the claim-right if he is not entitled to an injunction to restrain B, and/or if he is under a duty not to use force against B by way of self-help, but can in any case get

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*prudence*, 3rd ed., 1964, 255). Mr. Dias gets the whole matter right with the terse formulation: "X's privilege to wear the bowler hat and his right not to be prevented from so doing are two different ideas" (*Jurisprudence*, 2nd ed., 1964, 232). A nuanced account, clear-headed on the logic of the Hohfeldian schema but sensitive to the practical pressures to support privileges with claim-rights, is given by Mr. Lucas in *The Principles of Politics*, 1966, 157-158.

6. Stone's n.22 in LSLR, 144 (PFL, 121 n.19) seems to suggest that "the duty not to interfere" is the correlative of a claim-right to act. More clearly still, he says (LSLR, 144; PFL, 121) that "the correlative" burdens on A, B, C and D to X's privilege, are their 'no-rights' to keep him off". All this defies the elementary logic of Hohfeld's schema, by introducing a fourth term into what is (and can only be) a three-term relationship between two persons and one action (or omission).
7. But not likely, since (as noted *supra*, n.4) Stone elsewhere speaks of a claim-right to eat a salad.

damages? In short, if having a remedy is a condition of having a claim-right, what counts as a remedy for these purposes, and in particular need it amount to an ability (even if only *de jure*) to prevent B from acting contrary to his duty?

It is clear enough that Stone has not pressed any of these questions. His failure in this respect is more complete, but not perhaps more spectacular, than that of Professor Lord Lloyd. Lloyd offers to analyse two hypothetical examples to show how Hohfeldian terminology "assists in clarifying legal analysis and avoids confusion between different legal situations which may have different legal consequences". (*The Idea of Law*, Pelican ed.), 315; MacGibbon & Kee ed., 275. It is not necessary to follow his analysis very far:

"In the first example Smith buys a theatre ticket for a reserved seat at a performance at Brown's theatre. If, as a matter of law, Brown is not able to exclude Smith from taking his seat, this would amount to the grant of what is called in law an 'irrevocable licence'. Smith in this case has a liberty to enter and take his seat and Brown has 'no-right' to interfere with this freedom of Smith." (*ibid.*)

Let us interrupt to note that the analysis has already miscarried. The correlative of Smith's liberty to enter and take his seat is Brown's no-right that *Smith shall not do so*. A correct analysis of the vaguely described "irrevocable licence" is presumably that Brown has a duty (contractual, no doubt) to allow Smith to enter (i.e. not to exclude Smith), and Smith has a correlative claim-right that Brown shall not exclude him from entering. This claim-right adds to and supports (in a practical sense) Smith's privilege of entering. But Lloyd goes on:

"Suppose, however, that before the performance is due Brown wrongfully purports to withdraw Smith's permission to enter. The law may well say in this case that though Brown has acted wrongfully, Smith cannot legally compel Brown to let him in, so that Smith's only remedy is to sue for damages for breach of contract. This means therefore that Smith has no liberty to enter but only a right to sue for damages." (*ibid.*)

The student will want to know how this state of affairs is consistent with the hypothesis that "Brown is not able to exclude Smith from taking his seat"—it seems that indeed, in many senses, he "can"! Much more important, however, is Lloyd's muddle about the liberty to enter; on the law as stated by Lloyd<sup>8</sup>, there is no reason to suppose that Smith has lost his liberty of entering, for there is no reason to suppose that he has a duty not to enter (as he might well have but for the purchase of the ticket). What he has lost is not the liberty, but (if anything) the claim-right to be allowed to enter (i.e. not to be excluded). But has he lost even that? Is Brown to be regarded as free from a duty not to exclude Smith just because he is not (?any longer) liable to a mandatory injunction or some other such specific remedy? After all, he presumably remains liable in damages. Are we to say that one never has a

8. My comments are restricted to this hypothetical law, and are not to be taken as a commentary on the much more involved legal position in English and Australian law.

claim-right to the performance of a contract unless one can get specific performance? Hohfeld never formally pursues such questions (though he seems definitely to have assumed that claim-rights exist (e.g. at law) even in the absence of secondary rights to specific reparation (e.g. in equity))<sup>9</sup>. Lloyd, without warning or discussion, simply assumes a particular and none-too-attractive solution-by-stipulation, singling out one special type of remedy (specific) as decisive of the problem of stipulating the truth-conditional analysis of a Hohfeldian claim-right.

But this range of problems can now be left to appear more forcibly in the second part of the paper. One could extend the unravelling of the misconceptions in the textbook accounts of Hohfeld. But the reader who is armed with the three axioms can safely be left to do it himself.

## II

What is the use of understanding Hohfeld's scheme of analysis? As we have seen, a superficial familiarity with the terms of the scheme spreads darkness rather widely. But a secure grasp of Hohfeld opens the way to a ready penetration of some common sophistries. To be sure, no-one is going to be secured against the moral and political confusion of the age merely by his technical logical facility and clarity. But an awareness of technical derailments in the arguments of intelligent men is the basis for any enquiry into the deeper causes of the confusion. One or two illustrative analyses may perhaps suffice to make the point.

In his well-known article, "Taking Rights Seriously", *New York Review of Books* (17 Dec. 1970) Special Supplement, 23-31<sup>10</sup>, Professor Ronald Dworkin raises once again the question, "Does an American ever have the moral right to break a law?" His answer is based on the assumption that Americans "have certain fundamental rights against their government, certain moral rights made into legal rights by the Constitution". I shall not be questioning this assumption or its formulation, but only the argument used to get from this premise to the conclusion that

"In our society a man does sometimes have the right, in the strong sense, to disobey a law. He has the right whenever that law wrongly invades his rights against the government." (p.25)

The argument is based on the analysis of "rights in the strong sense":

"In most cases when we say that someone has a 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference . . . There is a clear difference between saying that someone has a right to do something in this [strong] sense and saying that it is the 'right' thing for him to do or that he does no 'wrong' in doing it. Someone may have the right to do something that is the wrong thing for him to do . . . Conversely, something may be the right thing for him

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9. See e.g. *Fundamental Legal Conceptions*, 132, 101-114, 150-151.

10. Reprinted in E. V. Roston, *Is Law Dead?*, 1971, and A. W. B. Simpson, *Oxford Essays in Jurisprudence, Second Series* (forthcoming).

to do and yet he may have no right to do it, in the sense that it would not be wrong for someone to interfere with his trying . . . Thus we say that the captured [enemy] soldier has a 'right' to try to escape when we mean, not that we do wrong to stop him, but that he has no duty not to make the attempt." (p.24)

Dworkin provides further cogent illustrations of the pattern of terms and relations thus defined, and again I shall not question the set of definitions. It is clear enough that Dworkin's "strong-right" is essentially a (moral and thus American legal) Hohfeldian claim-right (against everybody else: a multital or general claim-right) not to be interfered with in doing an act, X; normally each such claim-right will be conjoined with Hohfeldian liberty to do X; but the claim-right is not forfeited by the fact that on occasion the subject may have a (moral . . .) duty not to do X (i.e. no liberty to do X<sup>11</sup>)—in which case X is not "the right thing for him to do" but he has the "strong-right" to do it. And this is all perfectly intelligible.

The next stage in Dworkin's argument is to assert that if American's rights are to be significant and worth bragging about

"then these rights must be rights in the strong sense I just described. The claim that citizens have a right to free speech must imply that it would be wrong for the government to stop them from speaking, even when the government believes that what they will say will cause more harm than good . . ." (p.24)

Let this be conceded. The nub of the argument follows:

"But then the answers to our two questions about disobedience seem plain, if unorthodox . . . If [a man] has a moral right to free speech . . . then he has a moral right too break any law that the government, by virtue of his right, had no right to adopt . . .

[Careful! By virtue of the man's right, the government *was wrong* (by definition) to adopt the law. But remember: one can (by definition) have the (strong) right to do what is wrong.]

"My right against the government means that it is wrong for the government to stop me from speaking;

[Yes]

the government cannot make it right to stop me just by taking the first step . . .

[Well, let this pass; but remember Lloyd's Mr. Brown, who makes it right for himself to exclude Smith just by wrongfully taking the first step . . . And the common law sides with Brown on this point<sup>12</sup>, being unaware of the impossibility (moral or logical?) alleged by Dworkin. But let it pass.]

11. We are assuming that Dworkin would really wish to defend his equation of "wrong" with that which one has a "duty" not to do. But it would not affect the general argument if, as might be more plausible, he abandoned this equation and retained "wrong" in some sense independent of duties.

12. *Cowell v. Rosehill Racecourse Co. Ltd.* (1936) 56 C.L.R. 605.

. . . passing a law cannot affect such rights as men do have, and that is of crucial importance . . . If a man believes he has a right to demonstrate, then he must believe that it would be wrong for the government to stop him, with or without benefit of a law. If he is entitled to believe that, then it is silly to speak of a duty to obey the law as such, or of a duty to accept the punishment that the state has no right to give" (p.25)

If the reader treats this as the conclusion of a valid argument his derailment will now be complete; the repeated equivocation on the phrase "has no right" will have done its rhetorical work. What the premises and assumptions warrant is the conclusion that the state or government *is wrong* to legislate against or interfere with or punish the speech or demonstration. What the premises and assumptions do *not* warrant is the conclusion that the state "has no right" to do so, if by "no right" is meant no "strong right". In fact, as I interjected earlier, the premises explicitly allow for the possibility that a subject of rights and duties (and why not the state?) can have the strong right to do what it is wrong for that subject to do (and Dworkin stresses the point again at the end of his argument; see p.27).

In short, Dworkin's apparent argument omits to consider and exclude the possibility that while the citizen has the strong right to (wrongfully) speak or demonstrate (so that the state is wrong to interfere with him), the state has the strong right to (wrongfully) interfere, in which case *the citizen would be wrong to interfere with the state's interference*. But to refuse "to" accept the punishment" would be one way of interfering with the state's interference. So the omission is precisely a failure to prove what Dworkin sets out to prove, viz. that the subject of strong rights has no duty to accept punishment for breaking a (wrongful) law.

If it were necessary, we could go further. Consideration of the possibility that the state has a strong right alerts us to the topic overlooked by Dworkin: interference with interferences. And our second axiom for Hohfeldian studies will remind us that interference with an action (even of the action be itself an interference . . .) is always a conceptually distinct topic for Hohfeldian relations. This train of reflections will bring to our attention a more subtle but still important further weakness in Dworkin's argument: "speaking/demonstrating" is one thing, one topic for moral deliberation; but "breaking a law against speaking/demonstrating" is formally another thing, another topic for moral deliberation, with different aspects and consequences to be weighed and with a conceptually distinct set of Hohfeldian relations to be predicated of it. This difference is ignored as Dworkin's argument proceeds, *via* what looks like a piece of purely conceptual analysis (free from additional moral or political premises), from the strong right to speak/demonstrate to the strong right to break a law against speech/demonstration.

Meanwhile, the topic of interferences with interferences will have stirred some memories of the real problems of political philosophy. For has not Kant based the liberal conception of the state and of public law on the need to hinder those hindrances to individual freedom which arise from the actions of other individuals (*Science of Right*, Intro., s.D)? This dimension of the problem is missing from the core of Dworkin's argument; it makes elsewhere

a belated appearance, when it forces some rather arbitrary stipulations about the proper limits of claims of right (p.26). It deserves more reflection, not only because the need to hinder hindrances to freedom might well be a basis for a possible "strong right" of the state, but also because we have not yet confronted the real complexities of the problem of "rights" in society.

Let these reflections be limited to a single proposition that would presumably be entailed by the more grandiose proposition that "There is a right to freedom of speech". Let us assume a society consisting of three citizens, A, B and C, with a government or state authority, S. Now let us ask: What could be meant by the modest proposition, "A has a right to say X to B"? Let us suppose that B has no duty to listen to A. Then our reflections simply ring the changes on the elements provided by the three axioms . . .

One might be asserting (i) that C has (or ought to have) no right of action in tort or contract against A for saying X to B; and/or one might be asserting (ii) that A will not be criminally liable for saying X to B. There are many situations in contemporary legal systems where the first assertion is true while the second is false, and *vice-versa*, and many where both are true<sup>13</sup>.

Alternatively, one might mean that A's communicating X to B is or should be free from prior censorship by S, but not from *ex post facto* suit by C or prosecution by S. As Milton says in the *Areopagitica*, "it is of the greatest concernment to the . . . Commonwealth to have a vigilant eye how books demean themselves as well as men; and thereafter (*i.e.* after publication) to confine, imprison and do sharpest justice to them as malefactors".

Alternatively, or additionally, one might be asserting that C has a duty not to interfere with A's communicating X to B. And to say this may mean that if C does interfere he will be penalised by S, and/or it may mean that A can get damages against C for C's interference, and/or that A can get an injunction against C's interfering, and/or that A can resort to self-help against C's interference without thereby incurring criminal liability to S or liability

13. It may not be out of place to recall some of the many types of speech and expression which are prohibited or otherwise legally discouraged in the modern law: perjury; libel and slander; seditious libel, conspiracy to commit crime or any unlawful or indecent act; threatening, abusive or insulting language whereby a breach of the peace or incitement to racial hatred is likely to be occasioned; obtaining property or credit by false pretences or fraud; many sorts of false declarations in connection with public documents; inducing breach of contract; shocking public decency; using obscene language; glorifying the use of drugs; using words with intent to deprave or corrupt, or likely to deprave and corrupt, persons likely to hear or read them; making false reports tending to show that a crime has been committed; communication of official secrets; interrupting public meetings with intent to prevent the business; contempt of court; cheating the revenue; advertising rewards for return of stolen goods on a no-questions-asked basis; inciting disaffection amongst the police and armed forces; causing panic by shouting "fire!" in a theatre (though perhaps the law does not take so strict a view as John Stuart Mill, who said, in ch. III of *On Liberty*, that

"An opinion that corn-dealers are starvers of the poor, or that private property is robbery . . . may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard".)

Some people would like to see the foregoing list of legal prohibitions and discouragements extended: e.g., to make it an offence to record or communicate certain types of true and objective information (record as a student, bad debts, . . .)

in damages to C or to an injunction by C or to counter-self-help by C—or any combination of these combinations . . .

Alternatively, or additionally, one might be asserting that A has the liberty to communicate X to B without being snooped on by C or S. And this may mean that snooping by C is an offence penalised by S, and/or actionable in damages and/or by way of injunction by A, and/or a trespass against A giving a right to self-help . . . and so on as before.

Alternatively, or additionally, we might be asserting that C and S are under a duty to A not to deny him access to B and/or the means of communicating with B; and again, what it is to assert that C and S have a duty and A a corresponding claim-right varies along the range of A's interests and of types of enforcement action, self-help, non-interference, etc.

Thus, long before one examines the content (X) of the act of communication, it is evident that the assertion, "A has a right to say X to B", has hundreds if not thousands of possible legal meanings. Correspondingly, it has hundreds if not thousands of possible moral meanings within the moral discourse about what the morally just legal system should stipulate concerning acts of communicating X. No one of all these possible meanings is self-evidently the right moral claim. So the only way to specify the meaning of "right" in some claim of right—and then the only way to justify the restriction of the claim to this specified sense of "right"—will be to appeal to some principles which are pertinent in moral discourse but which are not expressed in terms of "rights".

To this ambiguity and the problems of its resolution must be added the ambiguity veiled by the symbol "X". Unless one takes the heroic (not to say corrupt) view that A has the right to say anything to B, however treasonable, damaging or gratuitously vile it may be when uttered to B, one is faced with the problem of specifying what is to count as X for the purposes of making reasonable the assertion under discussion. Here again, the postulate that human beings have rights is of no help. The justifiable specification of X will vary according to time, place and circumstance and everything else that affects the good of B, of C and of the whole community for which S is immediately responsible and for which we (as imagined architectonic legislators and/or as good lawyers, judges and citizens) are ultimately responsible.

So most claims of right in the modern Western debate are, as they stand, indefensible stumbling-blocks in the path of clear discussion between men of good will. A convenient and representative concrete example is afforded by the Vatican Council's Declaration "On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious" (1965)<sup>14</sup>. The Declaration begins with a flourish:

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14. The Declaration simply makes explicit one way of explaining the juridical order established by, e.g., the Universal Declaration of Human Rights (1948), arts. 18 and 29; the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art. 9; and thus the human rights provisions of many new Commonwealth constitutions: see for example the Fiji Independence Order 1970, dated September 30, 1970, S.I. 1970, p. 6630, Sch. chap. 1. The drafting of the Vatican Council's Declaration is probably to be ascribed mainly to Professor J. C. Murray S.J.

“the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no-one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits” (s.2)

“Within due limits”! Does this mean that the Hohfeldian claim-right being asserted (not to be restrained in one’s religious practices) only exists when the religious practices are the right ones? No. But it does mean that the right *exists* only to the extent that “the just requirements of public order are observed” (s.7)<sup>15</sup>. These requirements, in turn, are specified by certain moral norms:

“these norms arise out of the need for effective safeguard of the rights of all citizens and for peaceful settlement of conflicts of rights. They flow from the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice. They come, finally, out of the need for the proper guardianship of public morality.” (s.7)

When religious practices conflict with these norms of public order, they are said by the Council to be (*not*, as I said above, outside the scope of the right, so that the right does not *exist* with respect to such practices, but rather) “abuses of right”, against which abuses the government has a “special duty” to protect public order. (And such special duties are no doubt to be conjoined with governmental Hohfeldian claim-rights/Dworkinian strong rights against interference.)

“Abuse of right” is a juridically improper concept. If it means anything juridically relevant it means *absence* of right, i.e., “no-right” and/or “duty not . . .”. The introduction of the phrase “abuse of rights” is a sign that the speaker is covertly deflating an inflated claim of right. What justification can there be for making claims, knowing that one cannot and will not defend them when questioned about their implications?

The Vatican Council is not, in sum, defending a right to unhindered religious practice. Nobody who is aware of the range and variety of religious practices is likely to want to defend such a claim of right. The Council is asserting that the pursuit of truth about divine things, and the expressions of beliefs about divine things, are important values, important aspects of an individual’s worth and dignity, even when the pursuit miscarries, the beliefs are wrong and the expressions offensive to more reasonable, sensitive or well-informed men. And as values and as aspects of a citizen’s worth, such beliefs and expressions ought at least to be permitted (and at most to be encouraged) unless they threaten public morality, public peace or the welfare of fellow-

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15. What the Council actually says is that the right may only “be exercised” to this extent and subject to these requirements. It is very odd to speak of exercising an immunity; and this oddity is closely related to the juridically improper notion of “abuse of rights”—on which see my text *infra*.

citizens. All this could have been said without resorting to overkill about a non-existent "inviolable right to religious freedom".

The evils of overkill are considerable. Firstly, nonsense: for example, the talk about "abuse of rights". Secondly, evasion: thus the Declaration, uneasily aware of the nonsensicality of "abuse of rights", pretends that what it is allowing the government to interfere with is "possible abuses committed *on pretext* of freedom of religion"—thus introducing an irrelevant (and much more tractable) issue about *mala fide* claims of right. Thirdly, devaluation of moral currency: thus genuine and genuinely inviolable rights, such as the right of an innocent person not to be intentionally or negligently killed, are put on the same level as spurious (because inflated) claims of right, and are in danger of being watered down (by men whose commonsense exceeds their moral sensitivity) by a compendious exception clause to the effect that *all* human rights are subject to the exigencies of public order . . .