CHAPTER TWO

THE NATURE OF RIGHTS

SINCE PROPERTY RIGHTS are a subdivision of human rights, we need to give some consideration to the notion of rights generally before we attempt to deal with property rights specifically. No one can deny that the topic of human rights has become of heated political concern recently. But even the slightest familiarity with the context of the debate tells one that the terms 'human rights' or just 'rights' are used by different people to denote very different things. Historically this has always been the case. The various 'Bills of Rights' or 'droit d'hommes' that have been proclaimed, and often enacted into law, contain very different provisions. One needs only to examine the texts of some of the most famous Bills—from that passed by the English Parliament after the "Glorious Revolution" in 1689 through the first ten amendments of the Constitution of the United States added only four years after its ratification in 1787, down to the more recent Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948 which was followed by the United Nations Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights in 1966—to see how talk about 'rights' varies

considerably.[1] Some of the differences can be traced back to the different legal traditions that nations and peoples have followed. The language of rights has been most explicity developed by lawyers and jurists, hence we shall draw on these traditions in order to further our analysis.[2]

Human rights are important to men because human dignity depends upon real freedom of choice in thought and belief, action and responsibility. The whole issue of rights circles around the simple fact that certain conditions of freedom must be secured and protected in order for man to attain his potential. Rights are the guarantors of dignity and self-respect. Yet, on the other hand, rights themselves are incapable of defending their own interests. Therein lies their vulnerability and frailty. Rights need recognition if they are to be effective means for fulfilling human aspirations. This is why there is such clamor over human rights. And it is also why appeals

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[1]For a collection of texts on human rights see: Ian Brownlie, ed. Basic Documents on Human Rights, (Oxford: Clarendon Press, 1967). Also, Mauruce Cranston, What are Human Rights? (New York: Taplinger, 1973), esp. pp. 87-167.

[2]A. I. Melden, ed. Human Rights, (Belmont, Calif.: Wadsworth, 1970); Richard Flathman, The Practice of Rights (Cambridge: Cambridge University Press, 1976); D. D. Raphael, Political Theory and The Rights of Man, (Bloomington: Indiana University Press, 1967); Eugene Kamenka, and Alice Erh-Soon Tay, eds., Human Rights (New York: St. Martin's Press, 1978; and Alan S. Rosenbaum, ed., The Philosophy of Human Rights: International Perspectives (Westport, Conn.: Greenwood Press, 1980).

to human rights are insufficient in themselves to secure freedom. Rights must be respected in order to have any meaningful influence upon an individual's freedom.

Traditionally this situation has been acknowledged by the correlation of rights with complementary duties or obligations. In this way they are protected from abridgement by neglect or abuse. Simone Weil has written most directly about the dependence of rights upon duties. It is worth hearing what she has to say:

> The notion of obligations comes before that of rights, which is subordinate and relative to the former. A right is not effectual by itself, but only in relation to the obligation to which it corresponds, the effective exercise of a right springing not from the individual who possesses it, but from other men who consider themselves as being under a certain obligation toward him. Recognition of an obligation makes it effectual. An obligation which goes unrecognized by anyone loses none of the full force of its existence. A right which goes unrecognized by any one is not worth very much.[3]

What she is saying is that rights are claims made against others—either individuals or society as a whole—

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[3]Simone Weil, The Need for Roots (New York: Harper & Row, 1971), p. 3. W. D. Ross, The Right and the Good (Oxford: Clarendon Press, 1930) discusses the sense in which rights and duties are correlative on pages 48-56, and he makes the point that it would be "wrong to describe either legal or moral rights as depending for their existence on their recognition, for to recognize a thing(in the sense in which 'recognize' is here used) is to recognize it as existing already. The promulgation of a law is not the recognition of a legal right, but the creation of it, though it may imply the recognition of an already existing moral right. And to make the existence of a moral right depend on its being recognized is equally mistaken. It would imply that slaves, for instance, acquired the moral

to act or refrain from acting in certain ways. The right itself, being only a claim and not an achievement, has little power to enforce its demands if others ignore it. It can only appeal to the responsibility of those against whom it is made in order to secure its actualization. This does not mean that rights must be continuously exercised in order to remain effective, but that the obligations or duties that complement any given right must be fulfilled if the rights are to be protected. Duties or obligations, however, are self-protective in that nothing hinders their performance once an individual recognizes his responsibility regarding them. Even though it is possible for someone to interfere with another's performance of his duty, the duty itself, while certainly hindered, is not thereby negated. Indeed an individual discharges his duty even when he merely attempts to do so but is prevented by external forces. The actual fulfillment of one's duties is not so essential as the will to fulfill them. This is something that Kant appreciated well.[4] Even if we consider duties or obligations as mere positive pronouncements of statute

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right to be free only at the moment when a majority of mankind. . . formed the opinion that they ought to be free. . ." pp. 50-51.

[4]See, Immanuel Kant, Foundations of the Metaphysics of Morals, trans. Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), esp. Chapter 1, "Transition from Ordinary Rational Knowledge of Morality to Philosophical Knowledge."

law and not arising from moral principles, the situation is the same. Thus Jeremy Bentham, a firm opponent of the doctrine of natural rights, also argues:

> It is by imposing obligations, or by abstaining from imposing them, that all rights are established or granted . . . How can a right of property in land be conferred on me? It is by imposing upon everyone else the obligation of not touching its productions, &c. &c. How can I possess the right of going into all the streets of a city? It is because there exists no obligation which hinders me, and because everybody is bound by an obligation not to hinder me.[5]

Sometimes this correlation of rights and duties is denied. For instance, H. L. A. Hart writing against Bentham argues that:

> According to the strict usage of most modern English jurists following Austin . . . the person who has a right is something more than a possible beneficiary of duty; he is the person who may, at his option, demand the execution of the duty or waive it . . . and it is neither necessary nor sufficient (though it is usually true) that he will also benefit from the performance of it.[6]

Hart agrees that rights imply duties or obligations, but he does not believe that the latter always imply the former. Drawing on the distinction between civil and

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[5]Jeremy Bentham, Works, Vol. III, edited by J. Bowring (New York: Russell & Russell, 1962), p. 181.

[6]H. L. A. Hart, "Bentham, Lecutre on a Master Mind," reprinted in Robert S. Summers, ed., More Essays in Legal Philosophy (Oxford, Blackwell, 1971), pp. 36-37. See also, Hart, "Bentham on Legal Rights," in A. W. B. Simpson, ed., Oxford Essays in Jurisprudence (second series), (Oxford: Clarendon Press, 1973), pp. 171-201.

criminal law, he points out that in criminal law there can be no private claims; criminal codes impose duties or obligations but not rights, strictly speaking. While someone may refuse to prosecute a violation or denial of his civil rights such as the failure to fulfill a contract or some other tort, the same person cannot refuse to participate in the prosecution of a crime. Only the state may decide when, or if, to drop criminal charges.

A similar distinction can be made in the case of moral duties and obligations. Some moral obligations can be incurred or assumed by one party but then only canceled by the other party. This is the case with all promises. One cannot release oneself from one's own promises. On the other hand, certain moral obligations can never be waived, even by the beneficiary. Thus suicide and mercy-killing are prohibited.

If we examine Hart's examples carefully, we can see that they tend to support the connection between rights and obligations rather than undermine it. The fact that certain obligations, both in law as well as in morals, cannot be waived or canceled certainly backs up what Weil says. Moreover it makes the concept of human or natural rights more intelligible. The only real difficulty lies in our terminology. As often is the case with philosophical terms, time has wrought changes in our conceptual language which now work to obscure rather than clarify the real meaning of certain terms. The term 'rights' has shifted in meaning

from referring to those just activities, responsibilities, or interests which all men need to be happy to only a portion of those same things. 'Rights' are thus demands in a twofold fashion, i.e. rights and duties. In the past this was not the case. And so it is that sometimes our modern terminology seems to be referring to only one portion of man's just requirements while at other times it is plainly used to refer to the whole. It is this second aspect that the terms 'duty' or 'obligation' often signify. They are what is always 'rightful' for man to do. In other words, they are fundamental to justice itself, and no man can waive their performance, for they protect all men.

St. Thomas begins his examination of justice in the Summa with the question: "Is right (jus) the objective interest of justice?"[7] And by the word 'jus' he tells us he means "the just thing, and this indeed is right (jus)." He then goes on to explain that by usage the word has expanded in meaning: "'Right' (jus) was first applied to the just thing itself, and then derivatively to the art which discerns what is just; then further to the courts where right (jus) is administered, thus when somebody is said to appear juridically, in jure, and further when we speak of jus being delivered by one holding the office of

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[7]St. Thomas Aquinas, Summa Theologiae 2a2ae. pp. 57-62, Vol. 37: 'Justice' trans. Thomas Gilby, (Cambridge: Blackfriars, 1975), pp. 3 ff. We have sometimes altered the translation of this edition with an eye to greater literalness.

administering justice, even when his decision is wicked." Of course, in English this shift is not so evident, since we employ both Latin and Germanic roots in our terminology of rights. Additionally, from the Renaissance on the tendency in legal and political texts was to emphasize the subjective aspects of rights (jus) and separate them from the objective aspects or duties.[8]

Some have traced this shift back to Francisco Suarez's treatise De Legibus (c. 1610) where this authoritative interpretor of St. Thomas writes "the true, strict and proper meaning" of jus is "a kind of moral power (facultas) which every man has, either over his own property or with respect to that which is due to him."[9] St. Thomas' usage of the term is barely mentioned. A few years later, Hugo Grotius began his extremely influential work De Jure Belli ac Pacis (1625) by explaining that the term jure in his title may be taken to mean "that which is just," but he then goes on to offer an extensive exposition of "another meaning of jus . . . which has reference to the person; this meaning

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[8]The two most recent and helpful works in tracing this development of the notion of right (jus) are: John Finnis, Natural Law and Natural Rights (Oxford, Clarendon Press, 1980) and Richard Tuck, Natural Rights Theories: Their Origin and Development (Cambridge: Cambridge University Press, 1979).

[9]Suarez, Francisco. De Legibus I, ii, 5 in Selections from Three Works. Gwladys L. Williams, Ammi Brown and John Waldron, eds. 'The Classics of International Law' No. 20. (Oxford: Clarendon Press, 1944).

of jus is: a moral quality of the person enabling (competens) him to have or to do something justly."[10]

Grotius then draws on Roman law and clarifies that this "moral quality" can either be perfect or imperfect. In the first case it is a facultas, and in the second an aptitudo. When Roman lawyers refer to one's own (suum)—as in the famous definition jus est suum cuique tribuendi—they are referring to this facultas, according to Grotius. And, 'facultas' has three principle meanings: (i) power (potestas), which may be over oneself (libertas) or over others such as family (e.g. patria potestas, a father's power); (ii) ownership (dominium); and (iii) credit, to which corresponds debt (debitum). Here we find that Grotius agrees with Suarez, and against St. Thomas, in making jus essentially a power or liberty. It is as if the primary meaning of jus in the Summa has been transformed by relating it exclusively to the beneficiary of right. The element of right as being due has been lost.

In England both Hobbes and Locke followed in this line of reasoning about rights.[11] Hobbes especially reduces

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[10]Hugo Grotius, The Rights of War and Peace, edited by J. Barbeyrac, trans. anon. (London, 1738). Unfortunately, more recent and more readily available editions and translations, e.g. Carnegie Endowment edition of 1913-27, are based on the revised edition of De Jure Belli which Grotius published in 1631 and which does not reveal his intentions.

[11]The most influential treatment of both Hobbes and Locke is probably C. B. Macpherson, The Political Theory of Possessive Individualism (Oxford: Clarendon Press, 1962) where it is argued that from the 17th century onwards

rights to powers. He attempts to eliminate all reference to moral or even political standards in his exposition of the origin of rights. "So that in the first place, I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death."[12] The reason why such things as wealth and authority or reputation are sought is because they increase power. Thus:

> Riches joyned with liberality, is Power; because it procureth friends, and servants: Without liberality, not so; because in this case they defend not; but expose men to Envy, as a Prey. Reputation of power, is Power; because it draweth with it the adhaerance of those that need protection . . . Also, what quality soever maketh a man beloved, or feared of many; or the reputation of such quality, is Power; because it is a means to have the assistance, and service of many.[13]

All the powers that Hobbes describes and values consist in either defensive or offensive strength against others. Even exchange or commerce is viewed in terms of transfering power:

> The Value, or Worth of a man, is as of all other things, his Price; that is to say, so much as

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political philosophers came to accept and therefore to theorize upon the assumption that unlimited acquisition was both rationally and morally acceptable. Though Macpherson's thesis has not won too many supporters, his work has, nevertheless, proved to be very stimulating.

[12]Thomas Hobbes, Leviathan (1651), ed. W. G. Pogson Smith (Oxford: Clarendon Press, 1958), p. 75.

[13]Ibid., p. 66.

> would be given for the use of his Power; and, therefore, is not absolute, but a thing dependant on the need and judgment of another . . . And as in other things, so in men, not the seller, but the buyer determines the Price.[14]

That Hobbes is more 'realistic' about the nature of man and his motives is often believed. Here we shall not enter into the debate. But we need to note that Hobbes' view introduced a twofold shift in the way men understood rights: (1) Rights became competitive in nature; each man striving to maximize his realm of control and minimize his obligations. (2) Rights generated status instead of status generating rights; all men were equal in the state of nature, but through the assertion of rights (the eminence of power) some triumph over others and thereby gain greater status.

Hobbes' description of the state of nature and the rights arising therefrom was criticized by Pufendorf before Locke. He wrote in The Law of Nature and Nations (1672) that where "there is produced an Obligation in one Man, there immediately springs up a correspondent Right in another . . . who can fairly require it, or at least fairly receive it of me."[15] But he holds that the contrary is not true: rights do not produce obligations. This asymmetry of rights and obligations can be explained by distinquishing

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[14]Ibid., p. 67.

[15]Samuel Pufendorf, Of the Law of Nature and Nations. Trans. Basil Kennett with the notes of Jean Barbeyrac (London, 1729), III, v, i.

two types of rights. A right, stricto sensu, is "a Power or Aptitude to have a thing," and it is always correlative with an obligation. Yet there is not always nor necessarily an obligation correlative with a right "of doing any thing." This distinction is something which is referred to as the distinction between a 'right' and a 'liberty' in modern legal terminology. Property rights are hence much more limited than political rights. Moreover, Pufendorf argues that morally there exists a fundamental natural right to the earth with attendant obligations which counters the extreme thesis of Hobbes that one may be sovereign over all if he has sufficient power. There is, he says,

> A right to all Things, antecedent to any Human Deed, (which) is not to be understood exclusively, but indefinitely only; that is, we must not imagine one may engross all to himself, and exclude the rest of Mankind; but only that Nature has not defined, or determined, what portion of things shall belong to one, what to another, till they shall agree to divide her stores amongst 'em, by such allotments and divisions.[16]

This restriction modifies Hobbes' position and brings Pufendorf more in line with Locke who followed him on this point.

Yet Locke himself attempted to return to the more scholastic point of view towards rights and property, while at the same time attempting to secure a special place for

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[16]Ibid., III, v, iii.

private property as the exclusive dominion of select individuals. His major contribution was to emphasize the idea of the right of labor to the fruits of its work. This is something we shall give careful attention to further on.

The consequences of this way of thinking about rights and duties has been well summarized by Leo Strauss:

> Through the shift of emphasis from natural duties or obligations to natural rights, the individual, the ego, had become the center and origin of the moral world, since man—as distinguished from man's end—had become that center or origin.[17]

It is certainly clear that when rights and duties are viewed as opposites instead of as complements there is bound to be tension. Furthermore, men will strive to maximize the one (rights) and minimize the other (duties). If this reaches a significant portion of the population, then greater coercive measures or harsher sanctions will be necessary in order to secure respect for others' rights. The most serious difficulty that arises from speaking about rights and duties as entirely separate and unrelated entities is that it tends to be misleading about the consequences or effects of asserting one's rights or neglecting one's duties. It should be obvious that since rights and duties refer to valuable interests their loss or abuse can result in considerable

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[17]Quoted by Tibor R. Machan, "Some Recent Work in Human Rights Theory," American Philosophical Quarterly, Vol. 17, No. 2 (April, 1980): 103; see also, Leo Strauss, Natural Right and History (Chicago: University of Chicago Press, 1953), esp. 191 ff.

damage. Hence, if rights are treated too lightly, or as if the assertion of a right was only a matter of interest to the claimant, then the corresponding duties or another individual's potentially conflicting right will be abridged.[18]

Lawyers distinguish two types of rights in order to indicate against whom they are held.[19] Rights *in personam* are held against specific individuals. Husband and wife both possess special rights *in personam* (and the corresponding duties to respect and fulfill the other's rights) against one another. No one else can exercise those rights (nor can anyone else but the spouse respect them). On the other hand, rights *in rem* are held against the rest of the world. Everyone else must respect the rights *in rem* of any given individual. The English saying, "A man's home is his castle, and not even the King may enter therein without permission," is an illustration of a right *in rem*. A right *in rem*, in imposing on others a duty of respect, is itself

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[18]The tradition of Natural Law works to combat this danger. See: Michael Bertram Crowe, *The Changing Profile of the Natural Law* (The Hague: Martinus Nijhoff, 1977); A. P. D'Entreves, *Natural Law* (London: Hutchinson, 1972); Charles G. Haines, *The Revival of Natural Law Concepts* (Cambridge, Mass.: Harvard University Press, 1930); Yves Simon, *The Tradition of Natural Law* (New York: Fordham University Press, 1965). And for a selection of brief passages illustrating the occurance and variety of Natural Law positions, see: Paul E. Sigmund, *Natural Law in Political Thought* (Cambridge, Mass.: Winthrop Publishers, 1971).

[19]Here we follow some of the suggestions made by Joel Feinberg, "Duties, Rights, and Claims," *American Philosophical Quarterly*, Vol. 3, No. 2 (1966): 137-144 and his *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), esp. Chapters 4-6.

no respecter of persons. It should be noted that both rights *in personam* and rights *in rem* may be both positive and negative. For instance, an individual may have a possible right *in personam* against someone, as a child has an *in personam* right against his parents to receive support until maturity. And, an individual may have a negative right *in personam*, as a patient has an *in personam* right against his doctor not be knowingly harmed or unnecessarily endangered in the course of treatment. Equally, though most rights *in rem* are negative since they are to work to insure security or protection against infringement of some proprietary right or individual freedom, there are still some positive rights *in rem*. Indeed their importance cannot be overlooked. Consider, for example, the duty to take care that every citizen is said to owe to any and every person in a position to be injured by his negligence. One has this duty even towards the potential trespasser or burgler on one's land. Or consider the duty to come to the aid of accident victims and victims of crimes. Surely we can say that in both cases there is a positive *in rem* right to expect reasonable care is taken by all. We have a positive duty to be careful and a positive right to expect due care is taken.[20]

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[20]An interesting, recent study of the increasing recognition of a positive duty to take care is Marshall S. Shapo, *The Duty to Act* (Austin: University of Texas Press, 1977).

In an effort to classify the various types of rights and obligations that the law recognizes as well to schematize the relationships among them, Wesley Newcomb Hohfeld proposed a simple outline.[21] Though his arrangement has not received universal acclaim, for our purposes it is still highly useful in demarcating the scope and nature of the various kinds of rights and obligations that are encountered in legal circles. Sometimes the terminology used to refer to these relationships differs slightly, and ours may not be completely acceptable to all; but, nevertheless, it provides a relatively easy way of speaking about these things.

First we should note that all the terms we shall use—right, duty, liberty, power, liability, immunity, and disability—are part of 'Right' (jus) as understood in its most fundamental sense. Or, in other words, they are all aspects of the fundamental principle of justice 'to render every one his due'. Indeed even the term 'no-right' refers to jus. For, as we have seen, underlying the whole system of rights that a man may have is the duty or obligation to respect those rights and not interfere with their free exercise. The fact that certain rights are 'liberties'

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[21] Wesley Newcomb Hohfeld. Fundamental Legal Conceptions (New Haven: Yale University Press, 1919). See also, Glanville Williams, "The Concept of Legal Liberty," in Robert S. Summers, ed., Essays in Legal Philosophy (Oxford: Blackwell, 1968), pp. 121-145 and Theodore M. Benditt. Law as Rule and Principle (Stanford: Stanford University Press, 1978), pp. 158-176.

which more than one person may attempt to exercise in competition with others does not mean that this allows anyone to interfere wrongfully with the free exercise of his competitor's rights. All it means is that rightful competition is allowed in certain areas, <u>according to established rules or conventions</u>.

But let us look at a schematic representation before we discuss the relationships further:

JURAL OPPOSITES	Right	Liberty	Power	Immunity
	No-right	Duty	Disability	Liability
JURAL CORRELATIVES	Right	Liberty	Power	Immunity
	Duty	No-right	Liability	Disability

The important thing to notice about this scheme is that a distinction is being drawn between those rights which are protected by specific legal duties and those which are not. Again, as we have just noted, this does not mean that these 'liberties' (which are often called 'privileges') are without general protection but merely that they have no <u>specific</u> guarantees to insure their exercise. Just the reverse can be said about 'immunities' since they are completely protected from hinderence or exercise by the general 'disability' against interference. (Hence they too are often called 'privileges'.) In order to appreciate these

particular relationships we probably do best to look at some examples.

It is common that an individual may possess the property rights to some thing, especially land, and yet be without the 'liberty' to use the property. A landlord usually yields his liberty of access and use of his property for a specific period of time, but he does not thereby lose his control over the property, for he may still forbid a third party access if he has a 'no sublet clause' in the lease. Less common, but still possible, is the situation where someone inadvertently purchases a plot of land without securing an easement giving access (except perhaps by helicopter). On the other hand, an individual may possess a right which others also possess: these are more precisely spoken of as 'liberties'. Freedom of speech falls in this category. It guarantees all the liberty to say what they wish, so long as doing so does not interfere with the equal liberty of others. This means that while no one is obliged to listen to another, no one is permitted to interfere with the free exercise of freedom of speech. When a shouting match becomes a violation of freedom of speech is a difficult matter to decide, but the general principle is clear. In addition, it should be noted that freedom of speech is not the only, nor perhaps the primary, liberty men possess. Thus it is that slander is considered a violation of freedom of speech. It destroys another's good name, and hence his exercise of freedom of speech, and

so it is prohibited even when the slanderous statements can be shown to be true. Competing claims among right holders are common and so rules of 'fair play' must be established. This is, of course, extremely difficult to do since the possible conflicts that can arise between individuals even in relation to one specific right are enormous.

As well as having certain rights (and liberties) which may be acted upon that entail certain claims (or competitive interests), men also have certain powers (and immunities) regarding their legal and moral relationships with others. For instance, normally a person has the power to give or bequeath his property without the consent or even knowledge of the recipient. The existence of a power entails a corresponding liability in others which makes them subject to the power. Generally, however, powers are imperfect in the sense that they cannot be exercised without the tacit or explicit approval of the recipient. Contracts are usually bilateral, requiring the agreement of both parties. Certainly marriage is only possible upon the mutual agreement of the man and woman. Immunities are protective rights securing an individual from specific claims or duties. The most obvious examples come from law enforcement and the courts where the police and judges have immunity from prosecution in cases of false arrest or illegal acts. These are granted (and have some limitations) in order to protect the police and the courts from intimidation in the free exercise of their responsibilities.

We need not worry whether Hohfeld's scheme is too neat or overlooks too many other possible arrangements. What is evident is that it gives us a useful way of speaking about the varieties of 'Right' (jus) which are often missed in common speech. Consider, for example, the following: If X lends Y twenty dollars, then X has a right to get back his twenty dollars, and Y has a duty to pay X under the terms of their agreement. Moreover, once X lends Y twenty dollars, Y has an immunity from X against his unilaterally changing the terms of their agreement. Nevertheless, it remains in the power of X to forgive the loan to Y since the opposite of power is disability. On the other hand, if X sees twenty dollars laying on the ground, X has the liberty to pick it up, however he has no-right to prevent Y from doing so first.

Before we close this analysis of rights, we ought to summarize what we need to know in order to understand what specific right is being spoken of and how it may be exercised and protected.[22]

1. Specification of the right-holders: this may be an individual, association or institution (corporate body).

2. Specification of the right-respectors: those against whom the right is held which as in (1) may be individuals, associations or institutions.

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[22]Here we follow the analysis of Becker, Property Rights: Philosophic Foundations, pp. 8-11.

3. Specification of the nature of the relationship between the right-holders (1) and the right-respectors (2): this may be any one or combination of the four relationships Hohfeld outlined; i.e. right/duty, liberty/no-right, power/liability and immunity/disability.

4. Specification of the particular act, forbearance, status, title, benefit or responsibility 'owed' to or possessed by the right-holder: this is the 'content' of the right proper which may be very abstract or very concrete.

5. Specification of the conditions under which the right may be considered valid: this involves all necessary conditions for the exercise of the specific right (4) being considered.

6. Specification of the conditions under which the right may be considered violated: this involves all necessary or sufficient conditions under which the specific right (4) is violated.

7. Specification of the conditions under which the right may be considered void: this involves all the overriding conditions that are necessary to void the specific right (4).

8. Specification of the appropriate remedy for violation and/or voiding the right: this may involve compensation, restitution or other punishment.

9. Specification of the methods of applying the remedy: this may involve standards of wrongfulness as well as considerations of utility. Also, of course, some rights may not be legally enforced.

10. Specification of the agent(s) who may extract the remedies: this may specify officials, bar third parties or bar the right-holder.

Though this list may seem long and complex, careful scrutiny should show that it really only makes explicit what is usually understood when we are in agreement about the nature and exercise of a specific right. That there might be some disagreement about particular aspects of a given right is quite possible. Indeed it would be useful to narrow down

the particular disagreements to one or more of these aspects, for then the differences could be either resolved or even accommodated without too much difficulty. One of the most apparent reasons why there are many disputes over rights, and especially property rights, is that people are not clear enough about what they consider essential and what they consider marginal in relation to the right in question.

This leads us to a final but fundamental aspect of human or natural rights. Since such rights are shared by as many individuals who qualify to hold them, precise formulation of the parameters of activity entailed by the holding of any specific right must insure that one individual's exercise of the right does not obstruct another individual's potential exercise. In other words, human or natural rights are universal in the sense that each person has an equal claim upon their exercise. No one possesses preference regarding their performance. For instance, while courtesy may dictate that the first person to speak has preference in a particular discussion, if another person wishes to interrupt, it is not possible to argue <u>as a matter of right</u> that the first speaker must be granted preference. All have an equal right to speak: so long one does not interfere with the other person's right, two or more persons can all talk at once. Of course, communication is not enhanced by such behavior, generally speaking, but in terms of possibility there is no contradiction involved. The right to speak is not correlated with the duty to listen but with the duty

not to interfere when someone is speaking. This point has been noted above, however its implications have not been developed. This is what we need to consider.

The exercise of rights by two or more individuals may be incompatible for two reasons: either the two rights themselves conflict, such as freedom of speech and the right to privacy, or the two individuals conflict, as when both try speaking together. The challenge is to decide which right or which individual, as the case may be, deserves support and which demands restraint. In some cases, as we have seen, some criterion other than equality must be introduced as a measure or guide, if there is to be any resolution of the case. This gives rise to the need for establishing specific criteria for justice in society. After all, if there were only one individual, then we would not have incompatible rights in the first instance. Society gives rise to the need for justice, and an individual like Robinson Crusoe can not be said to be either just or unjust until another joins him on the island. Thus we are forced to consider other factors when two similarly situated persons find the exercise of their rights in conflict. We shall turn our attention to some of the most significant factors that must be weighed when we consider the criteria for justice in the next chapter. But here we need to consider the second source of incompatibility and what it implies about the nature of human or natural rights.

Hillel Steiner has made some acute observations about the

topic which we can draw upon. He argues that in order to develop a logically consistent set of rights, we must establish that "it is logically impossible for one individual's exercise of his rights within that set to constitute an interference with another individual's exercise of his rights within that same set." (his emphasis)[23] This means that any description of the characteristics or structure of a set of rights must provide conditions whereby two or more persons can act upon their rights without mutual obstruction. Otherwise we have created an impossible situation: since no one wants rights which are by nature incompatible with the existence of others. Again we must insist upon the universal applicability of human or natural rights.

So, to illustrate, it is obvious that since physical law limits one thing to one place at one time, there can be no right which would allow one thing to occupy another thing's place. On the other hand, since the same physical law rests on the fact that each thing must have sufficient space in order for it to exist in the beginning, we are led to conclude that, therefore, each and every thing must have a right to its own particular place. In human terms

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[23]Hillel Steiner, "The Structure of a Set of Compossible Rights," Journal of Philosophy 74 (1977): 767-775. See, also, his "Individual Liberty," Proceedings of the Aristotelian Society, LXXV (1974-75): 33-50 and "The Concept of Justice," Ratio, XVI (1974): 206-225.

this means that every individual that comes into the world has an equal and inalienable right to sufficient space in which to exist. What this means in regard to property rights is clear: there can be no consistent form of property rights which does not guarantee everyone equal access to space. This is because it is logically inconsistent to argue for one individual's right property on the basis of necessity without at the same time allowing the application of such an argument for the benefit of all. Just as we accept the starving man's right to take a loaf of bread to be applicable to all in similar circumstances, so too the universal right to survival insures us of at least minimum space in which we may exist.

As rightful actions must not interfere with the potential actions of others if they are to be meaningful and not self-contraditory, so then rightful possessions or entitlements must also conform to conditions which permit others to possess objects on a similar basis. If we allow someone the right to own a gun, then we cannot disallow another similarly situated the same right. Of course, we can disallow anyone who is not so situated, but that is a separate question. And, furthermore, we may so refine and define the necessary requirements for possession so as to eliminate all but one person from the exercise of the right. But this does not violate any laws of logic. It merely specifies the right very particularly. To be sure, someone may challenge such narrow specification as being unjust on the basis of one

criterion or other of justice, but this does not of itself demonstrate any inconsistency, even if it can be shown that another criterion would widen the application of the right. On the other hand, it should be evident that if we proceed on the assumption that liberty is a fundamental human right,[24] then equal access or entitlement to the conditions of freedom must govern all arrangements of property rights. The greatest dilemma of the liberal tradition of freedom has been to establish an equitable and workable theory of property rights. This thesis is an attempt to offer such a theory.

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[24]John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971), especially, pp. 60-65; pp. 243-251; pp. 298-303; and pp. 541-548. Also see, Brian Barry, "John Rawls and the Priority of Liberty," Philosophy & Public Affairs, 2 (1973): 274-290; and Norman Daniels, "Equal Liberty and Unequal Worth of Liberty," pp. 253-281 in Norman Daniels, ed., Reading Rawls: Critical Studies on Rawls' THEORY OF JUSTICE (New York: Basic Books, 1975).