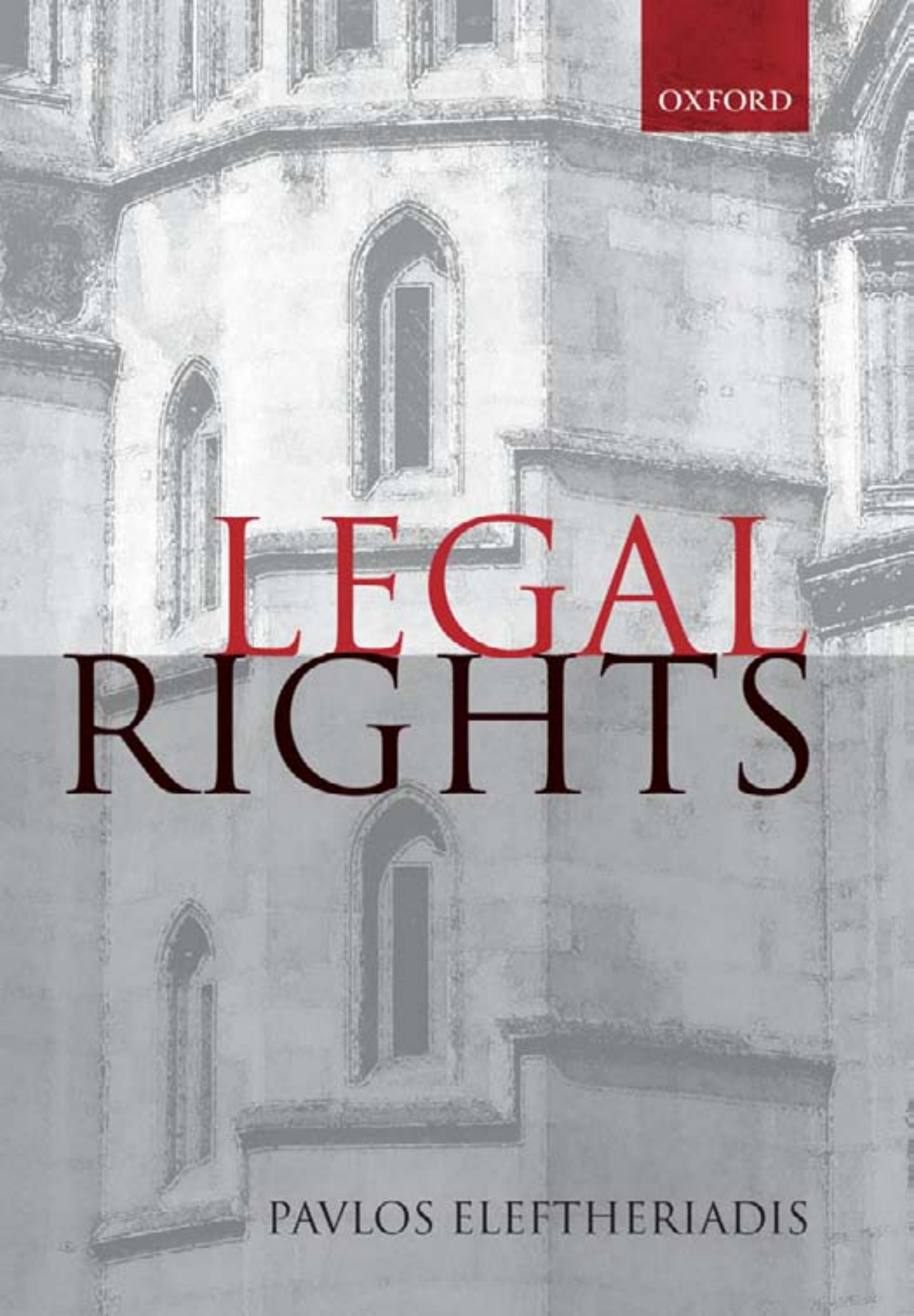
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To Rachel

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Preface

Laws are made and unmade by human actions. A parliament passes a new law and abolishes an old one. A court interprets a law to mean something and not something else. Such actions take their meaning from social and political processes that outline the nature of legislation and adjudication for a certain political community. The law is thus a human creation in a double sense, both because legislation and adjudication are human activities and because the framework within which legislation and adjudication take their meaning and develop their effects is itself a human artefact. It is a constitutional and political system of some kind. Jurisprudence is the philosophical study of all these frameworks and processes. To this extent jurisprudence is distinct from moral philosophy and political science, with which it has clear parallels and similarities. Moral philosophy explores practical reason unconditionally and is not exclusively focused on social processes. Political science, on the other hand, explores social and political actions without drawing conclusions as to what ought to be done, say, for example, that A should pay B this amount of money and so on. Legal rights and duties, by contrast, are meant to be reasons for action and they are also the result of the actions and words of a person or group. And here lies the central puzzle of legal philosophy: the merger of fact and value in the law. How can the facts of law-making and law-applying, normally the say so of someone, be a practical reason for anyone to do anything?

Some contemporary theories of law respond to the puzzle by making two related assumptions. The first is that jurisprudence is descriptive in that it describes some social institution. The second is that the idea of law and the nature of legal reasoning are two distinct issues. Hence, a theory of law is not a theory of legal reasoning and vice versa. So jurisprudence has little to say as to how we ought to decide cases. In effect, such theories say that neither good legal philosophy, nor valid law, offer any reasons for action. Such reasons are determined by the substantive contents of legal doctrine alone according to the particularities of each jurisdiction.

The two distinctions above are, in fact, just a clever attempt at evading the puzzle. Their joint effect is to say that jurisprudence and law are just social science. They say that jurisprudence describes legal institutions as they are, and not as they ought to be. Law describes how rules are made without saying anything about how they are to be applied in real cases. We leave problems of concrete application to the judgment of judges and officials. How these institutions and conceptual frameworks may lead to action-guiding standards is a separate question, which perhaps will be answered by parochial legal scholarship. This is, in my view, the core of a very influential strand of modern legal positivism. Yet both assumptions are seriously mistaken. We cannot distinguish between descriptive

and normative jurisprudence. We cannot distinguish between law and legal reasoning as two separate areas of study. These distinctions, popular though they have become, have undermined our ability to understand law as it is. We cannot make sense of law that is not meant to guide action in concrete circumstances.

In this book I attempt to show how these two key assumptions go astray by focusing on the case of legal rights. The idea of rights in the law helps us understand the puzzle at the heart of law because it shows it at its starkest. We learn by studying the best moral and political thought of our time that rights are reasons of a certain kind. They are such strong reasons that override other moral and political considerations. But how can such strong reasons figure in the law, if the law is conceived as a technical field that amounts to something less than practical reasoning? Most contemporary theories of legal rights satisfy themselves with the assertion that legal rights are something created by the historical facts. Rights are legislated via the active engagement and communication of the legislator's will. But such a position is in conflict with the practical content of the law. Legal rights and duties are meant to guide our actions. We cannot endorse or apply rights without engaging in some kind of practical reflection. It seems to me that this mode of reasoning and argument is precisely what ought to be studied by legal philosophy.

Judith Jarvis Thomson has challenged the theories that take legal rights to be simple creations of the legislator, with a simple argument to which I will return in the course of my argument. A conventional view among many legal theorists, she notes, is that legal and moral rights are two discrete territories within the realm of rights because they derive from different sources: the legal system creates legal rights through the mechanisms of law-making, whereas morality creates moral rights through practical reason. Yet, Thomson adds, it is still very unclear what we mean by a difference in the source of rights. Thomson offers a hypothetical example of a Nazi legal system that rules that there is a right to murder Jews. Surely such a legal right would not be a right at all, in the ordinary sense of the term. Rights have features that cannot or should not be dropped once we take them to be part of the legal order. She concludes that in some cases, that is, the case of the evil legal order, 'at least some legal rights are not members of the genus rights'.[1] Rights have a meaning that the legislator cannot change by fiat. This is what is revealed to us by the Nazi rights example. If we define legal rights as purely conventional, in other words, as creations of the processes of a legal system, we contradict the ordinary sense of the term right. We say something that we cannot brings ourselves to say, that rights can possibly have no moral content whatsoever.[2] If law appropriates the terminology of rights, it must do so without changing the term beyond all recognition. There are moral features of rights that we cannot ignore, because if we did ignore them, we would not be talking of

[1] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990) 75.
[2] *RR* 76.

rights at all. Even if the Nazis believed that they could kill Jews, it does not follow that they had such rights in law. If this argument is correct, legal rights and doctrinal law are to be studied as objects of practical rationality. And this is the argument that I wish to make in the pages that follow.

The argument will support four main conclusions. The first is that jurisprudence, the theory of law as well as the theory of legal rights, is political philosophy. This argument runs through the whole of the book and explains its structure, because it shows how the theory of legal rights ought to offer a justification of legal rights aimed at political society as a whole. The argument for this fundamental position occupies the first three chapters. The rest of the book is a concrete application of this finding, showing how legal rights are to be defended as public political ideas. The second main position is that jurisprudence is concerned at the first instance with the justification of institutions and not actions. Jurisprudence studies the virtues of public institutions, not the merits of individual conduct. This argument is presented in Chapter 3, explored at length in Chapters 4 and 5, and returned to in Chapter 8. The third main position is that we cannot understand the nature of law and legal rules without at the same time having a theory of legal modes of reasoning and argument. I develop this point in Chapters 4 and 5, where I examine the relevance of accounts of rights as lists of permissions and obligations. I reject theories that take the idea of rights to be merely a neutral tool of presentation without any substantive content. The fourth main position is that the key to the understanding of the role of legal rights lies in a distinction between legal rights and legal relations. The former are reasons, whereas the latter are conclusions of legal deliberation. This occupies us in Chapters 6, 7 and 8, where the argument for legal rights as grounds for clusters of legal relations is refined and explained. A main component of this argument is the rejection of what I call the 'rail-track' view of rules, according to which we apply rules by subsuming a set of facts under their fact-description. This simplistic view lies at the heart of certain theories of rights as general permissions. The idea of cluster rights that I defend avoids these simplifications.

These four main positions help us understand how rights work in law and legal reasoning and lead to many other interesting conclusions. For example, these four positions help us understand Hohfeld's correlativity doctrine between the main legal positions, a topic taken up in Chapter 6. They also help us understand property as a cluster of relations with other people, a concept that is developed in Chapter 7. The four positions also help us understand the role of freedom in private law and in affirming equal rights, a topic I explore in Chapter 8. Finally, through these distinctions we understand the force of the 'interest' theory of rights currently defended by a great number of legal scholars. Nevertheless, in the end our argument favours the rival theory, the 'will' theory, both as a theory of legal rights and a theory of legal relations. Ultimately, this book defends the view that the most defensible account of rights is offered by a will theory that recognises the equal moral status of persons.

There is a basic idea that guides these reflections, which ought to be stated in advance. It is an idea explored at length by the theorists of the social contract and especially by Rousseau and Kant and more recently Rawls. Political societies are neither voluntary associations nor fraternal communities. Unlike the conventions of a family, the rules of a market, or the hierarchies of a firm, law's coverage is comprehensive and encompasses every aspect of personal, social or economic life. This makes the task of legal theory quite different to that of moral or political theory. There is urgency in law, because its conclusions matter every day that the machinery of its institutions affects people's lives. Dworkin has explained this by focusing on the moral implications of a judicial decision. If a judge delivers a wrong judgment, then 'the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw'.[3] The institutions and practices of law provide for the structuring of social life coercively and comprehensively, in a way that sets it apart from all other social practices. To the extent that jurisprudence is concerned with this aspect of legal institutions, it is also directly involved with the guidance of human action. This, in my view, is the key to our puzzle. Law and its theory are not just exercises in abstract reflection. They affect human lives every day in thousands of different ways. Everyone that studies law and explores its most abstract foundations has to take into account the dominion that law exercises over us. Nowhere is this more evident than in the philosophical study of law, its general concepts and processes of reasoning. And nowhere is this more evident than in the study of legal rights as fundamental legal conceptions.

I am grateful to the Faculty of Law at Oxford University and to Mansfield College, Oxford, which granted me leave of absence from my teaching and administrative duties in Michaelmas Term 2007, when the final draft of the book was written. Teaching postgraduate seminars with Nicos Stavropoulos and Julie Dickson has allowed me to benefit greatly both from their deep knowledge and good judgment. Many other colleagues at Oxford have offered detailed comments and discussion. I am grateful especially to John Gardner, Leslie Green, John Finnis, Michael Freeden, Grant Lamond, Joseph Raz, Adam Swift and John Tassioulas. Ronald Dworkin's seminars and his colloquia in London have been a constant source of new thinking about law and its theory. For support, discussion and suggestions at various stages of thinking and writing about these ideas I am also grateful to Nicos Alivizatos, Samuel Freeman, James Gordley, Christos Hadjiemmanuil, Ross Harrison, Duncan Kennedy, Matt Kramer, Neil MacCormick, Alexander Nehamas, James Penner, Prince Saprai, Nigel Simmonds, Pavlos Sourlas, Jamie Whyte and Jonathan Wolff. Many thanks are also due to John Louth and Gwen Booth of Oxford University Press for their wonderful support.

Pavlos Eleftheriadis
May 2008

[3] Dworkin, *Law's Empire* (London: Fontana, 1986) 1.

List of Abbreviations

AL	Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).
CL	H. L. A. Hart, *The Concept of Law,* Second edn (Oxford: Oxford University Press, 1994).
EPD	Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics,* revised edition (Oxford: Oxford University Press, 1995).
FLC	Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, edited by Walter Wheeler Cook (New Haven: Yale University Press, 1923).
JR	Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006).
LE	Ronald Dworkin, *Law's Empire* (London: Fontana, 1986).
PL	John Rawls, *Political Liberalism,* second paperback edn (New York: Columbia University Press, 1996).
PP	Immanuel Kant, *Practical Philosophy,* edited by Allen Wood and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996).
RR	Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990).
TJ	John Rawls, *A Theory of Justice,* revised edn (Oxford: Oxford University Press, 1999).
TRS	Ronald Dworkin, *Taking Rights Seriously*, revised edn (London: Duckworth, 1978).

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1

History and Theory

Rights are among the most versatile and frequently used concepts of legal doctrine. Rights do at least two things in law and they do so in varying degrees. First, they are used as ordinary tools for describing the results of legal processes. When we win a case we say that the court recognized our rights or that our rights have been vindicated against our opponents. Second, they are used as statements of high-minded reasons. We say that under English law everyone has a right to property, a right to bodily integrity and a right to free speech, among others. In this latter sense we mean that rights are taken to have a special peremptory force in legal deliberation, on account of certain established features of the common law or on account of the moral features of rights that the law cannot ignore. Such reasons entail results, of course, but the two uses are different. It is easy to understand rights in the sense of vindications by a court: I have a right if the court says so. But what of rights as extraordinary reasons? What is this higher force of rights and how is this force to be harnessed by law and legal theory?

Ronald Dworkin has written that '[i]individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them'.[1] Dworkin's own particular account of the special weight of rights is contested, but this statement of the general role of rights is not. Joseph Raz, for example, rejects Dworkin's theory of law and rights in favour of a theory of exclusive legal positivism but agrees that rights have peremptory force. He notes that they 'mark matters which are of special concern' to the right-holder and are for that reason special.[2] In English law the peremptory force of rights is recognized by the Human Rights Act 1998, because the rights recognized there lead to the extraordinary device of a 'declaration of incompatibility'. So there is broad consensus that rights can be both technical tools and authoritative in deliberation in a way that sets them apart from other legal concepts.

This complex usage creates problems. If, for example, I have an individual right in Dworkin's sense, which under the Human Rights Act has received due recognition by the courts, but fail to enforce it because I did not apply for judicial review promptly under Part 54 of the Civil Procedure Rules or fell foul

[1] Ronald Dworkin, *Taking Rights Seriously,* revised edn (London: Duckworth, 1978) xi.
[2] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 250.

of the Limitation Act 1980, I end up both having and not having the right. I have the legal right because of its peremptory force and its general endorsement by the legal order. I have a doctrinally elaborated legal right because, say, precedent on the particular issue at stake is on my side (the facts of the case are exactly those of an earlier one where the claimant won). But in this example I do not have a legal right: I have lost the case because of my procedural errors. I have a legal right to win but I do not have a legal right to win. So our accepted usage of rights is not just plural. It is also confusing.

1 The History of Legal Rights

Unlike other central legal concepts that are used widely today, the idea of rights is not old. It is certain that neither the classical system of Roman law nor the classical common law employed the idea of legal rights. In both cases legal doctrine was based on bringing together facts and their appropriate remedies. Legal argument proceeded by means of the detailed case-by-case examination of facts rather than the application of general rules. The main technique was analogy, whereas deduction from abstract principles or categories was the exception.[3]

It is perhaps obvious why the political thought of antiquity did not employ rights in its political philosophy. The reasons must be that all classical societies were deeply hierarchical. Not only were they divided by the distinction between free men and slaves but even those with the status of citizen were divided according to class, birth and wealth in complex ways. Rights assume a basic equality between persons that neither Plato nor Aristotle nor any of the other leading thinkers of the classical world recognized. None of the ancient philosophers saw equality as a means to justice. They thought that justice requires giving everyone their due and that our due is determined by our background, actions and character. In *The Laws,* for example, the text that is closest to us in its commitment to the rule of law and to abstract law-like principles, Plato remarks that 'indiscriminate equality for all amounts to inequality, and both fill a state with quarrels between its citizens'. He advocates a complex equality aimed at conferring praise and the other benefits to those who deserve them as 'strict justice' requires.[4] This type of merit-based strict justice is of course not the kind of justice we have in mind when we think of equal moral and legal rights for everyone. We expect that even persistent criminals have the same panoply of rights as everyone else. Drawing this contrast between ancients and moderns

[3] See for example Peter Stein, 'Roman Law, Common Law and Civil Law' 66 *Tulane Law Review* (1992) 1591, Fritz Pringsheim, 'The Inner Relationship between English and Roman Law' 5 *Cambridge Law Journal* (1935) 347. For a different view see A. Watson, 'The Law of Actions and the Development of Substantive Law in the Early Roman Republic' 89 *Law Quarterly Review* (1973) 387.

[4] Plato, *The Laws*, trans. Trevor J Saunders (London: Penguin, 1975) 229, 757a.

Gregory Vlastos observes that modern moral and political thought claims the equal moral worth of everyone, whatever our merits or demerits. In his memorable phrase 'the moral community is not a club from which members may be dropped for delinquency'.[5] The idea of general and equal moral rights is therefore absent from classical and medieval political thought. We shall have to wait until justice is identified with equality before we find the first theories of rights as general principles applicable to all.

It is not exactly known when European legal scholarship finally moved on from the old Roman and common law of remedies to one of abstract and systematic rights.[6] The question is highly contested. The legal philosopher Michel Villey argued over a period of many years, for example, that the meaning of 'subjective right' ('*droit subjectif*') for the Roman *ius* emerged only in the work of the fourteenth-century Franciscan friar William of Ockham.[7] For Villey, Ockham's suggestion that property rights were 'a power of the will' over an object constitutes the first conception of a subjective right because it departs from the traditional conception of indivisible *dominium.* Ockham moves from property to a general concept that can be given a variety of contents, the common denominator of which is the personal control of any external object. This paved the way for a general theory of ownership based on the ideal of rights as permissions or powers of an autonomous person and, ultimately, on rights of liberty.[8] Richard Tuck has also noted that the concept of a legal right emerged through the working out of property relations and the Roman notion of *dominium*, although he believes that the process was complete before Ockham.[9] In the common law, which in this as in many other of its intellectual developments follows civilian scholarship, the transformation is complete with Blackstone, who arranges the whole of English law in terms of 'rights and wrongs' although his account of rights remains different from ours:

> Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong . . . it follows that the primary and principal objects of

[5] Gregory Vlastos, 'Justice and Equality' in Jeremy Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) 41, at 55.

[6] For the transition from 'ius' to 'right' as a moral power ('facultas') or a 'liberty' in Hobbes and Locke see John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) 206–210.

[7] See M. Villey, *Leçons d' Histoire de la Philosophie du Droit* (Paris: Daloz, 1957) 221–283 and M. Villey, *La Formation de la Pensée Juridique Moderne* (Paris: Montchrestien, 1968) 225 ff. See also Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, Michigan: Eerdmans Publishing, 2001) and M. Villey, *Le Droit et les Droits de l' Homme* (Paris: Presses Universitaires de France, 1998).

[8] See Villey, *La Formation de la Pensée Juridique Moderne*, 248 ff., Tierney, *The Idea of Natural Rights,* 170–203. See also Knut Wolfgang Nörr, 'Zur Frage des subjektiven Rechts in der mittelalterlichen Rechtswissenschaft', in D. Medicus, H.-J. Mertens, K. W. Nörr and W. Zöllner, *Festschrift fur Hermann Lange* (Stuttgart: Kohlhammer, 1992) 193.

[9] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979) 15–24. Tuck (24–31) also suggests that the first 'fully fledged natural rights theory' was created by Jean Gerson in the early fifteenth century.

> the law are RIGHTS, and WRONGS. In the prosecution of these commentaries, I shall follow this very simple and obvious division: and shall in the first place consider the *rights* that are commanded, and secondly the wrongs that are forbidden by the laws of England.[10]

In the course of a series of thoughtful studies of the history of European private law Peter Stein has suggested that these developments are linked to a deeper and prior change in legal reasoning. This is the creation of a modern conception of procedure. The modern idea of abstract subjective right emerges only when substantive claims become separated from procedural requirements, so that rights can be distinguished from remedies.[11] The same point linking the emergence of abstract rights to the development of a uniform procedure out of the multiplicity of different categories of proceedings has been made by Jolowicz: 'Only in post-classical times, when the same procedure was available in every case, did it become possible to work out a man's rights first in the abstract before considering the proceeding by which they were enforced'.[12] This change, for Stein, is evident in the systematic arrangement of the law by the sixteenth century legal humanist Hugo Donellus (1527–1591).[13]

Donellus was concerned with presenting the law as a rational system of rules and principles and his analysis was informed by the idea that law should become a 'rational science'.[14] Stein observes that: 'Donellus' inexorable logic led him to the distinction between substantive law, which is concerned with subjective rights, and civil procedure, which is concerned with its enforcement'.[15] The emergence of the distinction between substantive and procedural law makes possible the transition from a case-based law of remedies to a modern system of subjective rights. It allows the distinction between subjective right (what appertains to the individual) and various procedural regulations that follow it. It opens the way for a general reorientation of legal doctrine towards a system of general rules: 'Reasoning in the modern civil law is in principle deductive. One proceeds from the general rule, and then considers the facts of the case and applies the rule to the facts. This form of reasoning is the inversion of both the classical Roman law and

[10] William Blackstone, *Commentaries on the Laws of England* (Chicago: The University of Chicago Press, 1979) vol. 1, 117–8.

[11] Peter Stein, 'Donellus and the Origins of the Modern Civil Law', in J. A. Ankum et. al. (eds), *Melanges Felix Wubbe* (Friboug: Editions Universitaires Suisse, 1993) 439–452.

[12] H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1965) 426.

[13] Roscoe Pound also identifies Donellus as the author of the modern concept of right in private law. See Roscoe Pound, *Jurisprudence*, vols I–V (St. Paul.: West Publishing, 1959) iv, 60.

[14] See Stein, 'Legal Humanism and Legal Science' in his, *The Character and Influence of the Roman Civil Law: Historical Essays* (London: The Hambledon Press, 1988) 91.

[15] Stein, 'Donellus' 450. Donald Kelley notes that 'of all of the work of the great "systematists", that of [Donellus]…is probably the most comprehensive and influential' in Donald R. Kelley, 'Gaius Noster: Substructures of Western Social Thought' 84 *American Historical Review* (1979) 619, at 633. Savigny's student Roderich Stintzing claimed that Donnelus was the 'creator of modern jurisprudence'; see R. V. Stintzing, *Hugo Donellus in Altdorf* (Erlangen: Besold, 1869) 42.

the common law methods, both of which start with the facts'.[16] We may tentatively conclude that the emergence of the concept of rights follows developments both in the rationality of legal doctrine and in the systematisation of procedure. It is the result of the transformation of law from a series of analogies to a body of systematic concepts and sets of abstract and general rules. It also follows the clear separation of substantive standards of conduct from remedies, that is, derivative rules that deal with the enforcement of the principal rules. Yet, this transformation has not yielded a clear concept of a legal right.

Perhaps we should say that the two modern uses we have identified follow the history. The ordinary use of rights to describe particular vindications of claimants (as in the phrase 'the court has vindicated our rights') is the oldest use. It follows the idea of a remedy against a defendant in Roman law. Hohfeld, perhaps, captures the use of rights in the form of the old remedies with his emphasis on the bilateral nature of all instances of law.[17] Claims, liberties, powers and immunities signify what the winning party wins in a court case, in the form of a remedy. Yet the abstract use of rights as systematically organized concepts and reasons, as both Stein and Jolowicz note, is new. This change has to do with the developments of legal reasoning into a rational order that is distinct from procedure. We abstract from the concrete remedy (or concrete 'ius') the new idea of a 'subjective right' that belongs to individuals in general for a general, systematic reason. The particular remedy now derives from the general right in some way. The elegance of rights lies in the fact that they clearly link remedies with general rules: we say that freedom of speech is the reason for the liberty I have to publish this book or the right to property is the reason for the liberty I have to demolish my old house. In other words, the grounds and the remedy come together in a single system of ideas. The occasional confusion arises when we use the same name, right, to refer both to the remedy and to its ground. Because many grounds determine the remedy and operate against one another in the form of prima facie reasons, we may have a right (the ground) but not a right (the remedy).

The civil lawyers of the seventeenth century that started using the term 'rights' blended their usage in exactly this way. They, like Hohfeld, distinguished between liberty and claim. Whereas liberties signified the freedom from a duty, claims signified control over the duties of another. A claim was the *power* or *faculty* to demand performance. But notice how Hugo Grotius, one of the first lawyers to provide an analysis of private law in terms of abstract rights, conceives of personal rights as powers that are necessarily correlative to duties. In his *Introduction to the Laws of Holland* he writes as follows: 'A personal right [*Inschuld*, *ius in personam sive creditum*] is a right . . . which one person has against another entitling the first

[16] Stein, 'Donellus' 451. See also P. G. Stein, 'The Fate of the Institutional System' in Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (London: The Hambledon Press, 1988) 73–82.

[17] Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, edited by Walter Wheeler Cook (New Haven: Yale University Press, 1923).