Legal Rights

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# LEGAL RIGHTS.

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IT HAS been a common complaint on the part of analytical jurists that the philosophical jurist is wont to import ethical ideas into legal science which, in that environment, breed far-reaching confusions. How far these complaints are well grounded, and why, has been considered in another place.* In the present connection it is more germane to point out that importation of a confused juristic conception and ambiguous juristic term into ethical science has bred quite as many far-reaching confusions in that domain. Law held the hegemony in the field of learning when ethical and political and social science were formative as certainly as the natural sciences dominate our thinking to-day. As to-day we resort to figures of speech drawn from organic creation and summon biological analogies to our aid in all fundamental difficulties, so men formerly resorted to juristic figures of speech and sought for legal analogies. No legal institution seemed more apt for the purpose than the legal right. But the word "right" is a blind guide in its own proper field. Outside of that field, it has made for loose thinking and has actively stimulated misunderstanding and confusion at least since the seventeenth century. It is task enough to deal with this much-enduring word of many turns upon its own ground. Let us see, therefore, what it means when, supposedly, it is used strictly.[2]

As a noun, the word "right" is used in the law books in at least five senses. (1) Frequently it is used in the sense of interest—a "subjectively perceived relation derived from necessity, between the person feeling the necessity and an object; that is, the object for which the necessity exists and is felt and through which, by use or consumption,

* The references will be found at the end of the article.

actually or probably, it will or may be satisfied in whole or in part."[3] So used, it may mean an interest which one thinks should be recognized and secured by law, as in most discussions of natural rights, or an interest as recognized and delimited for the purpose of securing it through the legal order.

(2) Again the term "right" is used to designate the chief means which the law adopts in order to secure interests, namely, a recognition in persons, or a conferring upon persons, of certain capacities of influencing the action of others. The courts give effect to these capacities of influence by protecting those in whom they are recognized or upon whom they are conferred in the exercise of them, or by enforcing them specifically against those whom the law holds subject to such influence, or by vindicating them by some form of redress when they are interfered with. No doubt this sense has a certain relation to the foregoing. It is possible to define each conception in terms of "claim." The general claim or demand[4] in the first use of the word "right" has now become a recognized claim to acts or forbearances by another or by all others, in order to make the interest effective.[5] Putting it in this way, the claim may be one recognized and potentially effective legally, through the force of politically-organized society exerted to maintain the interest as the law has delimited it, or it may be one recognized and made effective morally, to maintain the interest as delimited by the moral sense of the community. I shall endeavor to show presently how this definition of "right" in the second sense in terms of "claim" grew out of Roman legal procedure, and hence to show why Anglo-American jurists are warranted in speaking instead of a capacity of influencing others which is recognized or conferred in order to secure an interest. But in either view two points are to be noted. In the first place, as Merkel puts it, the idea in the second use of "right" differs from that in the first use as the fortification from the protected land.[6] Secondly, rights, in the second sense of the term, are clearly set off from those

legal institutions which are called "rights" in the other senses in which the word is used, in that a right in this sense always has as a correlative a legal duty. It is a capacity of exacting or claim to exact some act or forbearance, with a corresponding legal subjecting of all persons or of some particular person to that exaction; a legal treatment of them as bound to accede thereto.

At this point a digression must be made. The term "duty" is used by jurists in more than one sense.[7] (a) It is used to denote the correlative of a legal right in the sense of that term now under consideration.[8] (b) It is used also to denote what Austin calls "absolute duties," imposed upon individuals to secure social interests and vindicated, not by the judicial assertion of a correlative private right (sense No. 2), but by a criminal prosecution intended to deter others, to meet the social demand for punishment of the offender and to reclaim the offender from his anti-social tendencies.[9] We have been wont to speak of a "right" of the state in this connection.[10] But that "right" is really dragged in by the heels to save the proposition that every duty must have a correlative right. Where the state as a corporation has interests of substance—*e.g.*, holds property for public purposes, takes bonds for the faithful conduct of its officers, has liens on property for taxes, loans its funds to depositary private banks—here it has private rights (sense No. 2) given by law to secure these public interests. No such rights are correlative to a duty not to be cruel to animals. The interest secured in this case is a general social interest in public morals, and the legal system secures it, not by conferring any right (in sense No. 2) but by imposing an absolute duty of humanity to animals, enforced by penal actions or criminal prosecutions. (c) The word "duty" is also used, for another legal institution of great importance, namely, a legal situation where, as a consequence of his calling or as a consequence of a course of conduct which does not measure up to the standard imposed by the law in order to maintain the social interest in the general security, the

individual is subjected to a possibility of being under an obligation of action towards someone, without voluntarily assuming it [11] or of being held to make reparation to someone, if injury results, where, if none results, unless a prosecution will lie to secure the social interest, no legal consequences will follow.[12]

Summing up this second use of the term "right," we may say that so used it signifies one of the legal institutions whereby "rights" in the first sense are secured, and that it is distinguished from the other legal institutions which secure "rights" in the first sense in that there is always a correlative legal duty.

(3) Still another sense of "right" is a capacity of creating, divesting, or altering "rights" in the second sense, and so of creating or altering duties. Rights in this sense, or powers,[13] as we are now coming to call them, like "rights" in the second sense, are legal institutions devised to give effect to "rights" in the first sense. In order to secure certain individual interests, the law confers directly or recognizes, as the case may be, certain capacities of altering the existing legal situation. Examples of powers conferred by the law directly are the *ius disponendi* of an owner, the power of making a will, the power (in Anglo-American law) to break a contract and substitute a duty of paying damages for the pre-existing duty of performing the promise, the power to create a new title by sale in market overt, the power of the assignee (at common law) to sue in the name of the assignor, the power of a grantor in an unrecorded conveyance (under American recording acts) to convey to a bona fide purchaser what he no longer has to give, so that if the purchaser records he will obtain a new title to the estate which the grantor appeared to have and purported to dispose of. Examples of powers conferred by one person upon another and recognized by law, are powers of appointment of estates in the law of real property (*i.e.*, powers given by a testator or settlor to some person who does not own an interest in property, to determine upon whom that interest shall devolve, as in

a gift to John Doe for life, remainder to such of Doe's nephews as he shall appoint by deed or will); the power of an agent to bind his principal, conferred by appointing the agent; directions to a trustee to make some disposition which does not involve a beneficial interest in any human being, so that the trustee, although no one can compel him to make such disposition, may do so with impunity by virtue of the power, if he chooses.[14]

An example of the need for discrimination in the use of the term "right" is afforded in the law of agency. Agency is a relation growing out of entrusting a person with a power of representation. The principal confers on the agent and the law recognizes a power of binding the principal by acts within the scope of the agent's authority. This is recognized by law in order to secure the principal's individual interests. But the law also, against the principal's individual interest, confers directly upon all agents a certain power of binding their principals (as between the principal and third persons) by acts within the apparent scope of their authority. That is, an agent is given a power of creating rights (sense No. 2) in others against his principal and of creating corresponding duties in his principal, in order to give effect to the social interest in the security of transactions and the free course of trade. It is wrong for the agent to exercise this power. We say that he "has no right to do it" as against his principal, and is liable to his principal if he does. Still he may do so and in that event the principal will be bound. This is as much a "right" as the so-called "right to break a contract of personal service," where specific performance cannot be coerced—and no more.

Again, whereas a right in the second sense has a legal duty as its correlative, there is no significant legal institution correlative to a power. At this point a second digression becomes expedient.

A useful method in getting at some of the conceptions which have been confused and are still confused too often under the term "right" is to work out the correlative and

the opposite respectively of each idea. Salmond was the first to employ this method,[15] but it has been carried out thoroughly and tested with reference to a wealth of judicial material by Professor Hohfeld in the paper heretofore cited.[16] In the case of a right in the second sense above set forth, he points out that the opposite is "no right" and the correlative "duty." In the case of a right in the fourth sense, to be discussed presently, he points out that the opposite is "duty" and the correlative is "no right." But in the case of a right in the third sense, or a power, as it is better to call it, this method gives us no positive result. It does no more than confirm the conclusion, reached on other grounds, that we have here an institution significantly different from rights in the second or the fourth sense and yet, like them, a means of securing rights in the first sense. Professor Hohfeld has, indeed, ingeniously worked out an opposite, which he calls "disability," and a correlative, which he calls "liability." But these conceptions are quite without independent jural significance, and each name is available and in use for other and important legal conceptions. The opposite of power—of the capacity of creating legal consequences, or, as Gareis puts it, of altering the sphere of rights or the jural relations of persons[17]—is the absence or want of capacity to create such consequences. This may, it is true, be involved in a wider incapacity or disability. It may be that the natural entity in question is not a legal entity, as formerly in the case of a slave. Or it may be that a legal entity, with capacity for rights in the second sense, is subject to a total or partial incapacity for legal transactions, and so may not exercise powers that involve such acts. Yet there are cases where one who labors under a general incapacity for legal transactions may have a power, notwithstanding his general disability, as in the case of an infant agent.[18] Again, it may be that there is a mere absence of capacity to alter the legal situation because the situation is one which may only be altered by virtue of a power conferred voluntarily by some person entitled and no such power has been given. Here again

the so-called disability is quite without jural significance. One may admit, it is true, that in each case there is an *inability* to create a certain type of legal consequences. But this is quite different from the condition of general want of capacity for legally effective action which goes by the name of disability and plays so important a rôle in the law of persons. So also with respect to the correlative. Professor Hohfeld calls this by the name of "liability," that is a situation where one is subject to have a relation in which he is interested controlled by another. Thus, one who has appointed an agent may find himself bound by what the latter has done. A promisee (at common law) may find his claim to performance changed into a cause of action for damages by a breach of the contract. An offeror may find himself bound by contract through acceptance of his offer. An offeree may find his power of acceptance cut off by revocation. The owner of a stolen chattel (in England) may find himself under a duty of respecting the control of a purchaser in market overt, and may find his claim against the whole world cut off. The grantee in an unrecorded deed may find his legal relation to the property terminated in an instant by prior record of a conveyance to a bona fide purchaser. But this subjection to the operation of a power is not a jural conception of any significance. The significant conception is that already considered in connection with the third sense of the term "duty." This does not detract from the great merit of Professor Hohfeld's discussion of the idea of a legal power. But it requires us to emphasize the distinction between a right in the second sense, with the significant juristic conception of legal duty as its correlative, and a right in the third sense, or a power, where there is no correlative institution which plays any part in the legal system.

(4) Yet another use of the term "right" is to signify a condition of legal immunity from liability for what otherwise would be a breach of duty. Sometimes, as in the case of self-defense, there may be an absence of legal restric-

tion upon exercise of one's natural powers—a negative conception for which the English books have used the term "liberty."[19] But this "liberty" seems to be merely a negative way of looking at a positive *facultas agendi*, which, as a matter of course, may be exercised as an exercise of one's personality, except as the law may limit it in order to secure some other interest.[20] The more important legal institution is a means of securing interests (usually but not always, upon a balancing of conflicting interests) by positive exception of a situation from the operation of the ordinary legal rule. It seems convenient to use the term "privilege" for this conception.[21] Using the term in this way, privileges may be conferred directly by the law because of some social or public interest which may be maintained best by exemption of certain persons or certain classes of acts or acts on certain occasions from the operation of general rules of law. For example, what would ordinarily be actionable as a libel because of its effect upon the reputation of the subject of the writing may be privileged and hence involve no liability when written in honest criticism of the official acts of a public officer, since the public interest in free criticism in such a case outweighs the individual interest. Again, a communication which would ordinarily be a wrong because defamatory, may be privileged because of a social interest in such communications, as in case of answers to inquiries by surety companies or inquiries as to the character of a servant. Again, privileges may be conferred directly by law upon a balancing of individual interests, as in case of those forms of self-redress which the law still permits. Thus recaption of chattels or distress of cattle damage feasant is allowed upon a balance of interests in certain cases to secure the interests of substance of an owner whose property rights are invaded, because in those cases the ordinary rules do not adequately secure them. But without any balancing of interests the law may recognize a privilege conferred by an individual in order to secure individual interests of substance, as in the case of a license.

Under the name of *beneficium* the conception denoted by this fourth sense of the word "right" plays an important part in Roman law. For example, co-debtors by stipulation were each liable for the whole; but if there was the *beneficium diuisionis* each was liable only for his share. Again, a debtor, as a general rule, was bound to answer for the debt with all his property until the debt was satisfied. But debtors in certain relations were allowed the *beneficium competentiæ*, the privilege of answering only so far as they could do so and yet retain a competence. Here manifestly the *beneficium* was set up to secure a social interest in piety and good morals on a balancing of that interest with the individual interest of the creditor.[22] While we sometimes call instances of this legal institution by the name of privilege, as in the typical cases of the privilege against self-incrimination in the law of evidence and privileged communications in the law of defamation, they are usually spoken of as "rights." A good example of this may be seen in the so-called "right of deviation," where the highway is impassable. Here, on a balancing of the individual interest of the owner and of the social interest in freedom of travel and communication, A, who would ordinarily be a trespasser in so doing, is permitted by law to make his way around the obstruction or the impassable spot in the highway by going over B's land. But for the privilege (or so-called right) of deviation, B, in Windscheid's way of putting it, can enforce a command of the legal order that A keep off. Because of the privilege, B has no right (in the second sense), no claim, such as he would ordinarily have, to the effect that A keep off, and A is not under a duty to keep off as he ordinarily would be. Thus, applying the method of correlatives and opposites, to which reference was made above, we see that this sort of so-called right has duty (in the first of the senses considered above) not for its correlative, but for its opposite, while its correlative, the mere absence of a right (in the second sense) is not a significant legal institution.

(5) Right, as a noun, is also used in a purely ethical sense of that which is just, so that, even in legal speech, we not infrequently say one has "a right" to this or that because, without any definite claim, we feel that on a balance of equities we should like to see him have it.

(6) *Ius*, in Latin, and its equivalents in the languages of Continental Europe, have the further ambiguity of also meaning "law" in general, compelling the German jurists to speak of "objective right" and "subjective right." The one, that which is right looked at objectively, is a complex conception of that which is right plus law in general as a formulation of what is right. The other, that which is right looked at from the standpoint of the individual, is a no less complex conception, or rather bundle of conceptions, which we express by the term "a right."[23] How many diverse legal institutions are included in that bundle is well illustrated in the conventional analysis of "the right of ownership." The civilians tell us, and their statement is copied into the books in English, that *dominium* includes (1) *ius possidendi*, (2) *ius utendi*, (3) *ius fruendi*, (4) *ius abutendi*, (5) *ius disponendi*, and (6) *ius prohibendi*.[24] What this means is not that one "right" involves six other constituent "rights." The matter is far more complex. The interest of substance of the owner, in itself something which we think ought to be secured, is given effect by a variety of legal institutions: (1) A claim against the whole world to have possession of the thing owned, with a general correlative duty in all others; (2) a claim against the whole world to make use of the thing owned, with a correlative duty as before, coupled with an absence of restraint upon the natural powers of action of the owner, maintained by law to secure his interests of personality, so long as, confining himself to use of the thing owned, he does not compel the law to balance any other interest therewith; (3) a like complex of a claim to enjoy the thing owned with an absence of restraint upon his natural powers of action while he is enjoying the thing owned; (4) an absence

of restraint of the same sort, so long as his abuse of the thing owned does not conflict with any important social interest; (5) a capacity of altering the legal situation by substituting another in his place in this complex; (6) a claim to exclude all others from the thing owned, with a correlative legal duty imposed upon everyone. The use of one word for this complex and for all its constituents has made the term "right" quite useless for purposes of critical reasoning. In jurisprudence, interest, legal right, power, and privilege, are coming into use for the first four of the five meanings of "a right" set forth above and those who use juridical analogies in other fields would do well to make similar discriminations.

But, it may be asked, how did one word come to be so overworked? The answer is that the several legal institutions which we call by that word have developed gradually in relatively modern times, while the interests which those institutions secure have attracted chief attention and furnished the theory for both the agencies of security and the things secured.

Modern juristic terminology begins in the Roman law. But Roman legal terminology has its origin in the stage of strict law[25] when remedies were the chief institution. One was given an action to obtain a certain remedy. Rights are a later generalization, even if they are logically implied in the remedy. Hence, the classical Roman books deal with rights only as it were subconsciously.[26] The word which serves for all purposes (*ius*) often means the legal position of a person which gives him legal standing or makes transactions and remedies available to him, as in the expression *ius Latii*.[27] Sometimes it means "power," as in the case of *ius disponendi* already considered. Even in the cases that come nearest to the meaning "a right," namely, the texts dealing with what is now called "abusive exercise of rights,"[28] the idea is more nearly one of a natural power of action which is unrestrained within the limits of a recognized interest. So far as conscious analysis goes, rights are institutions of the maturity of law. We get

little help here from the classical texts which speak from the stage of equity or natural law, in which duty, as the moral conception, receives the chief emphasis.[29]

In the fourteenth century, the commentators began to deduce right *in rem* and right *in personam* from the Roman *actio in rem* and *actio in personam*. But as soon as this had fairly begun to raise the question of legal rights, as institutions distinct from remedies and anterior to them, a new era of equity or natural law supervened, in which emphasis was put rather on the ethical idea of duty.[30] Accordingly the moral claim to security for interests as a moral institution, which was the occasion of duty, began to attract attention, and we get our first definitions of a right under the influence of the confusion or identification of law and morals. The formula which has had the widest currency is to be found in Grotius, who defines a right as a moral quality of a person which makes it just or right for him either to possess certain things or to do certain actions.[31] This idea of a right as a *qualitas moralis personæ* has persisted in American professional thinking. In the form of right as a "moral power," it is to be found generally in the formulas of nineteenth-century philosophical jurists.[32] A modern version is given by Salmond and in his latest book by Clark. In his earlier book, Salmond deduced rights in particular from right (*i.e.*, what is just) in general by Bentham's principle of utility.[33] Thus "utility" demonstrates those "qualities of a person" which it is in accord with right that we should secure.[34] Clark's theory shows the influence of the social-philosophical jurists. He starts with "moral rights and duties protected and enforced by . . . 'the common conscience of a human society.'" These, he says, are natural rights, and these, given the legal sanction of interference by the state, in addition to the natural sanction of "common disapproval of interference with that individual right or . . . a common feeling of duty to respect it," are legal rights.[35] Perhaps one may restate the analysis thus: (1) An interest, the claim of a human being to this or that; (2) a recognition

of this interest by the common conscience of society, giving rise to a natural right,—giving a moral claim in addition to the *de facto* claim to be secured; (3) a recognition of this natural right by the state in actually securing it. There is much here to think about and this way of putting it may perhaps bridge the gap between interests and legal rights more to the satisfaction of many who are offended at the enumeration and weighing of interests with a view to securing as many and sacrificing as few as possible.[36] But if one were more sure of the common conscience of society, he would have more confidence in it. Administration of justice involves a great deal as to which it is very hard to find such a common conscience and the law has continually to balance interests where the general conscience is quite helpless.

In contrast with the philosophical view that makes legal rights depend on moral rights, we have the Austinian analysis which makes legal rights depend on duties, which are imposed by commands of the state.[37] This is a corollary of Austin's doctrine as to the nature of law. But its significance for our purpose is in the idea of a right as a power or capacity of exacting acts or forbearances; a power or capacity conferred by the state through the duties it imposes by its commands. The state does not create the interest. But the means of securing the interest, namely, a capacity of exaction of certain conduct from others through the force of politically-organized society, is the creature of the state. In thus distinguishing the means of securing from the thing secured, Austin took a great step forward. Jhering, however, presently started a new fashion in the analysis of a right which turned attention once more to the thing secured. His working out of the idea of the interests which the legal system secures is epoch-making in jurisprudence. But in this particular connection, pointing out that the law balances interests and chooses from among them, securing some but not all, and defining those which the law secures as legal rights,[38] retarded the distinction which had to be made eventually,

between the interest, the interest legally recognized and delimited, on the one hand, and the several legal institutions by which it is made effective, on the other hand.

Later an idea of a right as a legal relation has grown up. It got currency from Ahrens,[39] but may be found frequently in the formulas of social-philosophical jurists to-day,[40] and has been worked out thoroughly by Wigmore.[41]

Since Jhering the distinction between the *de facto* interest and the legally-recognized interest has been admitted universally. But we still have four different ideas in current definitions of a right, namely, (1) the idea of a right as a moral power or capacity in a person, (2) the idea of a right as a power or capacity given a person by law, in each case for the purpose of securing interests, (3) the idea of a right as a secured interest, and (4) the idea of a right as a relation. Looking at these more critically, they reduce to three: Right as authority or capacity, for it is desirable to use "power" in a technical sense; right as interest, and right as relation. Let us examine these more in detail.

(1) The idea of a right as an authority or capacity conferred by law goes back in some sense to Grotius. The eighteenth-century philosophical jurists thought of a right as a capacity or authority of demanding that others do or forbear which inhered in each of us on unanswerable moral grounds.[42] Austin took this idea over and made out of it an analytical theory of a right as a capacity conferred by law. But the German writers on the Pandects, from whom, as is well known, Austin got much of his inspiration, had been doing the same thing. Hence recent English and recent German theories have not been far apart. Thus Dernburg, after a philosophical definition of a right as "the share in the advantages of life which the general will recognizes as due to a person and guarantees to him" —thus defining a right as the delimited and guaranteed interest—goes on to say that out of this delimitation and guarantee there grows a claim (*Anspruch*). He defines

this *Anspruch* as "the present power to influence the action or forbearance of another." [43] This last is not substantially different from the standard English analytical formula.[44]

A closer examination of the term *Anspruch* will make the matter more clear. The ambiguity of *Recht* and the obvious desirability of distinguishing the interest secured from the legal right or legal power by which it is secured, have made *Anspruch* a very popular word in recent German juristic literature. It has an ambiguity of its own, however, as it is used in two senses: (a) A legal right in the sense of the English analytical jurists (sense No. 2 above), and (b) a cause of action, the basis of a complaint addressed to a tribunal. This use of the word for legal right as the word for cause of action seems strange to us but is perfectly natural in a Roman-law country. In our procedure we put the stress upon the wrong done because our procedure developed for the most part around or on the analogy of the action of trespass, since the king's courts got jurisdiction through breach of the king's peace, which was a wrong. But Roman procedure lays stress on the right infringed, not on the wrong that infringes it. It grew around the old formula of *legis actio*, in which the plaintiff set up the right he asserted. On this model, in the formulary procedure, the *intentio* (statement of plaintiff's claim) set up his right in general terms, not the breach as with us. Hence it is natural for the German, trained in the Roman procedure, to fall into an ambiguous use of *Anspruch* to mean both the legal right and the cause of action based on that right. Taking *Anspruch* in its meaning of legal right, Dernburg's analysis would be: (1) An interest, an extra-legal or natural institution; (2) the interest as delimited and secured by law, a compound of the natural and the civil; (3) the claim or *Anspruch* which is one of the means of securing the interest as delimited, a purely civil institution. This last is what the English analytical jurists call a legal right and they agree with him in speaking of it as a capacity of influencing the acts of others.

Windscheid is substantially to the same effect and is even more in accord with Austin. He distinguishes two meanings of *subjektives Recht*. The first is the sense in which we speak of having a right to certain conduct or a certain act or forbearance on the part of others. In such cases, he says, the legal order, in view of some situation of fact, has issued a command, enjoining conduct of a certain sort and has put this command at the service of the person in whose interest the command was issued.[45] Where Austin speaks of the command of the state, Windscheid, a historical jurist, speaks of a command of the legal order—a command having its origin, not in the conscious will of the state, but in the subconscious development in experience of a principle of right, which has crystallized as it were in the legal order. Windscheid says that the legal order leaves it to the person entitled whether he will put into operation the means which the legal order provides against the one who infringes the command. Accordingly the will of the person entitled is controlling as regards the carrying out of the command issued by the legal order. As he puts it: "the legal order has promulgated the command in his interest; it has made its command his command; the right has become his right." That comes to saying that in this sense of the term "a right" (the second of those above noted) a duty is correlative to a right. There is a legal right and a legal duty, but the duty is a relative one. It is relative to a person whose interest is secured by the right. Thus he limits "a right" in this proper legal sense to cases where there is a correlative duty. It will have been seen that this is very like Austin. Austin would say, the state commands; this creates duties to obey; correlative to these situations of persons who are bound to act or forbear for one's benefit, are the capacities to exact the acts or forbearances which are legal rights. Windscheid says, the legal order recognizes and delimits interests; to secure them within the limits fixed, it imposes relative duties by its command; then it gives the individual whose interest is secured a capacity of enforcing the command, which is a legal right.

Windscheid turns next to a second meaning of *subjektives Recht*. There is an example of this second meaning when we say that an owner has a right to alienate the thing owned or a creditor has a right to assign the claim or an offeror has a right to revoke the offer. Here, he says, the meaning is that the will of the person entitled is controlling with respect to the coming into existence of a right in the former sense or with respect to the termination or alteration of an existing right in the former sense. This is what we are coming to call a "power," and, indeed, German jurists have long called it by the equivalent *Befugniss*.[46] His first sense is what the English analytical jurists have called "legal right." The latter, as Windscheid puts it, is authority to use legal machinery to give effect to a command of the legal order for the securing of some interest; the former is a capacity to determine whether such a command shall exist. To use his words, in case of a power, "the legal order ascribes to the person entitled a controlling will, not for the enforcement but for the existence of a command of the legal order." He next tries to unite the two in one idea, and undertakes to frame a definition which will comprise both "kinds of rights in the subjective sense." His formula runs thus: "A right is a power of will (*Willensmacht*) or authority of will (*Willensherrschaft*) conceded by the legal order." In other words, in his analysis, for the purpose of securing interests, the legal order gives to the individual will (1) power to enforce, if it chooses, commands addressed to others by the legal order, and (2) authority to create, alter, or terminate situations to which such commands are annexed.

Three points in Windscheid's discussion are of special interest. In the first place, he does not notice and set off the conception designated above as the fourth sense of "a right," or better "a privilege." As has been seen such a conception plays an important part in Roman law in the case of the *beneficium diuisionis*, *beneficium competentiæ*, etc. But it happened that these privileges got a word of their own in Latin. As the Romans did not speak of a *ius*

*diuisionis* it has not been necessary in modern law to set off a meaning of *Recht* for such cases, nor has anyone thought it necessary to work out an all-embracing conception to include this along with delimited interest, legal right and power. Does not this throw some light upon the utility of such attempts with respect to our word "a right," where such terms as "right of deviation" have led many to feel that legal right, power and privilege must be summed up or rolled up in some one general idea? In the second place Windscheid's analysis is obviously influenced by the ideas of the nineteenth-century metaphysical jurists, accepted by him in common with the historical jurists, especially the idea of referring everything to the will as the fundamental datum. Hence he thinks of a legal right as a capacity in the individual will to enforce a command in its interest and of a power as a capacity in the individual will to create situations or to terminate or alter them so that commands will attach, which this or some other individual will may enforce. The third and most important point is his view of the nature of a power; his conception of the contrast between the capacity to bring about enforcement of commands at will and the capacity to produce at will situations to which enforceable commands are annexed by law.

Of the writers of the present generation, Cosack, in particular, emphasizes the distinction between legal right and power calling the latter *Rechtsmacht.* He starts with the notion of the legal order as an ordering of mankind through rules. One way, he says, in which the legal order achieves this ordering is to guarantee a special authority to individuals. Such an authority guaranteed by a rule of the civil law, is a private legal right. So his formula runs: "A right is an authority guaranteed by law to the person entitled."

(2) We come now to right defined as interest. The formulas hitherto considered have defined one of the means by which the legal order secures interests which it has recognized and has delimited for legal purposes. The

"natural rights" which played so great a part in the jurisprudence and public law of the past were interests. Hence a theory of rights as interests but connected modern juristic thinking with the first use of the term right in modern juristic writing. Jhering is the classical exponent of this mode of looking at a legal right. As has been seen, he defines it as an interest protected by law.[47] In other words, there is: (a) The natural right, the interest, quite apart from law, which we think ought to be secured; (b) the legal right, the interest which the law has defined and limited and given its sanction within those limits. Clearly he is not defining the same thing as the authors first considered. If Roman terminology may be used, one might say that there are: (a) The natural interest, the *de facto* claim independent of law, (b) the legal interest, the natural interest as recognized and delimited by law, and (c) the legal claim (*Anspruch*) by which the legal interest is made effective. It will be noted that I have omitted the word "right" entirely in this account of the matter, for it is more important that these ideas be kept distinct than to fix meanings to any particular word.

Perhaps Bierling has given the best analytical treatment of the idea of rights as recognized and delimited interests.[48] He says that the term "a right" has two meanings, one of which has two aspects, so that ultimately there are three meanings. He expresses the first meaning by the word *Anspruch* and gives as examples, the right not to be injured by others in one's honor, not to be injured in one's body, not to be disturbed in the use of particular property, or to have this or that performed by a particular person. These are what the English analytical jurists call legal rights. In this sense, he says, a right is a claim, which one may make against the world at large or against a particular individual, to which the law gives its sanction. His view, then, is this: The law recognizes an interest, delimits it, and in order to secure it, creates a legal claim to that extent. It is the original natural interest all the time. The law simply makes it a legal institution within the limits in which it is recognized. The moral claim is

now a legal claim, also. This is ingenious and has much to recommend it from a philosophical standpoint. But the two legal institutions, the legal interest and the legal capacity to make the interest effective by calling in the state against others, seem to demand more differentiation than this analysis provides.[49]

Bierling designates what he calls the second meaning of "right" *Befugniss*. But this, he says, has two aspects. The first aspect he terms "simple legal permission" (*dürfen*). The content of this is purely negative. It is "the legally not forbidden." The second aspect he terms *können*. It is legal capacity to effect something, or, to use his words, "capacity in pursuance of certain provisions of the positive law, to produce determinate legal consequences through legal transactions." Obviously, this is what we have been calling legal power. The other aspect, however, is not exactly what we called privilege (right in the fourth sense above). That idea, as we have seen, for reasons growing out of the Roman law, did not go by the name of right and so did not get mixed up with legal rights and powers. The idea in Bierling's *dürfen* is rather that of an unrestrained natural power of action—the idea which English judges often express by the term "liberty."[50] Accordingly Bierling's analysis may be put summarily thus:

Right in the wider sense
- 1. *Anspruch*, claim—legal right.
- 2. *Befugniss*
  - (a) *dürfen*, natural power unrestrained —liberty.
  - (b) *können*, — legal power.

This is the best presentation of the matter, from the standpoint of the civil law of which I know. If *Anspruch* were defined as Windscheid defines it, little more could be said. Two points deserve special notice. First, where Windscheid speaks of power in terms of will, Bierling considers that it is a capacity to create legal consequences by legal transaction. Is this accurate? Is a breach of a contract which cannot be enforced specifically a legal

transaction? And yet it turns the promisee's claim to performance into a claim for money reparation. Is not the true account of the matter this: A power may be exercised by legal transaction, *e.g.*, alienation, or by an act not intended immediately to have legal consequences, *e.g.*, cutting of wood by a tenant without impeachment of waste, transfer of a note to a bona fide purchaser, sale in market overt? In the last two cases there is a legal transaction between seller and buyer, but the power of cutting off rights of the third-party owner is not its object. Secondly, and more important, the second aspect of *Befugniss*, the idea which he expresses by *dürfen*, calls for examination. Is there one idea here, or are there two? Does this include such things as the "right of deviation," the privilege against self-crimination, the "right of fair comment," etc., so that we may divide Bierling's *dürfen* once more into (a) liberty (to find a name for the moment) as in the case of the *ius abutendi* and (b) privilege, as in the case of a license or a privileged communication? If there is a difference, it seems to be this: In the case of a privilege, something which involves aggression which infringes a secured interest of another, is privileged, so that the person who has the privilege is under no duty and no liability. In the case of a "liberty," something which does not immediately involve aggression and is an incident of a secured interest, for that reason involves immunity if there is incidental injury. But what is this more than saying that in each case there is no duty or liability? On the whole it does not seem that any useful distinction may be made.

(3) It remains to consider right defined as relation. Puntschart first worked this out fully in German,[51] but in view of the recent thorough development of the idea by Wigmore, his analysis need not be set forth. Kohler's theory, however, demands a moment's notice. He says that a right is a control by a certain person of a definite advantage of life. The legal order is primarily an ordering of these controls over advantages. The right is primarily a capacity to control some definite advantage of life more

or less at one's pleasure. But this control is effected by the legal order's sanctioning and protecting a relation between (a) individual and object, (b) individual and other individuals.[52] The power of control here is put as the means of securing the recognized and delimited interest. This accords with the position of the analytical jurists. One may concede that the power involves a certain relation. But what is the significant jural institution? It seems more important to mark off the capacity of control and the correlative duty.

Wigmore, who has treated the theory of right as relation with characteristic thoroughness and analytical acumen, begins with what he styles *nexus*. He holds that *nexus* involves two elements, the person element and the interest. In the person element there are two persons: (1) The person by whom state force is demandable, and from his side the *nexus* is termed a right; (2) the person against whom state force is demandable, and from his side the *nexus* is termed duty. The second element, interest, is the "fact of human condition which state force aims to protect or cause to be realized." [53] Thus he puts right (the capacity of demanding state force to secure an interest), duty (subjection to liability of state force for the securing of an interest) and the interest for security whereof the right and the duty are set up and imposed, as elements of a legal relation—of what the Germans would call *subjektives Recht*. How far is it important to insist upon this wider conception, including interest, legal right, and duty—or, indeed, natural interest, legally limited interest, legal right, duty, power and privilege? Would anyone try to do this if it were not that most of these ideas have developed later than the words by which we have tried to express them and so "right" has been an all-inclusive word? It seems doubtful whether we gain much by trying to include all these things under some one word, since the thing secured and the legal institutions that secure it are not reducible to any significant general idea behind them all.[54]

[1] The Scope and Purpose of Sociological Jurisprudence, 24 *Harvard Law Rev.* 604, 610.

[2] For modern discussions of legal rights reference may be made to: Hohfeld, Some Fundamental Conceptions as Applied in Judicial Reasoning, 23 *Yale Law Jour.* 16, 28; Salmond, *Jurisprudence*, secs. 70–74, 78–85; Gray, *Nature and Sources of the Law*, secs. 22–62; Wigmore, Summary of the Principles of Torts (*Cases on Torts*, vol. 2, appendix A) secs. 4–8; Korkunov, *General Theory of Law* (transl. by Hastings), secs. 27–29; Gareis, *Science of Law* (transl. by Kocourek) 31–35; Brown, *The Austinian Theory of Law*, 172 *et seq.*; Schuppe, *Begriff des subjektiven Rechts*, chap. 2; Bierling, *Kritik der juristischen Grundbegriffe*, II, 49–73; Dernburg, *Pandekten* (8 ed.) I, sec. 38; Windscheid, *Pandekten*, I, sec. 37; Kohler, *Lehrbuch des bürgerlichen Rechts*, I, secs. 44–46; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, I, secs. 16–20.

[3] Gareis, *Enzyklopädie und Methodologie der Rechtswissenschaft* (3 ed.), sec. 5.

[4] See James, *The Will to Believe*, 195–206.

[5] This is expressed in Windscheid's much quoted phrase: "Das Recht ist sein Recht geworden."

[6] *Juristische Enzyklopädie* (2 ed.), sec. 159, note.

[7] As to legal duties, see Salmond, *Jurisprudence*, sec. 77; Gray, *Nature and Sources of the Law*, secs. 45, 46, 59–61; Korkunov, *General Theory of Law* (transl. by Hastings), sec. 29; Miller, *The Date of Jurisprudence*, chap. 3; Bierling, *Juristische Prinzipienlehre*, I, sec. 11.

[8] See Hohfeld, Some Fundamental Conceptions as Applied in Legal Reasoning, 23 *Yale Law Journ.* 16.

[9] Austin, *Jurisprudence* (4 ed.), Lects. 17, 22–26.

[10] Holland, *Jurisprudence*, chap. 7; Pollock, *First Book of Jurisprudence* (3 ed.), 57–61.

[11] Wyman, *Public Service Companies*, I, sec. 331.

[12] See Terry, *Leading Principles of Anglo-American Law*, secs. 108–112.

[13] On "powers," reference may be made to Salmond, *Jurisprudence*, sec. 76; Miller, *The Data of Jurisprudence*, 63–70; Kohler, *Lehrbuch des bürgerlichen Rechts*, I, sec. 48.

[14] For example, the direction to the trustee in the case of In re Dean, 21 Ch. D. 552, to use a certain portion of the trust estate in caring for the testator's dogs and horses during the remainder of their lives. There was no beneficiary of the trust here who could enforce the direction. But the trustee had a power which the law would allow him to carry out.

[15] *Jurisprudence*, chap. X and summary (4 ed. p. 196).

[16] Note 2, *supra*.

[17] *Science of Law* (transl. by Kocourek), sec. 4.

[18] It is significant to note how the courts put this. "An infant can exercise a power . . . where an intention appears that it should be exercisable during minority." In re Cardross, 7 Ch. Div. 728.

[19] Salmond, *Jurisprudence*, sec. 75.

[20] This is well put by Gareis, *Science of Law* (transl. by Kocourek), sec. 34, and note 2.

[21] See Professor Hohfeld's paper, *supra*, note 2; Salmond, *Jurisprudence*, sec. 75; Brown, *The Austinian Theory of Law*, 180–181 (note); Miller, *The Data of Jurisprudence*, 96–100; Bentham, *Works* (Bowring's Ed.) II, 217–218; Hearn, *Theory of Legal Duties and Rights*, 133–134.

[22] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 *Harvard Law Rev.* 195, 231.

[23] Schuppe, *Begriff des subjektiven Rechts*, chap. 2.

[24] Hearn, *Theory of Legal Duties and Rights*, chap. 10. Cf. Korkunov, *General Theory of Law* (transl. by Hastings), 215.

[25] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 *Harvard Law Rev.* 195, 204.

[26] On Roman uses of *ius* see Puntschart, *Moderne Theorie des Privatrechts*, secs. 2–9, Cf. Maine, *Early Law and Custom*, 365; Bekker, *Pandekten*, I, 46.

[27] Gaius, I, sec. 95. Cf. *ius Italicum*, *Digest*, L. 15, 1.

[28] *E. g. Digest*, L. 17, 55.

[29] An attempt has been made to show that *omne ius* in Gaius, I, sec. 8 (Digest, I, 5, 1), should be translated "every right." Kelly, The Gaian Fragment, 6 *Ill. Law Rev.* 561. But the argument is based on the proposition that such a translation results in a more logical analysis, and presupposes the long juristic development from the twelfth century to the present. Absence of any word for "a right" in an advanced stage of legal development is no uncommon phenomenon. See the Russian juristic coinage in modern times, Korkunov, *General Theory of Law*, 212, and the significantly analogous coined word in modern Japan, Smith, The Japanese Code and the Family, 23 *Law Quart. Rev.* 43 and note 1.

[30] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 *Harvard Law Rev.* 195, 213.

[31] Grotius, I, 1, 4. Cf. Rutherforth, *Institutes of Natural Law*, I, 2, sec. 3.

[32] "A moral power over others residing in oneself." Stahl, *Philosophie des Rechts* (5 ed.), II, 279. Cf. "A power over an object which, by reason of the right, is subjected to the will of the person entitled." Puchta, *Cursus der Institutionen*, II, sec. 207.

[33] *First Principles of Jurisprudence*, 15, 24.

[34] In his later work Salmond gives a better account of this in terms of interests. *Jurisprudence* (4 ed.), sec. 72.

[35] *Roman Private Law:* Jurisprudence, II, 629–630.

[36] See my paper, Legislation as a Social Function, *Pub. Am. Sociol. Soc.* VII, 148, 158–9.

[37] "Duty is the basis of right. That is to say, parties who have rights or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon other parties." *Jurisprudence* (3 ed.), I, 307.

[38] "An interest protected by law." *Geist des römischen Rechts*, III, sec. 60.

[39] "A relation between persons, concerning an object, created by a particular fact, determined by a principle or a rule of law, for an end of human life." *Cours de droit naturel*, I, sec. 23.

[40] *E. g.*, "A relation sanctioned and protected by the legal order." Kohler, *Einführung in die Rechtswissenschaft*, sec. 6.

[41] *Summary of the Principles of Torts*, secs. 5, 6.

[42] Burlamaqui, *Principes du droit de la nature et des gens*, I, 2, chap. 6, sec. 2. Cf. Vattel, liv. I, chap. 13, sec. 158.

[43] *Pandekten* (8 ed.), I, sec. 38.

[44] Holland, *Jurisprudence*, chap. 7.

[45] *Pandekten*, I, sec. 37.

[46] *E. g.*, Bierling, cited in note 2 *supra*.

[47] *Supra*, note 38.

[48] *Kritik der juristischen Grundbegriffe*, II, 49–73.

[49] See Merkel's comment, *supra*, note 6.

[50] See Miller, *The Data of Jurisprudence*, 96 *et seq.* Judicial usage in England and America is critically examined in Professor Hohfeld's paper, *supra*, note 2.

[51] *Moderne Theorie des Privatrechts*, secs. 4–9.

[52] *Einführung in die Rechtswissenschaft*, sec. 6.

[53] *Summary of the Principles of Torts*, secs. 4–8.

[54] Compare the attempt of Korkunov (Hasting's translation, p. 212) to do the same thing. According to him, subjective right is equivalent to right-power, which is the possibility of realization of an interest. So it includes (a) externally a claim (*Anspruch*), (b) internally the possibility of realization of an interest. Is not this an analysis of the meanings of an ambiguous word rather than of a conception or an institution of the law?

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