Who enjoys the benefits of rights?

Who Enjoys the Benefits of Rights?

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Declaration

I declare the work presented in this thesis is my own.

Anna Clarke

Abstract

There is a problem with citizens' rights in Western liberal democracies, a problem largely ignored in the philosophy of rights except as an aspect of 'discrimination'. Citizens' rights are defended as a bedrock of political equality, a springboard for personal freedom, opportunity and success in the exercise of autonomy and individual choice. However, the persistence of inequality across multiple metrics, and the extent to which rights are in practice denied to socially salient groups, provide powerful evidence that citizens' rights do not deliver on their promise of status-equality.

My thesis addresses this failure. Drawing on Hohfeld's celebrated analysis of rights, I examine the relation between formal citizens' rights and the parallel working of 'informal' jural relations of social entitlement and obligation. To understand the limitations of formal rights, we need to take account of their informal, social counterparts, locating both formal and informal jural relations in the complexity of the social world. I use case studies to show how informal jural relations impose obligations that diminish the freedom of some while promoting that of others, thus undermining the status equality that formal rights are meant to deliver.

I analyse the spatial dimension of our formal and informal jural relations. Starting from Kant, I criticise the view that space is a continuous medium in which liberties conflict. Drawing on Heidegger and Bourdieu, I develop a phenomenologically richer account of the conflicts that arise in the socially differentiated space in which we seek to exercise our formal and informal jural relations.

A more robust conception of political equality, I propose, needs to look at a neo-Roman account of liberty and engage with the complex social hierarchies in which we live. With this approach we can conceive what it would take to offer a full enjoyment of citizens' rights to all.

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Chapter 1
Introduction

In this thesis I am concerned with the social, political and economic rights that we associate with a universal and equal status of citizenship in Western liberal democracies. These rights include universal suffrage and other political rights, rights to education, health and welfare, rights to due process at law, to a fair trial and against arbitrary arrests and detention, employment related rights including pensions, health and safety at work, a minimum wage, holiday and sick pay. Citizen rights in a liberal democratic society are associated with justice, fairness, liberty, and equality. Rights seem to express these values in both substantive and procedural terms, as ends in themselves and as means to those ends. Rights are key to a modern liberal society's socio-political identity, and they carry a heavy ideological burden.

In the twentieth and twenty-first centuries, such rights have come to be regarded as a necessary if not sufficient guarantor of a universal status of equality between the adult citizens of democratic states. As T. H. Marshall describes, rights are seen as "the stuff of which status is made" (1950, 29). However, empirical evidence shows significant and patterned differentials in the enjoyment of citizen rights. Citizen rights exist alongside structural and systemic differentials in basic social goods including health, wealth, and employment. A problem with citizen rights can be inferred from the seemingly counterintuitive proliferation of remedial anti-discrimination statutory rights[1]. The necessity for such legislation indicates that formal entitlement to equal rights has not produced substantive political equality and social justice. In this thesis I consider that failure as part of an analytic and conceptual analysis of the relation between rights and liberty. The question I address is what this lack of correspondence between the form of universal equal rights and their substantive practice tells us about the way rights actually work in a complex social world. In answering that question, I also address another related question: *Who Enjoys the Benefits of Rights, if so many citizens do not?*

This deficiency in citizen rights is not (simply) a product of discrimination in particular interpersonal rights-relations. The problem with rights is perhaps better captured by

[1] Now the Equality Act 2010 c.15

appealing to the idea of an institutionalised or systemic denial of status to members of particular socially salient groups. This perspective on the trouble with rights seems to suggest that an acknowledgement of fault and a commitment to reorganisation and re-education might produce the necessary change to ensure that an individual's rights to (say) justice and due process are respected. Thus in 1999 the Macpherson Report (1999) following the Stephen Lawrence Inquiry found institutional racism in the Metropolitan Police Force (MPS)[2]. Institutional racism was described as seen in "processes, attitudes, and behaviours" based upon "unwitting prejudice, ignorance, thoughtlessness and racist stereotyping" (para. 6.34). However, work to eradicate those processes, attitudes, and behaviours has been slow and is stalling. In 2022, the MPS has one again been criticised for the persistence of racism, sexism, misogyny and bullying (Independent Office for Police Conduct Report 'Operation Hotton'[3]). This suggests the problem with rights goes beyond the culture of particular institutions and systems. There is a wider problem at large in the social world, beyond the confines of particular institutions.

I contend that citizen rights by themselves, even in conjunction with anti-discrimination regimes and a commitment to institutional reform, are not able to disrupt long standing, entrenched differentials in status in society. I further claim that social hierarchy and inequality is founded on the persistence of *informal* jural[4] relations that cannot be overridden by the diktat of conventional *formal* jural relations—which is to say, citizen rights.

What are these informal jural relations? They are relations of obligation and entitlement analogous to formal (conventional, legal) rights inasmuch as they work through the enforcement of particular obligations correlative to particular entitlements, just as legal rights are relations of correlative right/duty. But unlike legal rights, informal jural relations are founded entirely on social practice, including norms of behaviour, etiquette, public morality and the like. My claim is that informal obligations in the social world can and do override the liberty involved in exercising legal rights. To understand what it takes

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[2] Macpherson, W., 1999. *The Stephen Lawrence Inquiry*. Report of an Inquiry by William Macpherson of Cluny. [online] William Macpherson, p.64. Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf> [Accessed 23 March 2023].

[3] Independent Office for Police Conduct 2022 *Operation Hotton Learning Report* <https://www.policeconduct.gov.uk/sites/default/files/Operation%20Hotton%20Learning%20report%20-%20January%202022.pdf> accessed 12 February 2022

[4] 'Jural' in the sense of pertaining to obligation (right) and entitlement (duty) including but not confined to strictly 'legal' relations.

to ensure the practical enjoyment of formal citizens' rights we need to analyse and understand them in their real-world social, spatial and phenomenological context, a context that includes other forms of jural relations—beyond formal, legal rights—that can be understood in terms of 'rights'. These informal jural relations are the source of differentials in access to the full benefit of formal rights because they play a critical role in the maintenance and reproduction of a social hierarchy. This hierarchy is manifest in patterned and systemic denials of liberty for members of certain socially salient groups, and the reinforcement and augmentation of liberty for members of other social groups. The benefit of formal citizen rights is (for some) undermined and subverted in practice by the counter-effects of these informal entitlements and obligations. The perverse outcome of this hierarchy in access to rights is that those who actually enjoy the benefit of rights, those who are able to engage successfully with the content of citizen rights, are generally the least likely to invoke their right to do so, because such benefits are freely available to them as a matter of course. This perversity is a manifestation and consequence of a status hierarchy which reproduces and maintains differentials in access to liberty.

I offer a 'situated' analysis and critique of rights to argue that the benefits of formal rights are affected by their interaction with the many and various informal entitlements and their correlative obligations at work in the social world. These informal jural relations can be analysed using Wesley Hohfeld's *Fundamental Concepts Applied in Judicial Reasoning* (1978[5]) in the same way that formal rights fit with Hohfeld's analysis. I anticipate two objections. First, that rights have a positive normative valency, at least in moral and political philosophy, and my analysis seems to undermine this. Secondly, that parsimony demands the domain of rights should not be expanded to include an amorphous category of informal jural relations. My response is briefly as follows. First, a practical philosophical concern with rights-in-the-world must include an acceptance that rights can be deployed in the maintenance of relations of dominance/subordination, and in exploitation. Thus the landlord/tenant relation, based upon legal rights, can be a vicious source of material, physical and psychological harm for a tenant who has a precarious tenure of inadequate accommodation at an excessive cost. The same applies to employer/ employee relations founded upon contractual rights typically heavily weighted in favour

[5] This is the third edition of a 1964 reprint of two articles that first appeared in the Yale Law Journal: (1913) 23 Yale Law Journal 16 and (1917) 26 Yale Law Journal 710 (also available at https://digitalcommons.law.yale.edu)

of the employer. Why not then include within the domain of rights a set of informal jural relations that may be vicious in their practical effects? Secondly, we should adopt a non-reductionist view of what rights there are in world (Harel 2005, 202). This allows us to include (for example) legal rights, moral rights, 'natural' rights, human rights, ancient rights, and animal rights. There is no reason why it should not include informal jural relations of entitlement/obligation.

The approach I have outlined above is key to an understanding of the all too apparent failure of formal rights to ensure substantive equality between citizens. My analysis of this inequality will rely on the following:

- a Hohfeldian analysis of the correlative and opposite relations between eight jural positions, focussing in particular on right, no-right, duty, and liberty. This analysis needs to be applied not only to recognised formal rights-relations but also to other social relations that are 'jural' in character. I will apply Hohfeld to both formal and informal relations of entitlement and obligation, and I will consider the interaction between formal and informal entitlements/obligations, and the implications for liberty.
- a contextual, 'situated' philosophy of rights including the social practice and phenomenology of rights-enjoyment in 'space'. For this I draw in particular on Martin Heidegger's phenomenology and Pierre Bourdieu's social practice account of habitus. I also rely on Sara Ahmed's phenomenological account of '(dis)orientation' in social space. My argument is illustrated by six case studies in which I draw on first person testimony and my own observation. This approach distinguishes my analysis from many found in the philosophy of rights more generally. These tend to deal in analyses of form and function that are theoretically detached from the social world and do not address empirical evidence concerning our practical enjoyment (or otherwise) of rights. By contrast, I rely on an analysis of rights that considers the individual's experience of 'space' as explanatory of critical differentials in our respective access to, and enjoyment of, the citizen rights to which we are all equally entitled. When I talk about space, I do not mean to refer to an empty, 'neutral', geometrical, physically bounded, mapped-on-paper, timeless location in the world. This is the idea of space found in Kant, and incorporated into physicalist accounts of negative liberty. By space I mean to describe a dynamic, contested, antagonistic, particular, time-specific, social place. This idea of space makes sense of the silence that greets a stranger walking into a Wild West

saloon (real or metaphorical). It makes sense of how it feels to be the 'wrong' gender in a heavily gendered space, or the 'wrong' body in a White (or Black) space. It explains why women and men make different choices about where (and when) to walk alone. It brings into account the choices made by members of different ethnic groups as they go about their lives, including their choice of clothing, gait, and demeanour. It explains the operation and effects of implicit dress codes that signal to all concerned when the 'wrong' person tries to enter a place from which they are tacitly excluded. And it shows how such choices and effects reflect relative degrees of individual liberty, where liberty is understood as a Hohfeldian position critical to the enjoyment of rights.

Using these two axes of Hohfeldian analysis and a phenomenological/social practice account of jural relations in action in dynamic space, I propound a theory of rights that shows how informal entitlements and obligations necessarily interact with formal rights, and what follows as a consequence.

The Chapters in my thesis are as follows:

Chapter 2— A Situated Account of Rights In this Chapter I defend a 'situated' account of rights. This is an approach to the philosophy of rights that includes a formal Hohfeldian analysis but stands in contrast to the more limited approach typical of analytic philosophy. It includes a genealogical critique of rights, following Foucault (more or less). This approach has several major advantages:

- it gives weight to the history and ideology of rights in order to criticise the Enlightenment 'gloss' characteristic of many philosophical accounts. The proliferation in citizen rights at the beginning of the twentieth century needs to be seen in the context of a long and persistent practice of rationalised exclusion from formal rights affecting socially salient groups in society defined by reference to gender, race, property, religion and other markers of differentials in social status;
- it justifies my focus on the social character of our jural relations. The practical enjoyment of formal rights must be understood in the wider social context, a context that includes the operation of informal jural relations of obligation and entitlement, relations that maintain and reproduce a hierarchy of social status and power in space.

- it allows the use of Hohfeldian concepts to bring informal jural relations under the same analytic umbrella as formal rights and to show how their interaction interferes with liberty, revealing a radical deficiency in the operation of formal rights for citizens.
- it shows that the phenomenology of social practice in space is a necessary part of a situated philosophical account of rights.

Chapter 3—Jural Relations: An Analysis of Form In this Chapter I demonstrate how Hohfeld's conceptual analysis can be applied to all jural relations, which is to say Hohfeld can be used to analyse both formal (legal) and informal jural relations. I focus in particular on two things. The first is the relationality of *liberty* as a jural position correlative to *no-right* and in opposition to *duty*. Applying Hohfeld to the interaction between informal and formal rights, I show how informal duty excludes the liberty needed to partake in the benefit of citizen rights. The second point I bring out is the distinction that Hohfeld (and other jurists) draw between *in personam* and *in rem* rights. While *in personam* rights are (broadly speaking) binding between consenting jural partners, *in rem* rights (for example, property rights) impose duties on an indeterminate number of people. I propose that very many informal jural relations are generally *in rem* in character, catching duty-bound jural partners in the maintenance of a social hierarchy through conformity to social norms and conventions.

Chapter 4—Liberty In this Chapter I develop an argument central to my thesis that liberty is at the heart of our enjoyment of rights. Rather than looking at liberty as 'freedom', whether of the positive or negative variety, I concentrate on liberty as a Hohfeldian position standing in correlation to no-right, and in opposition to duty. Hohfeld argues that the liberty/no-right correlation, and the liberty/duty opposition, are jural relations that are "just as real" as the correlation between right/duty that tends to be the focus of jurisprudence and philosophy (Hohfeld 1978, 48 fn 59). I develop this idea of the relationality of liberty as something distinct from a philosophy of individual freedom. Liberty in its relational character describes that which is allowed under the rule of law. But while liberty is permissive, it is necessarily precarious and contingent. I bring this contingency and precarity to the fore in a case study Going Topless which I use to

illustrate the patterned differentials in liberty affecting members of socially salient groups, patterns that can be mapped onto status differentials in a social hierarchy.

Chapter 5—Rights and Liberty as Social/Spatial Relations In Chapters 2, 3 and 4 I make two related claims, that

- our formal rights play out in a complex web of social/jural relations and
- these relations include many informal jural relations of entitlement and obligation that enhance and/or detract from our enjoyment of formal rights.

In Chapter 5 I introduce my claim that space has a dynamic, structuring effect on our social/jural relations: our access to liberty and the benefit of rights depends on both *who* we are and *where* we are. I engage with Kant's concern with freedom and our interpersonal relations in space. I criticise Kant, and some contemporary rights' theorists, for a failure to take account of the complexity of social space, and the concomitant exclusion from their analyses of empirical observations and anthropological questions about our social relations. I conclude the Chapter by introducing a discussion of 'affect' and space.

Chapter 6: The Sociology and Phenomenology of Rights

This Chapter addresses the question of how informal jural relations work through social practice and the phenomenology of space to entrench a social status hierarchy that reflects differentials in access to the benefits of liberty and rights, including formal citizen rights. I rely on Martin Heidegger, Pierre Bourdieu and Sara Ahmed. Heidegger's account of the phenomenology of *Dasein*—Being-in-the World—emphasises our 'thrownness' into a world we have not chosen. Heidegger describes our relation to the world in terms of either an easeful, successful 'ready-to-hand' engagement or as a disrupted and difficult interface with the world found in 'unreadiness-to-hand', or failure. Bourdieu offers a sociological analysis of an individual's *habitus* and *field* in the social world. Habitus is fixed through the unconscious adoption of social practices that in effect incorporate our 'position' in a social structure. Heidegger and Bourdieu offer an account of the persistence of social differentials and division, and show the importance of our experience of space in the social world. Ahmed's phenomenological account of 'orientation' and 'disorientation' in space in *Queer Phenomenology* (2006) highlights the

contrast between easeful enjoyment of rights and liberty and the unease and disruption felt in deviation from social norms.

Chapter 7: Entitlement and Privilege Pursuing the question how and why it is that members of certain socially salient groups are denied the full benefits of citizen rights, this Chapter approaches the issue by considering the phenomenology of entitlement and privilege. I make three points.

- First, exclusion from the benefit of rights is felt as an experience of injustice. By contrast, easy access to all the benefits of citizen rights is felt as an undifferentiated experience of normality. For those with the requisite deontic status, enjoyment of the entitlements due to a citizen of a democratic liberal state feels simply like getting on with life;
- Secondly, while the phenomenology of entitlement is felt as an undifferentiated liberty do as one chooses, that liberty is built on the back of a relative lack of liberty in others. The feeling of ease some people enjoy in an exclusive environment relies on its exclusionary nature: to be 'in' requires that others are 'out';
- Thirdly, a social hierarchy relies for its maintenance and reproduction on the operation of informal entitlements and obligations all the way down. Those who have relatively low deontic status will still enjoy entitlements within certain domains, while those with higher deontic status may still find themselves at a disadvantage—in the wrong place at the wrong time. The friction between higher and lower status, and our understanding of that friction in terms of access to/exclusion from citizens' rights, reflects not only deontic status but also relative degrees of political and other power, including the symbolic power described by Bourdieu.

Chapter 8: Conclusion My argument about citizen rights and their interaction with informal jural relations does not carry within it any obvious solution to the problem of social hierarchy and exclusion from the benefits of citizen rights. My analysis offers a practical insight into the way citizen rights actually work in a society with a social hierarchy characterised by entrenched privilege and the persistence of patterned exclusion and disadvantage. Understanding this not only gives force to a neo-Roman idea of freedom as independence from the will of some other, it also requires an extension of our understanding of what it means to be 'independent'. This requires a determined focus on

substantive political equality rather than acquiescence in the idea that formal equality is sufficient: Skinner (1998, 79); Halldenius (2022, 219, 231-232). This relies on an idea of liberty as a claim about status rather than a matter of an individual's action or choice (Green 2022, 29).

Finally, I need to say something about terminology. My research is very much focussed on people who are members of one or more socially salient groups within a liberal democratic society. 'Social salience' broadly aligns with the 'protected' characteristics described in the UK Equality Act 2010 section 4. I am conscious of the need to represent members of these groups in ways that are inclusive and appropriate, reflecting so far as possible the way they would wish to describe themselves. Two points in particular concern me. First, in writing about race and ethnicity I want to be as specific as possible and to avoid resorting to broad 'catch all' categories (such as 'Black, Asian and Minority Ethnic'—'BAME'). When I draw on particular examples (as I do in some of my case studies) I aim to describe people as they would describe themselves. When I refer to race or ethnic group, I shall capitalise the names of all ethnic groups, for example 'Black', 'South Asian', 'White'. I acknowledge that appropriate terminology in writing about ethnicity and race is still evolving, and moving fast.

The second concern I have is that when I make claims about the exclusion of members of socially salient groups from the full benefit of citizen rights, most of my examples describe the experience of racism and/or sexism and misogyny. I regret this rather skews the picture, as if members of other groups do not suffer the same or similar effects. The paucity of examples reflects the availability of material in the news media and in the philosophical literature. There is of course much to be said about the experience of people who fall into other socially salient groups, and their under-representation speaks in part to the control of symbolic power described by Bourdieu.

Chapter 2

A Situated Account of Rights

2.1 *Introduction: a situated account of rights*

The political philosophy of rights pays scant regard to our contemporary experience of citizen rights in practice, and there appears to be little inclination to examine whether those rights actually foster the liberal values they are thought to serve—freedom, autonomy, respect, a certain sort of equality—in the context of a democratic political system. This neglect speaks to a tendency to focus on either a 'strictly' analytic approach to rights in political philosophy, or a preoccupation with the 'ideal', or both[6]. But it also reflects a complacency about how and why the world actually is as it is. There is a 'rights-wash' in the history of liberal democratic societies. This history obscures the fact that until relatively recently the majority of the population were deliberately excluded from citizen rights. An important philosophical rationale for that exclusion was founded upon status arguments about personhood and property, and the qualities or attributes required of a person (and a proprietor) as a bearer of rights. These are qualities that were denied in those (such as women and the enslaved) who were historically excluded from any entitlement to certain rights even while their 'natural' human dignity was affirmed. The long shadow of that historical exclusion has effects that persist to this day, notwithstanding a formal extension of rights to all adult citizens. These effects are expressed in a hierarchical society that underpins and reproduces a distribution of patterned and persistent discrimination affecting certain salient social groups.

[6] See for example Mill, J (2015); Kramer, M., N. Simmonds, and H. Steiner (2000); Rawls, J. (1999); Raz, J. (1986); Sandel, M. (1998); Steiner, H. (1994); Hart, H. (1982)

This imperfect enjoyment of formal rights is a problem in particular for deontological or status-based rights theory given that a certain kind of practical rationality in the rights-holder combined with the benefit of a compliant correlative duty-bearer has to be assumed if the theory is going to work in practice (Rawls 1999, 8). I mention the particular problem faced by deontological accounts of rights in this context partly because an instrumental/consequentialist theory can accommodate non-compliance with duty within an overall objective to maximise some 'good'[7]. But I also highlight the problem for deontological theory because its 'status' justification for rights is fundamental to a Western liberal social imaginary, reflecting the idea that rights are not only a natural feature of what it is to be 'human' but also an ineradicable part of our political DNA. This self-understanding draws on an appeal to an Enlightenment inheritance that carries considerable weight not only in contemporary politics and ideology but also within a philosophy of rights.

A situated account of rights opens up the possibility of making sense of our fractured practical experience of citizen rights that are *prima facie* universal and equal in their extension. Such an account involves an approach to theory that acknowledges the actual practice of rights in our modern legal, political, social and cultural institutions, and includes the history and development of that practice. It offers a rich conceptual analysis, an analysis that involves looking at rights as a subset of our wider social relations. Locating rights in social practice recognises that an exclusively conceptual and/or normative account of rights will generally fail to capture the "dynamic interrelatedness between the moral, historical and institutional dimensions of rights" (Ivison 2008, 31)[8]. Reflection on the complexity of the connections Ivison describes enables us to understand our present dysfunctional experience of rights through the lens of a history of rights as an institution in the modern world. It also helps us to unpick an ideology of rights based upon the legacy of a particular kind of moral-status reasoning about rights founded on an ideal of individual freedom, persons and property. Susan James observes that it is not enough to assert the primacy of citizen rights in the teeth of cultural practices that deny women's equality and freedom: we need to address the question "what would it take to

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[7] This only goes so far, as there are consequentialist theorists who rely on a status threshold for rights which are reserved for those who are holders of relevant 'interests' (Singer 1983, 121, 124)

[8] Ivison describes this in terms of 'naturalism' in rights theory

provide an effectively enforceable claim?" (2005, 99). A situated account of rights will make us focus on the precarity of rights-enjoyment in contemporary liberal democracies, and this in turn may help us to answer that question.

A situated account of rights stands in contrast to the more typical 'formal' and 'functional' analyses of rights in political philosophy. These tend to treat 'form' fairly shortly and focus mainly on questions about function. But this is not function in the sense 'how do rights work?' Rather, it is function understood in terms of 'what ends are served by rights?' The answers to this enquiry are varied—from 'justice' to 'freedom', from 'equality' to 'autonomy', from politics in the service of the individual and 'freedom', to politics in the service of communitarian ideals. Nigel Simmonds denies the neatness of the supposed distinction between form and function. Thus he proposes that a political philosophy which privileges individualism and autonomy as part of its content or function is "of a piece" with a formal analysis of law that tends to reflect and reinforce those same individualistic values (2000, 117). Simmonds shows how formal analysis can be corrupted by normative commitments and he argues for analytical jurisprudence as a reflective exercise that concerns our understanding of the actual operation and practice of political and legal institutions in the modern world. This approach carries an implicit acknowledgement that rights as an institution have not sprung fully formed into being in response to the adumbration of some political ideal or principle. Rather, they have emerged piecemeal, and have only with hindsight come to be identified with some supposedly pre-institutional or 'basic' value, such as 'natural dignity', autonomy, or Divine law.

One way to think about the practical experience of rights is to frame at least some forms of interference with rights in terms of wrongful discrimination. Sophia Moreau (2020) says discrimination concerns rights because such a claim includes (but is not limited to) an "appeal to a prior moral right, a legal right, or a special duty" (2020, 2). I have no objection to characterising discrimination in these terms. However, philosophers tend to focus on what constitutes discrimination and fail to consider how an apparent shortcoming in access to the benefit of rights might tell us something about rights. One of the principal motivations for my present research was an initial concern with the inadequacy of anti-discrimination law as an effective response to rights-denying

discrimination (Clarke 2019). I have now come to the view not only that anti-discrimination law is insufficient as an adequate remedy for discrimination, but also that anti-discrimination law expresses a fundamental problem with rights, as I describe in the next paragraph[9].

My argument starts from the normative assertion implicit in the grant of new statutory rights for citizens, as if to say: 'here is a warranty of your entitlement, by right, to a particular benefit'. But this warranty is all too often falsified by practical experience. The benefit is denied in practice. Moreover, attempts to address this problem through the grant of further anti-discrimination rights reserved for those who suffer particular forms of interference with rights (and liberties) in certain domains speaks to an exclusion that calls into question not only the promise of universality but also the nature of 'rights' themselves. This paradox of an additional right-to-enforce-rights (when rights are themselves generally considered to be enforceable *claims*) underpins the need for a nuanced and reflective analysis not only of what rights are, but also of how they operate at large in the world, and why they fail. In the following case study, I illustrate a different approach to our understanding of rights, one that goes beyond questions of form and function and looks at practical experience.

2.2 *Case Study #1 Patricia Williams*

I take this from Patricia Williams' *The Alchemy of Race and Rights* (1991). Williams (1991, 146) describes looking for an apartment in New York after she arrives there to teach law. She compares her experience with that of a colleague, Peter, who is also looking for somewhere to live. Peter hands over a $900 cash deposit to lessors who are strangers to him. He is given no documentary proof of a tenancy, nor a receipt for the money he has paid, nor any keys. He tells Williams he likes to rely on a "handshake and good vibes", and his trust is repaid when later he is let into the apartment and the keys are handed over. He explains that a lease imposes "too much formality". Williams, on the other hand, feels she could never risk taking an informal approach to renting, and she is sure no Manhattan landlord will trust her as a Black woman anyway, regardless of paperwork. Peter tells her that as a White, male professional, he seeks to 'soften' his

[9] See also below Chapter 7 section 5

powerful status by adopting a trusting, informal persona. She, on the other hand, feels she needs to 'play by the book' in order to counter the perception of her Black femaleness as "unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute" (147). Williams goes on to say that in her experience any informality in Black tenant/White landlord relations (such as taking payment in advance in cash) does not speak to a trusting relation between the parties (mirroring Peter's transaction) but quite the contrary—it tells of active distrust. She identifies the point to be drawn from her own and Peter's contrasting experience in these terms:

"[O]ne's sense of empowerment defines one's relation to the law, in terms of trust/distrust, formality/informality, or rights/no-rights" (148).

I shall take each of these pairs in turn—

- *trust/distrust*. I suggest Peter recognises but is in practice hardly aware of the trust reposed in him, even though he probably considers himself worthy of trust, and acknowledges his own social status as a professional White male. Implicitly, he recognises his own empowerment because he wishes to 'soften' it. By contrast, Williams is all too conscious of her relative subordination, her sense of disempowerment. She has to factor in both her race and her gender in her negotiations in the property market. She knows she is not trusted. Peter is able to rely on his status as a trustworthy White male to enable him to forego the formal protection offered by an exchange of signatures, the production of keys, and a receipt for monies paid. Williams, on the other hand, is not given that option, because she, as a Black woman, is simply not trusted.

- *formality/informality*. Williams has to rely on being dealt with on formal terms, if she's given the option of dealing at all, and it is this formality that clothes her in the status of an arm's length partner in a formal jural relationship. Peter has the option to adopt either formality or informality in this transaction, and his decision to rely on a "handshake and good vibes" was something he could decide on for himself, rather than depending on the stipulations of his landlord. In taking the informal route, Peter comes across as 'a good guy' to his landlord: someone 'like me'. Peter is taken to be a jural partner, regardless of formality. Williams has to act the role of a formal lessee,

but this feels like a transient, instrumental move, rather than a recognition of real status.

- *rights/no-rights*. On the face of it, Peter appears to be the one who does not rely on his 'rights' in this scenario. As such, he puts himself at risk of loss if his deposit is stolen and he doesn't get into the new apartment. However, the operation of informality and no-rights between individuals who can afford to take the risk brings benefits to both. On Peter's side, he has improved his social standing in the eyes of the landlord. He has put himself in a position where the landlord may feel inclined to trust him in future. Perhaps (if the need should arise) the landlord will cut Peter some slack on late payment of rent, or respond more speedily to a request for repairs. Peter will be given the benefit of the doubt, should that doubt ever arise. Trust, as much as formal rights, oils the wheels of social/commercial relations between these strangers. For Williams, her awareness of the way she is likely to be judged by any landlord means that she goes to friends, not strangers, for a lease on an apartment in a building they own. And even though they are friends, Williams signs a formal written lease as an "arm's-length transactor". Note Peter has a choice whether or not to take the 'formal' route in his dealings with a landlord. This is what Williams lacks. She has fewer options, fewer choices, less freedom. She feels unable to present herself to the world as someone of value, with her own power, and with "sufficient *rights* to manipulate commerce" (her emphasis) (147). She contrasts her experience with Peter's: he wants to avoid anything that formalises his 'stranger-stranger' commercial relations in a way that might be felt by him as a "commodification" of his person, denying him recognition of his authentic self (148 fn 3). Williams, on the other hand, relies on the strict formality of her transaction because she has to, she has no choice. She says a stranger-stranger relation is preferable to a stranger-chattel relation, by which I think she means to say that her formal rights signify status and establish her as a party to a property transaction, enabling her to be taken as such in negotiation. Without that status, she is assumed to be a lesser being, a chattel, an object, something literally without rights and lacking the requisite capacity to engage on terms of mutual trust and aid.

Superficially, the contrast between Williams' and Peter's different experiences in the housing rental market seems to offer a lesson about the importance of rights in providing a 'level playing field' for people of unequal social standing. Both managed to get the housing they needed, notwithstanding differentials in social status, and the discriminatory attitudes of some landlords. Williams used the formality of rights to ensure she was treated appropriately in the transaction, while Peter could get along without that formality. However, these contrasting accounts do not demonstrate a levelling effect from rights-equality. Rather, they open a window onto a world in which rights for many are not in themselves enough to secure the benefit of the expressive promise: this is yours by right. Peter shows us that he has no need to rely on formal rights at all, while Williams feels constrained by her experience of discrimination to avoid the open market entirely, dealing instead with friends. And even then, still she feels the need to protect herself, and project her own trustworthiness, with a formal contract. A cost/benefit analysis of Williams' experience of rights in this case suggests she extracted the benefit she received at much cost to herself, beyond the monetary consideration she agreed to pay. This is the cost of anticipating trouble ahead, and planning to avoid it; of bringing to mind and reflecting upon a history of rights' denial and discrimination; of recognising in herself someone who others consider to be untrustworthy, (implicitly) not 'like them' and of relatively lesser worth than themselves; of remembering previous occasions when her rights and she herself were not respected. This is the cost of dealing with the cognitive dissonance of finding that 'rights' for her are not sufficient to secure the benefits they promise while others, such as Peter, secure those same benefits without (explicit) recourse to rights at all[10]. Note the Hohfeldian correlative to Peter's no-right is liberty. I return to the critical importance of liberty in the practical enjoyment of rights and the maintenance of status hierarchy in later Chapters.

A situated analysis of rights enables us to make sense of this account of the mundane execution (or not) of formal documents between landlord and tenant, each exercising their rights pursuant to the agreement between them. We need to appreciate that formal jural relations between individuals are just one aspect of their wider social relations. In this thesis I seek to explore the world of rights as seen from Williams' perspective, while also

[10] Peter would be able to rely on an implied contract giving him rights arising from his payment of a deposit/rent and his occupation of the apartment.

noting the experience of those who benefit from informality and no-rights as they pursue their ends. Through this exploration I raise a wider question concerning the 'rightness' of rights: Who do they benefit? What good do they do?

My situated account can be thought of as a genealogical critique, following Foucault (as described by Geuss, 2005). A genealogical critique of rights involves not a rejection but an interrogation of how and why rights have become embedded in our political culture, how they work in the world, what role they play, and how it is that rights have the normative heft that they do. This approach will broaden our understanding of the history and practice of rights. My critique will include consideration of both phenomenology and social practice as part of an analysis of formal and informal jural relations. This will allow us to consider and respond to the "eminently *somatic* reality"[11] (author's emphasis) of rights-privilege and rights-denial as phenomena in the world (Geuss 2005, 146). Critique puts rights, and the contingency of rights, in their historical context, and allows us to question motivations for the extension of formal rights that go beyond a platitudinous embrace of 'equality'. The explanatory force of a socially situated account stems from the way it factors in the social-world conditions under which rights are actually enjoyed, whatever universality and equality may be expressed in analysis of their form and function. It pushes against parsimony and elegance in political philosophy. It challenges 'hypotheticals' and reliance on 'analytical' truth at the expense of testimony from actors in the real world.

In the rest of this Chapter I am first going to look at the role of the 'person' and 'property' in the history of the philosophy of rights. This then leads to an examination of the analytic alternative to my approach in which I consider Hillel Steiner's defence of rights as domains of protected freedom. I conclude by saying something more about ideology and the modern history of rights, followed by a brief conclusion.

2.3 *Persons and Property*

When Hillel Steiner says that all rights are analysable as "essentially property rights" (1994, 93) he makes a claim not only about the nature of rights but also about the

[11] Geuss uses this phrase to justify and describe a genealogical critique of 'sin' as a concept, recognising that sin is *felt* by those who believe in it.

character and properties of the rights-holder (or proprietor, we might say). The person and [his] relation to property is at the heart of an ideology of the individual that persists in modern liberal democracies. It is an ideology that in practice undermines the effectiveness of regimes of universal rights and formal equality. The tenacity of ideas about the attributes and capacities of the person, and their relation to property, needs to be brought into the picture in a situated account of the philosophy of rights, if only to show how these ideas tend to distort analytic accounts of the form and function of rights.

The person needs to be distinguished from the 'natural' man. No-one is a person by nature. In origin, a person was artificial rather than natural inasmuch as persons stood in representative capacities, performing in religious ritual, or drama, or in legal proceedings, and the like (Douzinas 2019, 11). In such cases, they acted not as themselves but as a character or a representative of an office, their status or standing being entirely derived from the role they performed. In this sense, being a 'person' entails the assumption of a role by an individual standing in a representative capacity. This notion of standing provides a bridge between ritual and drama on the one hand, and the law on the other: it catches the basically instrumental fiction of role-play in all of these domains. It also illustrates an ambiguity in the meaning of standing taken in the sense of a simple place-holder as against standing understood in terms of status. Over time, person as a heuristic device has come in both philosophy and jurisprudence to be associated with status in a normative sense, and that status has been transferred to the particular individual behind the mask of personhood. The power of that status is reflected in the notion of passing for or impersonating someone (typically a (White) man) in order to wear the mask of personhood. In jurisprudence and classical Will Theory, a person has a status associated with *will*. Jural rights-relations are relations not between individuals but between persons (Simmonds 2000, 127). In both jurisprudence and philosophy, the notion of personhood takes us beyond the confines of a transactional jural device and carries the idea of a status associated with rights.

It is perhaps unsurprising that wealth, particularly in land, is both a source and a mark of rights and status. Status attaches to social position in a hierarchical society, and that position oftentimes both reflects and enables the accumulation of property, and the rights associated with property (to income, to enclosure and exclusion, to exploitation or sale,

for example). These property-related entitlements are all 'incidents' of ownership that reflect the wide range of options open to rights-holders generally and a property owner in particular: which is to say, they enumerate in formal terms the choices which may be made by those who have the right (and necessarily the *will*) to do so. Here we see the practical manifestation of the relation between personhood and the exercise of a personal autonomy.

As Simmonds describes, in classical jurisprudence in the eighteenth century personhood came to be understood in terms of certain mental faculties necessary for the exercise of the control and choice—the will— characteristic of rights, and property rights in particular (2000, 127). This relation between (property) rights and mental capacity suggests a 'chicken/egg' conundrum about the source of personhood, the basis of (property) rights, and the connection between the two. Two premises:

(1) the requisite capacities for the exercise of rights are those of the autonomous chooser;

(2) the autonomous chooser is a person;

lead to the conclusion that rights-holders are persons, but in two senses of the word. Person has a double meaning. Rights holders are strictly legal persons in an instrumental and formal sense. But they are also persons in a normative (substantive moral) sense: they are autonomous individuals with a capacity to set their own ends and pursue them.

This property/person relation is reflected in Locke (2003) who argues that we have a reflexive personal sovereignty, and in that sense we have a 'property' in ourselves expressed in a fundamental freedom to exercise our personal capacities and abilities, to pursue our own advantage in cooperation with others, and to claim a right in any property taken in hand by us from Nature and improved through our work upon it. He says:

"[…] that though the things of nature are given in common, yet man, by being master of himself, and "proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property;" and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common with others." (*Second Treatise* V. 44)

Locke's 'great foundation' combines two critical elements standing at the heart of liberalism and its idea of freedom, those of the subjective will found in self-mastery and the subjective right found in private property (and in other domains). Locke maintains

that a sufficiency in resources (land) and an effective limit on an individual's ability (and desire) to take more of it than they should, means that title to land is both an obvious and secure *natural* right (V. 51). A contemporary claim in the same vein is found in Nozick (1974, 29, 93).

Locke's analysis has an attractive simplicity. However, a political community will tend to improve on nature, and superimpose conventional rights (and duties) on its members, and this in turn risks conflict affecting individuals in their relation to each other and to the state. Simmonds identifies the debate over rights as originally concerned with a debate about civil authority and political legitimacy (2000, 224). In the eighteenth century, the problem of reconciling the freedom of one individual to engage in a self-masterful exercise of will with the freedom of others to do the same came to dominate a (broadly speaking) Kantian debate about the status of, and justification for, both private and public rights—which is to say, the rights governing commercial and domestic relations between private individuals and the rights of the state to exercise coercive control over its citizens. This debate had many faces and forums, but I suggest a common denominator was a concern about the person and property, and the relation between them[12].

Kant accepts that his Doctrine of Right is descriptive of practical relations between persons in a formal sense only. It is not concerned with the matter in issue between them —their ends—nor the context in which they find themselves acting. Rather, the Doctrine of Right describes a "reciprocal relation of choice" that ensures personal "freedom […] in accordance with universal law" (2018, 6:230). This accords with the longstanding tradition in philosophy and theology of adherence to a philosophy of action/agency that privileges the 'internal act' of the mind/soul—the act of choosing—over the 'external act' with its necessarily spatiotemporal dimensions. This privileging of the internal act of will has its parallels in legal analysis. It is the "motive force of the will" that seems to do all the work in making legal transactions effective (Brett 2016, 47)[13]. Simmonds remarks that this emphasis on persons and their capacities creates a parallel realm of jural relations

[12] Sabbadini (2020, 190-191) argues that understanding Locke as the keystone of contemporary liberalism's focus on the inviolability of property rights as essential to individual liberty fails to do justice to Locke's overriding concern with the *self-ownership* that underpins his natural law theory of rightful property acquisition.

[13] Although some legal effects are only achieved if an (internal) act of will is also combined with an (external) physical act. For example, an effective gift of a chattel requires either an intention to make a gift *and* physical delivery to the donee, or the formal execution of a deed.

that is apparently distinct from social relations. I suggest it also tends to 'wash out' the circumstantial details that would otherwise figure in an account of the social practice expressed in a particular jural relation. Kantian and other classic Will theorists focus on jural relations between persons (describing an individual as the bearer of a 'will') to the virtual or total exclusion of the human social relationship that necessarily underlies any formal jural relation (Simmonds 2000, 127). It seems a search for simplicity in analysis, combined with an exclusive concern with the person and their will, risks denying the diversity of human interests and experience in the world.

Formal rights-equality is undermined by a commitment to the primacy of the person, particularly when combined with deep-rooted beliefs about, and attitudes towards, members of certain salient social groups. These beliefs and attitudes are entangled in the philosophy of rights such that claims to universalism in rights are sabotaged by the persistence of an ideology of the person as a normative 'standard'. Deviation from that standard affects the practical enjoyment of rights. Which is to say, stereotyping and bias about the capacities and properties of individuals lies behind discrimination founded on a divisive social hierarchy seen, for example, in the persistence of gender and race based assumptions about people[14]. The person is philosophy's pale pink, square-jawed, flat chested 'crash test dummy': an adult White male representing the normative standard basic prototype holder-of-rights. This dummy is tested in artificial conditions, and cannot help us to account for the complexity of the social world and its impact on access to the benefits of rights. Its continued use in the philosophical modelling of rights fails to represent the diversity of people, and the conditions in which they live.

2.4 *The analytic alternative?*

I pose my situated account of rights as an alternative to a standard analytic model. But what is that analytic alternative? In this section I am going to comment on the distinction between form/function in the context of the principal (respectively deontological and consequentialist) rival accounts of rights—Will Theory and Interest Theory. I will then conclude this section with a closer look at Hillel Steiner's 'strictly' analytic account of

[14] For an example concerning employment and sport see MacInnes, Paul 2020 "F A Chairman Greg Clarke resigns after 'unacceptable' comments" The Guardian 10 November 2020: available at <https://www.theguardian.com/football/2020/nov/10/fa-chairman-greg-clarke-resigns-after-unacceptable-comments?CMP=share_btn_link> (accessed 27 November 2020)

rights, an account which he maintains offers a formal analysis of rights upon which we can all agree. I should say that I endorse the basic utility of formal analysis in our theories of rights, and favour an uncomplicated adherence to Wesley Hohfeld's conceptual scheme[15].

An exclusively form/function approach to the philosophy of rights avoids a considered backwards-looking reflection on how rights have emerged, developed, and changed over time and circumstance[16]. Instead it tends to rely on the manipulation of a Hohfeldian analysis of form combined with various stipulative assertions based upon presuppositions and beliefs about the individual and their relation to the law. This includes a belief in both the primacy of law as a mediating force in society and the priority of individual rights within the law (Simmonds 2000, 117). This is not to say that there is a general consensus on questions about the form and function of rights. But it does mean that much of the debate over rights in philosophy and jurisprudence is hemmed in by its adherence to principles underpinning liberal individualism. Within these confines the debate over rights is overly reliant on concerns about a particular sort of individual, and how that individual may be best served. The underlying assumption is that the bearer of rights should be understood in terms familiar to liberal individualism as an adult possessed of the capacity to exercise a rational autonomous agency: a person. Thus the debate over rights tends (if you will) to be an expression of circularity in a boot-strapping exercise that privileges a post-Enlightenment Western liberal understanding of the individual person in society, where person is a term of art familiar in analytic philosophy and social context plays a subordinate (if any) role.

In his analysis of fundamental concepts, Hohfeld (1978) defines eight separate jural positions exclusively in terms of their relations of opposition or correlativity. His formal analysis of the relational structure of a 'right' defines it in terms of its correlation to 'duty', and its opposition to 'no-right'. Likewise 'duty' is defined only in terms of its correlation to 'right' and its opposition to 'liberty'. Hohfeld distinguishes all of the eight jural positions he relies on from each other, and only defines them in terms of these

[15] I devote the next Chapter to formal analysis, exploring in particular Hohfeld (1978) and both formal and informal jural relations.

[16] The philosophy of human rights does tend to provide a historical context, although such accounts are not without their own shortcomings as I describe in the next section, below.

simple bi-lateral relations of correlativity or opposition. Leif Wenar describes this as an analysis of rights in terms of simple atoms (Hohfeld's jural positions) that combine as complex molecules (in bi-lateral relations of correlation/opposition) (Wenar 2021, 2.1.6).

Hohfeld developed his conceptual approach as an aid to his analysis of judicial reasoning. To be effective in this regard, his analysis needed to be basic but also sufficiently comprehensive to enable him to apply it indiscriminately across a wide range of legal judgements concerning a multiplicity of legal domains across time and space, from English courts in the sixteenth century, through to the British House of Lords and United States Federal and State courts in the nineteenth and early twentieth centuries. Hohfeld's basic but comprehensive analytic method serves its object well, enabling him to make valid comparisons between judgments concerning rights made in different jurisdictions in contrasting cases. In this endeavour, Hohfeld's formal analysis serves its purpose in identifying 'fundamental concepts'. It is (or should be) characteristic of any formal analysis, including Hohfeld's, that in itself it says nothing about the scope and content of rights, and duties, nor about the characteristics of those entitled to rights, nor about the normative role of rights in jurisprudence (or political philosophy).

I mention Hohfeld's project to draw a contrast between what I consider to be his success in analytic simplicity compared to the relative complexity of formal analyses found in many of the proponents of Will Theory and Interest Theory. Each in their own way focuses mainly on questions of function rather than form: what ends are served by rights? But form is prayed in aid in support of arguments about function. In particular, Will Theory bends Hohfeld's analysis to suit its purposes. For example, H.L.A. Hart as a proponent of Will Theory defines the holder of rights not simply as someone with a claim on some other individual for the performance of a (correlative) duty, but also as an active exerciser of choice and control. Thus for Hart and other Will Theorists a right not only correlates with duty but also entails powers. In a straightforward case the owner of property has a right to exclude unauthorised strangers (trespassers), but in practice she may choose not to exercise that right. It is this controlling aspect of rights—which tends to require the exercise of a Hohfeldian 'power'—that allows Hart to describe the bearer of rights in normative terms as a 'small-scale sovereign' (Hart 1982, 183). Will Theory adopts Hohfeld's syntactical use of jural positions, but demands of necessity that a right

must include powers of enforcement/waiver and not be defined (following Hohfeld) simply in terms of relations of correlative duty/right and opposite right/no-right. I provide a more detailed description of Hohfeld's conceptual analysis in the next Chapter. My concern here is to show how this commitment to powers as essential for rights is an embellishment that lies at the root of Will Theory's insistence that rights are for 'persons'. Only those with the requisite mental capacity to exercise choice and control can benefit from rights. Those who lack that capacity, or who are deemed to do so (like minors who lack legal standing) are excluded from the enjoyment of rights. This is a normative claim that has in effect been 'imported' into formal conceptual analysis[17].

Proponents of Will and Interest Theory use relative complexity in formal analysis in order to make their respective formal accounts 'fit' their normative commitments. It seems to me that formal analysis, properly so called, should stand outside the 'content' of normative dispute. It should provide a conceptual template or framework that defines the parameters of normative debate. The introduction of (implicit) normative claims distorts formal argument. It promotes arguably irrelevant contingencies as conceptually necessary. One reason why this is objectionable in the Western analytic philosophical tradition is that claims to 'analyticity' carry a certain weight, and are treated with a perhaps unmerited respect that inhibits serious reflection on both the method of argument and the conclusions reached. Mixing formal with evaluative claims is like playing with loaded dice: it skews the game. Another reason why this corruption of formal argument is problematic, and the one I am principally concerned with here, is that the normative implications found in much formal analysis in the philosophy of rights is disguised, and its advocates are apparently unaware of the presuppositions they rely on, presuppositions that still shape our understanding of what rights are, and how they serve the typical rights-holder. A situated account of rights, reliant on a basic Hohfeldian formal analysis as a part of a larger whole, would better serve our understanding of what it takes to partake in the benefit of universal and equal citizen rights, and perhaps enable us to overcome the present failures in the enjoyment of such rights.

[17] Interest Theory has its own formal complexity as it effectively unshackles the right/duty correlation in order to accommodate an 'all-things-considered' interest as the foundation for a right: see Raz (1986).

2.5 *Hillel Steiner and Compossible Domains of Freedom*

Hillel Steiner illustrates the problems that can arise from complicated argumentation in the formal analysis of rights, and shows how analysis can be contaminated if constructed on contested normative foundations. He starts from a shared concern, arguing that we need consensus on what we mean by a 'right' because rights concern practical action in the world. Steiner contends his analysis of rights excludes all extraneous circumstantial issues, including empirical and anthropological questions, and our evaluative (moral) commitments, relying on syntactical formalism alone. Steiner argues that strict adherence to a 'univocal' formal definition of rights, one with "logical properties", will prevent the label 'rights' being applied indeterminately, and thus avoid the risk of expansionism in the number of social relations to which that label is applied. He justifies the need for "univocality", which is to say that we should all agree what we mean by a 'right', by appealing to the need for a common conceptual foundation when making normative commitments. Steiner claims he deals in a 'hard currency' of formal analysis, one that he wishes us to accept as the 'gold standard' in our conceptual understanding of liberty and rights (Steiner 2000, 233). He characterises the conclusions of his engagement with formal analysis in terms an account of a right with "sufficiently definite logical properties" (234). He defends his analysis of 'compossible' sets of rights as "more coherent than Hohfeld himself *sought to elaborate*" (my emphasis) (235).

Steiner's formal argument proceeds from a rejection of "ordinary and legal" usage and an appeal to "everyday intuitions" found in "ordinary thinking" (2000, 235, 236). He maintains that this resort to a linguistic 'what do we mean by rights?' intuition, rather than a moral intuition, is intended to promote agreement between us on questions of formal analytics. He tells us we share an intuition that rights are a means to resolve deadlock in disagreement. Thus, he says, rights are needed when "two disagreeing persons' chosen courses of action intersect", rendering their separate intended actions mutually incompatible such that one or the other or both parties' are thwarted in achieving their object (236).

Integral to Steiner's account of rights is his negative, physicalist account of liberty—freedom— which he describes in terms of a chosen pursuit of action within a particular slice of space/time. This account of liberty is not concerned with our psychological states,

nor with our hopes and desires, nor with the particular ends we are pursuing, nor with the effect of offers, threats, norms, expectations, shaming, shunning, respect, disrespect, honour, you name it—it's irrelevant. All that matters in Steiner's account of what it is to be free is an unimpeded opportunity to act on our intentions: freedom is found in the successful execution of an intended action. We are unfree only to the extent our action in space/time is "rendered impossible by the action of another individual" (1975, 33). This is (as Steiner puts it) a description of "non-moralized" or "flat" liberty (2018, 84). We can see from this that if other people intervene to occupy the space we intend to occupy, or take up the tool we intend to use, or constrain our movements in any way (by imprisonment, for example) we suffer a loss of liberty. It makes us unfree. It is from here that Steiner proceeds to define a 'right' in terms of 'vested' liberty[18]. We can follow the link between Steiner's account of negative liberty as freedom from physical restraint in space/time, through conflict over action in personal domains of space/time, and then arrive finally in the resolution of conflict by the erection of impermeable barriers for the mutual protection of all of our 'vested' liberties—which is to say *rights* understood as exclusivity in action in time and space.

Recall Steiner's "everyday intuition" about rights as a means to resolve deadlock in disagreement. He describes deadlock in physical terms: deadlock happens when two "chosen courses of action intersect". In Steiner's lexicon, these are 'incompossible' paths. Reflection on who has a 'right' to continue on their chosen course enables resolution of this dispute. Steiner says rights must be recognised as enforceable claims, compelling compliance with a correlative duty. In this part of Steiner's argument we find common ground with many other accounts of the form of rights, including Hohfeld's, which are expressly adopted (in a modified form) by Steiner. Hohfeld's conceptual analysis defines a right in terms of a correlative duty in some other. Duty is the defining feature of a right for Hohfeld, rather than the action and choice (liberty) of the right-holder, which is the main focus of Steiner's concern. To the extent Steiner endorses a conception of rights as claims, he follows Hohfeld. However, there are no Hohfeldian foundations to the move he then makes from unimpeded action in space/time (liberty) to the protected exercise of liberty in domains of space/time (rights), as I shall now explain.

[18] Steiner does maintain the distinction between 'vested' liberties, protected by (sets of) rights, and 'naked' liberties—such as taking a walk in the park—and this (naked) liberty/right distinction is one I return to further below and in the next Chapter, on the form of rights.

Steiner's initial focus on deadlock in disagreement and its rights-based resolution is simply a 'preliminary intuition' that serves to demonstrate that recourse to 'rights' enables parties to resolve their differences without getting into the substance of their underlying dispute. His formal analysis of rights is concerned not with dispute resolution but with justice. He proposes that rights should be understood as "elementary particles" in our account of justice. Justice for Steiner entails a foundational right to equal freedom for individuals, and his conceptual analysis of rights aims to deliver a theory of rights consistent with this idea of equal freedom. In this he echoes Kant's concept of *Right* as

"the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (2017, 6:230)[19].

Steiner too looks to 'unite' the separate choices of individuals who each have an equal (and separable) share of freedom. To do this he relies on the notion of 'compossibility' in the enjoyment of rights, where rights are defined in terms of *sets* of "serially entailed […] duties and corresponding rights" that taken together produce discrete individual domains of liberty with "guaranteed joint performability" (2000, 270).

Rather than defend this theory of justice on its own (evaluative) terms, Steiner appeals to the language of logical contradiction to support his claim that a working account of rights necessarily entails some form of universal compatibility between rights, and this in turn requires us to understand rights as protected domains of liberty. In making this claim, Steiner relies on analytic argument couched in the formal language of rights, proposing that an appeal to "certain formal features of rights, apart from those bearing on compossibility" (1994, 3) will demonstrate that any account of rights other than compossibility is simply self-contradictory. I take it that Steiner claims he can use basic Hohfeldian analysis to demonstrate the soundness of his argument, without recourse to claims about negative, physicalist liberty and compossibility, and without making claims about the substantive content of rights.

In *An Essay on Rights* (1994), Steiner illustrates his claims about (in)compossibility with a discussion of the problems encountered by a florist who has a contractual obligation to deliver flowers for a wedding. But on the day, the florist can't get to the wedding venue

[19] I consider this further in Chapter 5 section 2

because a demonstration is blocking access to the building. Steiner observes that discharge of the contractual duty to deliver flowers involves the exercise of a 'naked' liberty (using the highway to access the building) which (in these circumstances) is practically impossible short of physically assaulting the demonstrators. If the florist were to drive her van into the crowd of demonstrators this would be contrary to their right not to be assaulted. Steiner argues there is a conflict between the florist's two duties—to deliver flowers and not to assault demonstrators in the process—and this conflict produces a logical contradiction that demonstrates the invalidity of any rights other than those conceived according to principles of compossibility.

Simmonds identifies two difficulties with Steiner's argument (2000, 185 and 1995, 130, 131). The first concerns logical contradiction. The florist owes two separate duties: to deliver flowers; to respect the demonstrators' right not to be assaulted, represented as follows:

X owes duty p to Y and

X owes duty r to Z

There is no logical contradiction between these two separate duties to different parties. This is the case even where discharge of duties *p* and *r* are mutually incompatible (perhaps involving being in more than two places at once, for example). Contradiction is found here:

X owes duty p to Y

it is not the case that X owes duty p to Y.

The contradiction here lies in the action *p* being both permissible and impermissible. This is not what Steiner is describing in his claim about logical contradiction between separate (different) duties owed to different people. However, Steiner goes on to claim that this permissibility/impermissibility conflict is precisely what he relies upon in his 'compossibility' argument (2000, 273). What he is describing is not a logical contradiction but a conflict between liberties, both of which are permissible but not inviolable. This becomes clearer in Simmonds' second objection to Steiner's analysis.

Simmonds' second objection concerns Steiner's reliance on a substantive claim about a demonstrator's right not to be assaulted. In Hohfeld's analysis, liberties (such as attending a demonstration) are simply permissible. Liberties are legitimately subject to interference

so long as that interference is itself permissible (i.e. not contrary to duty). The demonstrators who are impeding the florist are exercising a liberty, not a right. Their actions, and the florist's intended action in delivering flowers, are not analytically comparable as exercises of separate 'rights'. The florist does not owe any duty to the demonstrators *qua* demonstrators. At this point in his argument Steiner introduces the substantive content of the florist's duty not to assault the demonstrators, and proposes that there is a logical contradiction in the coincidence of the florist's separate (contractual) duties to the wedding party organiser and her (common law/statutory) duty not to assault the demonstrators. This apparent conflict in rights is used to 'pump' intuitions about contradiction. But it is not the case that the florist's contractual duty to deliver flowers stand in logical contradiction to the demonstrators liberty to demonstrate (or even their right not to be assaulted). It may (or may not) be the case that in any particular legal jurisdiction the execution of a contractual duty can be lawfully obstructed by the exercise of a liberty[20]. However, this is a statement about the substantive content of law rather than a necessary feature of a standard Hohfeldian analysis of rights. And it may be the case that physical assault is a breach of a person's right to physical integrity. Again, this is a claim about the substantive content of (legal) rights in a particular legal jurisdiction. These are both contingent claims. Despite his declared intention, Steiner clearly does not rely upon an argument founded on "certain *formal features* of rights, apart from those bearing on compossibility" (1994, 3) (my emphasis).

Steiner fails to make an argument about logical contradiction and compossibility as the basis for the elimination of any alternative formal accounts of rights apart from his own. Steiner seeks to distinguish his analytic argument from his own normative commitments to justice as a fundamental right to equal freedom enjoyed in compossible domains supported by a web of duty (2000, 269). However, I consider he not only fails to observe the requirements of 'logic' and formal analysis but also introduces normativity at every stage, starting from his initial reliance on "intuition" and including his commitment to negative liberty and his depiction of conflict over space/time. Thus he fails to make his analytic argument prior to and distinct from his evaluative commitments.

[20] This has been broadly the position in the UK but that has changed to a degree with the enactment of the Police, Crime, Sentencing and Courts Act 2022 c.32.

Steiner's commitment to Will Theory as a functional account of rights is necessarily weighted with arguably normative content. This entanglement between formal and evaluative claims is perhaps not surprising. Simmonds argues that political philosophy is so reliant on its "evaluative interpretative perspective" that analytic jurisprudence can give no more than a very basic formal foundation to its enquiry (Simmonds 1995, 332). I suggest Hohfeld's analysis of fundamental concepts in rights arguably meets and does not overstep this minimal threshold for basic formalism. Simmonds questions whether it is even possible in the domain of rights to make conceptual analysis prior to evaluative inquiry, as Steiner claims to do (Steiner 2000, 300). The problem for Steiner is compounded, as I see it, because he cannot *see* that his evaluative perspective has both dictated and constrained his conceptual analysis. He is not alone in this. There are terms of art deployed in political philosophy and philosophy more generally that stand as non-evaluative conceptual tools but which carry significant normative baggage. I have addressed two of these—persons and property—already. Steiner fails in his intention to deliver an uncontroversial, non-evaluative "logical" analysis of rights and freedom, not only because his formal argument fails but also because he cannot extract his argument from its evaluative, normative foundation. Steiner argues that Will Theory is able to tell us "*how things actually are* in a set of jural relations" (his emphasis) (301) by taking a supposedly non-evaluative approach to the theory of rights. I am sceptical about his success, and it is my object in this thesis to pursue the same enquiry and elucidate 'how things are' in jural relations, while trying to avoid the pitfalls I describe in Steiner's analysis.

Before concluding this section I want to say something about Steiner's claimed allegiance to Hohfeld, and the role of liberty in Steiner's account of rights. I discuss Hohfeld and the form of rights in the next Chapter, but this point is relevant to Steiner's substantive argument and its intrusion (as I see it) into his formal analysis. There is no necessary relation of correlativity between rights and liberties in Hohfeld. Rights are simply defined by their correlation with duty. As I have shown, liberty/freedom is Steiner's point of departure in his discussion of rights, and equal freedom is the cornerstone of his idea of justice. Steiner promotes the individual in action in space as the basic expression of liberty, and rights as protected domains of liberty. In taking this approach Steiner tends to ignore the essential relationality of rights, which always entail observance of duty by

another. While a passive duty of non-interference seems to be consistent with this approach, it ignores duty as an active obligation to benefit or support a right, and fails to mention the mutual right/duty balance typical of contractual obligations, and other rights. This stands in contrast to, for example, Onora O'Neill (1996) (2002) who emphasises the essential role of duty in her account of rights. This is not to suggest that Steiner excludes the complexity of duty, which he recognises as more than simple non-interference. But it is to say that he discounts its importance in favour of the priority he gives to individuals, their freedom, and the choices they make.

In the next section I aim to put my discussion of 'persons', 'property' and 'freedom', and the rights associated with them, into a philosophical and historical context.

2.6. *Ideology and Rights in Modernity*

Citizens' rights in Western liberal democracies could be taken to express the universalisation of the status of citizens as 'persons'. On this account, Kant's ideal moral egalitarianism is expressed through a recognition of equal status in each citizen as they are accorded the respect due to them as a *person* and enjoy an appropriate degree of self-respect for their own dignity (*Metaphysics of Morals* 6:435)[21]. The persistence of an ideology of 'success' in liberal rights' regimes supposedly founded upon ideals traced back to the Enlightenment would seem to support this view, but the practical failure of this exemplar of ideal theory (and many others) is simply illustrative of a problem, as I see it, with wishful thinking about the enjoyment of rights in contemporary society.

The 1789 French Revolutionary *Déclaration des Droit de l'Homme et du Citoyen* (*'Déclaration'*) is popularly considered the foundation of today's liberal rights, including human rights. James Griffin is one among many who share an eagerness to find a neat connection with, or even progression from, the Enlightenment to the present day in our understanding of 'natural' and 'human' rights, describing a "historical notion" of human rights in the following terms:

[21] I note this ideal account of personhood utterly fails to reflect Kant's own commitment to White racial supremacy in a racial hierarchy, and his characterisation of women as 'naturally' inferior to men, rightly subject to the control of their husbands, and capable of enjoying only passive citizenship.

"The secularized notion [of human rights[22]] that we were left with at the end of the Enlightenment is still our notion today. Its intension has not changed since then: *a right that we have simply in virtue of being human*" (2008, 1) (emphasis in original).

It seems self-evident (on its face) that the *Déclaration* actually stands as a statement of division between the natural 'man' and the political 'citizen'. Apart from the title's description of two separate types of rights, Articles 6 and 14 of the *Déclaration* explicitly define citizens' rights in terms that are separate from the rights of man: while all citizens are human, not all humans are citizens. Be that as it may, Griffin is by no means alone in this field in his assertion of a universal embrace of 'human rights' for all following the *Déclaration*. Etienne Balibar (2014) actually takes the *liberté* and *fraternité* of the *Déclaration* with its proclamation of two sets of rights (of 'man' and of 'the citizen') not as a disjunction but as a single declaration of the rights of man/citizen. Hence his adoption of the portmanteau concept of *Équaliberté* by which the 'rights of man' (a set of basic, 'natural', pre-political rights to which we are all equally entitled) and the 'rights of the citizen' (conventional political rights concerned with the community, the state, and liberty under a sovereign government) are assimilated with each other (2014, 46). Balibar argues that the 1789 *Déclaration* represents a 'first modernity' that did not itself produce any consensus on the universality of rights nor the interdependence of equality and liberty. But he describes how a second modernity following capitalist industrialisation and the bourgeois revolutions of the nineteenth century made the proposition of Equaliberty somehow undeniable. Equaliberty, he suggests, came to be indissolubly associated with claims for social justice and the extension of citizenship to all:

"The man of the *Déclaration* is not the private individual as opposed to the citizen, who would be the member of the state. He is precisely the citizen […]." (2014, 46)

Balibar acknowledges this reading is contentious, and that it flies in the face of a tradition that interprets the *Déclaration* as expressing distinct rights of man ("universal, inalienable, subsisting independently of any social institution, thus virtual, etc") and separate rights of the citizen ("positive, instituted, restrictive but effective"), and which sees the former (natural rights) as the foundation for the latter, citizen rights (2014, 44).

[22] Griffin translates *les droits de l'homme* from the *Déclaration des Droits de l'Homme et du Citoyen* as "human rights" rather than 'rights of man'

Balibar says that this marriage of equality and liberty is a "self-evident truth", echoing the American Declaration of Independence[23].

It seems on Griffin's and Balibar's (quite different) philosophical accounts, an Enlightenment notion of natural rights sowed the seed of a universalism in rights that was all encompassing in both extension and intension, such that equal civil and political (citizen) rights must surely follow. However, the idea that universal human/citizen rights are a direct product of eighteenth century Enlightenment thinking does not bear close analysis. It is flatly contradicted by Peter de Bolla, drawing on data from digital searches of archives of eighteenth century manuscripts:

"[A]ny claim for the ubiquity, solid formation, acceptance, or even wide spread understanding of the concept of universal equal human rights by the end of the eighteenth century must be wrong." (2013, 273)

Further, and very much to the point, the revolutionary imposition of a new political regime in France, albeit one founded on an appeal to universal natural rights, and a disavowal of absolutism, had at its heart notions of status, hierarchy, and privilege based upon property, gender and other ways of dividing people. In other words, the normative status of the legal and philosophical *person* was undisturbed, and its limited distribution was reaffirmed. This is not to deny the Revolution was a rejection of the *ancien régime.* But the opportunity to universalise political rights during and after the Revolution was deliberately rejected. This concerned men too, but their claims were at least admitted in principle under the terms of the 1793 *Constitution*. Women, who had enjoyed no political rights prior to the Revolution, and who were at best 'passive' citizens under the terms of the *Déclaration*, were excluded from political rights[24] after the Revolution notwithstanding express consideration of their claims, following Olympe de Gouges' *Déclaration des Droits de la Femme et de la Citoyenne* (1791). The adoption of the revolutionary *Déclaration* actually provided an opportunity for the rationalisation of difference as the basis for exclusion from political and other rights' enjoyment. Women actively supported the French Revolution and argued for inclusion as citizens in the first French Republic, but this was refused. Olympe de Gouges was guillotined in 1793. In

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[23] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"

[24] 'Passivity' is fatal to an entitlement to rights because it signifies a lack of the autonomy and capacity for action required of a 'person'. Others also excluded from citizen rights under the *Déclaration* included men who could not pay the poll tax, children, domestic servants, rural day-labourers and slaves, Jews, actors and hangmen.

post-revolutionary America, women who in some states had been able to vote before the revolution were explicitly excluded from the franchise as new constitutions took effect[25]. In the UK, the Great Reform Act[26], regarded as a critical initial step in a process of reform that led to universal adult suffrage in the UK in the twentieth century, included for the first time an explicit provision defining voters as 'male persons', thereby excluding women entirely from the Parliamentary franchise[27].

This exclusion, I suggest, reflects a social order that is evident on the face of the 1789 *Déclaration* with its appeal to a foundation in natural law and natural rights. Its authors describe its terms as based upon "simple and incontestable principles" including the principle that, "Men are born and remain free and equal in rights" and "Social distinctions may be founded only on the general good" (Article 1). Women (and others) were included within the scope of the natural 'rights of man'. But of what use were these rights of "liberty, property, security, and resistance to oppression" (*Déclaration* Article 2) in a social order that rejected women as citizens and made the normative claim that social distinctions are founded on "the general good"?

T. H. Marshall shares Griffin's and Balibar's conclusions about an almost teleological expansion in rights in modernity, but from a different perspective. In his seminal *Citizenship and Social Class* (1950) Marshall describes the progressive introduction of civil and other rights since the seventeenth century as a public and political acknowledgement of equality and universality in status. As he puts it, these institutional reforms represented a broadening of access to the "stuff of which status is made" (1950, 29). His analysis of citizenship rights and social class is framed in terms of sociology rather than political theory. Notwithstanding his concern with class, his account sits well with an ideology of rights in our contemporary society. He identifies rights with the extension of citizenship status in what came to be a liberal democratic state in the UK. I take issue with Marshall on two counts. First, he pays insufficient attention to detail, particularly detail concerning those who are excluded from rights. In the course of his

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[25] History of American Women *Women's Rights after the American Revolution* <http://www.womenhistoryblog.com/2013/06/womens-rights-after-american-revolution.html> accessed 20/5/19

[26] Representation of the People Act 1832 2 & 3 Will. 4 c.45

[27] UK Parliament 2023 *The Reform Act 1832* <https://www.parliament.uk/about/living-heritage/evolutionofparliament/houseofcommons/reformacts/overview/reformact1832/> accessed 1/11/2022

(critical) analysis, Marshall makes inaccurate and sweeping statements about the history of rights in the UK. For example, commenting on the effect of the 1918 Representation of the People Act[28], he says:

"No sane and law abiding citizen was debarred by personal status from acquiring and recording the vote" (1950, 19)

This description fails to acknowledge the different treatment of men and women. If the point is that status *as a person* was extended to all, that subtlety fails to acknowledge the differentials in age (30 for women, 21 for men) and the fact that women were still subject to a property qualification for enfranchisement, while men were not. The older age qualification for women, and the property qualification, are infantilising and represent an implicit denial of women's status as *persons* for as long as they fail to qualify. Universal adult suffrage was introduced in 1928, not 1918. Marshall's quick gloss on the history of rights is illustrated in the following:

"The story of civil rights in their formative period is one of the gradual addition of new rights to a status that already existed and was held to appertain to all adult members of the community—or perhaps one should say to all male members, since the status of women, or at least of married women, was in some important respects peculiar. The democratic, or universal, character of the status arose naturally from the fact that it was essentially the status of freedom, and in seventeenth century England all men were free." (1950, 18)

He characterises an exclusionary regime as "universal". And it was not just married women who were denied civil freedom. So too, for example, were Roman Catholics and Jews[29]. In another instance of 'unfreedom', women generally had no right of entry to the professions and universities until the enactment of the Sex Disqualification (Removal) Act 1919[30]. Consider also the UK's colonial history and the introduction of controls on immigration after the Second World War. A new (inclusive) citizenship status for Commonwealth citizens was created in the British Nationality Act 1948[31] but thereafter immigration controls progressively curtailed those rights on an essentially racialised basis[32]. This history of a progressive restriction in citizenship is at the root of the 'hostile environment' that denied particularly Black British citizens their rights to work, housing,

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[28] 1918 7 & 8 George 5 c. 64

[29] The Catholic Emancipation Act 1829 10 Geo. 4 c.7 and the Jews Relief Act 1858 c. 49 removed formal barriers to Catholic and Jewish persons taking seats in Parliament if otherwise entitled to do so.

[30] Sex Disqualification (Removal) Act 9 & 10 Geo. 5 c. 71

[31] British Nationality Act 1948 c. 56

[32] Williams, Wendy (2018) *Windrush Lessons Learned Review* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf> provides a comprehensive account of this legislation and its effects, culminating in the Windrush Scandal (accessed November 2020)

banking facilities, NHS services, student tuition fee loans, and more in the Windrush Scandal[33]. The principle of exclusion remains operative in practice up to the present, where a political and social hierarchy reflects ideas about gendered, racialised, and other 'difference', notwithstanding the extension of universal citizen rights.

My second concern with Marshall is his assumption that a grant of formal rights expresses a recognition of social 'status' equality. He is not alone in this. Axel Honneth and Martin Hartmann argue that the expansion of subjective legal rights, including ani-discrimination rights, in social democratic polities in the mid-twentieth century stands as an expression of moral progress through a mutuality of recognition (2012, 170-172). Not only do Honneth and Hartmann seem to take the social democratic expansion in citizen rights at face value, Honneth claims the grant of legal rights gives force to a moral idea of a rational agreement between subjects to obey the law (1995, 117). Which is to say, in effect, there was *in practice* a general recognition-theoretic acceptance of universal status equality between citizens. I am doubtful of this, even on its own terms. Surely the need to include anti-discrimination rights for the benefit of salient social groups in this expansion in rights undermines Honneth's appeal to a 'rational agreement' to obey the law?

It is not simply that Marshall, Honneth and Hartmann are mistaken. It is that there is a popular narrative about 'freedom' and 'rights' characteristic of a contemporary liberal democratic ideology that serves to distort our understanding of both the history and the present day practice of rights. That history is as much a history of rationalised exclusion from rights as it is a history of the universal and equal extension of rights. It is particularly important to bring this historic exclusion from rights into the picture because (as I shall argue) its downstream consequences include the continuing practice of rights-diminishment and denial today, even where formal rights are in place. This history is at the centre of the situated and reflective conceptual approach to the analysis of rights that I adopt in this thesis.

Balibar acknowledges that the 'equaliberty' of citizenship is still associated with "old exclusions". Indeed, he observes the rise of "new principles of exclusion […] more

[33] See the Wendy Williams (2018) (fn 30 above) for an account.

deeply rooted in anthropological essentialism than the earlier ones" (2014, 106). Balibar notes it make no difference how a universalism in status may be characterised, its "principle of inclusion" necessarily carries within it the "possibility of exclusion" (108). Whereas citizenship (including its associated rights) might in the past have been denied to "strangers", exclusion

"is now directed at individuals or groups who are perceived or declared strangers to the norm of humanity or its complete realization: women, children, criminals, the mad, representatives of 'inferior races,' etc." (109)

Balibar considers three possible explanations for the paradox of exclusion of these individuals and groups from a supposedly "universal" right to citizenship. The first of these is the 'dog-in-the-manger' refusal of those who seek to maintain their exclusive status—a dialectical struggle between the defenders of the *status quo* and those seeking its upheaval. Balibar identifies the second explanation for exclusion in Geneviève Fraisse's argument that 'public reason' dictates that women and other excluded groups have a "differential access to public reason and to rationality itself" (Fraisse 1994, 109). This reflects the longstanding and persistent influence of (pseudo-)Darwinian, evolutionary claims about gendered and racialised markers of 'difference' coming up against the ideal of the rational 'person'. These views are entrenched, Balibar suggests, by a process of 'naturalisation' that has institutionalised our collective understanding of the capacities (the 'nature') of those who are excluded. Balibar puts 'children' forward by way of example here (2014, 110), and I think it is telling that the differential status of children in many domains, including rights, is still accepted by many as quite unremarkable and 'natural', albeit not without some equivocation.

Balibar observes that the "conditions" relied upon to justify exclusion from an otherwise 'universal' status spring from a deep anthropology of division, the source of differentiation between the 'normal' and the deviant or abnormal in humanity. Note the 'exclusion' I am concerned with here is the informal, practical denial of what are formal 'universal' entitlements, rather than the explicit denial of citizen rights to non-subjects. This is exclusion expressed through a social practice of division and a two-faced ideology of universality and 'difference'. I am not entirely wedded to the ineffability of Balibar's idea of a 'deep' anthropology (2014, 110). However, I do agree that all of the explanations for exclusion from rights offered by Balibar—from a 'public reason' that dictates who is capable of rationality, to differentials in power relations, to a

'naturalisation' of difference—are at work in undermining the enjoyment of rights by those who fall within the purview of practical exclusion. I take up some of these ideas in Chapter 6 in which I introduce Pierre Bourdieu's account of habitus and social practice. My object is to offer a way to understand this exclusion from universal, equal rights within a 'situated' analysis that locates formal rights in the wider context of social/jural relations more generally[34].

2.7 *Conclusion*

In this Chapter I have defended a socially situated account of rights in philosophy. I have argued that the standard treatment of form and function in rights theory does not offer the resources needed to account for the practical failure of rights for citizens who are members of particular socially salient groups. My criticism of the form/function approach can be broadly summarised in terms of both ideology and analysis. There is failure to recognise that formal analysis can be skewed by its proponents' normative commitments. Formal analysis often relies on (and reproduces) certain normative assumptions about the person and liberty. Both Will theorists and Interest theorists can be criticised for their use of formal analyses "framed to favour their commitments in normative theory": conceptual analysis in itself cannot be relied on for the resolution of normative disputes (Wenar 2005, 224).

It is a complex question why and how people are denied a full enjoyment of the citizen rights to which they are entitled. The answers are bound up with principles and processes of division and exclusion that have a long philosophical and ideological history, right up to the present. Simmonds proposes that we should try to find a formal analysis of rights that reflects our practices in a way that "fosters [the] objectives that we take those practices to serve" (2000, 122). What this means, I suggest, is that we need a formal analysis of rights and liberty that not only reflects the values and interests of the political community but which also is not falsified by reflection upon our actual experience of rights and liberty in the world. We need to steer a course in our analysis of rights and liberty that never loses sight of the social relations that underly the formal jural relations we are describing. These social relations are a necessary condition for jural relations.

[34] In Chapter 6 I appeal to Martin Heidegger's phenomenology and Pierre Bourdieu's analysis of social practice as I discuss the reproduction of the hierarchical social structure that underpins differentials in the enjoyment of rights today.

Jural relations simply describe conventional social relations, not some metaphysical parallel world peopled by ‘persons’. In the next Chapter I address the form of rights, applying Hohfeld’s “legal conception” to a range of jural relations, from ‘formal’ citizens’ rights to informal entitlements and obligations.

Chapter 3

An Analysis of Form

3.1 *Introduction*

The distinction between 'formal' and 'informal' jural relations is at the heart of my argument in this thesis. I use 'formal' in this context to describe the legal rights of citizens that are (generally speaking) codified in statute and case law. Against these, I posit a set of 'informal', more amorphous and often contentious[35] relations of entitlement and obligation between individuals in the social world. I argue that these relations, just like relations founded on statute and case law, are properly analysable in terms of Hohfeld's domain-specific jural positions. I will describe these as 'informal jural relations'. Both formal (legal) rights and informal jural relations are instances of social relations between individuals. I stress these are all jural relations in that they concern primary relations of right/duty or entitlement/obligation, and they implicate the further ancillary relations necessary for the maintenance and enforcement of those primary relations.

This Chapter shares a good deal with a perhaps more 'conventional' account of rights found in philosophy and jurisprudence. In common with many others[36] I adopt W. N.

[35] This contention may concern whether such relations actually exist, on what (social or other) basis they are founded, whether they are 'patterned', and their effects. I consider this further in Chapter 6 'The Sociology and Phenomenology of Rights'

[36] See for example Kramer, Simmonds, Steiner (2000); Wenar (2005) and (2021)

Hohfeld's *Fundamental Conceptual Analysis Applied in Judicial Reasoning* (1978). My approach to the analysis of rights differs from many others in two key respects. First, as I have already indicated, I extend Hohfeld's analysis beyond formal (legal) rights and apply it to *informal* jural relations. Secondly, I emphasise two aspects of jural relations that are perhaps relatively neglected by other philosophical treatments of rights. The first is that I pay particular attention to 'liberty' as a jural relation (and I develop this further in the next Chapter). The second is that I emphasise the distinction between rights *in personam* and rights *in rem.* These two aspects of my analysis are relevant in particular to my argument concerning the way informal jural relations work, and the interface and tension between informal jural relations and citizens' formal rights.

This extension of Hohfeld to informal jural relations is a critical move for me. I use it to show how relations of entitlement and obligation underpin a social hierarchy that disrupts access to the full benefit of citizen rights. This in particular affects certain socially salient groups (typically those identified by reference to 'protected characteristics' in Equality Act 2010 section 4), but also affects those occupying the 'lower' strata of a social hierarchy based on class. Formal jural relations are straightforwardly distinguishable from informal jural relations, if only because formal (legal) relations are (by and large) readily ascertainable and recognised for what they are. This means they can be mapped onto Hohfeld's analytic scheme without any question whether we are actually dealing with questions of right and duty. The field of informal jural relations, by contrast, is relatively novel and open to question. While I argue that informal and formal jural relations are equally susceptible to a Hohfeldian analysis, I accept that my argument for the existence and relevance of informal jural relations stands in need of justification and proof.

Our interpersonal interaction in the social world can be analysed in terms of a broad range of basically jural relations (including but not confined to strictly legal relations). These jural relations are founded on the law but also on social convention and other norms of interpersonal behaviour. I was prompted to take Hohfeld's analysis and apply it to social relations by Johan Brännmark, who adopts both "informal jural relations" and "deontic status" to describe differentials in the burden of entitlement/obligation affecting individuals in the social world (2018; 2019; 2021). Deontic status describes an individual's relative burden of jural obligation vs. entitlement within different domains.

Informal jural relations may be characterised in terms of morality, etiquette, faith, religious observance, social 'norms' and similar rationales or explanations. At the heart of my research is a concern with embedded, patterned and persistent informal jural relations of entitlement and correlative obligation standing outside formal rights. For now, I am going to describe how Hohfeld's analysis can be extrapolated and extended beyond the field of formal rights/duties to provide a common framework for the analysis of interpersonal jural relations of right/duty or entitlement/obligation, including those social relations that are commonly characterised as oppressive or otherwise vicious instances of the enforcement and reproduction of asymmetries in power. In subsequent Chapters I make my argument for informal jural relations using further case studies as instances of informal jural relations in action. In Chapter 6 I consider the spatial, phenomenological and sociological aspect of jural relations and deontic status, relying on Heidegger and Bourdieu. In doing so, I appeal to the experiential and spatial dimensions of entitlement and obligation, and the critical role of liberty. I aim to show that barriers to the successful enjoyment of citizen rights are grounded in a burden of informal obligation expressed in diminished deontic status that affects how individuals feel in social space and impacts their exercise of liberty.

This practical and theoretical analysis will enable me to develop two arguments. The first concerns the interaction between formal legal rights and informal jural relations. I contend that the weight of a legal entitlement can be powerfully reinforced or radically undermined by the operation of parallel informal jural relations: informal 'entitlement' will promote enjoyment of a formal right for some, while the lack of any analogous or complementary informal entitlement may well undermine enjoyment of a formal right for others. This is manifest to varying degrees across a spectrum that reflects differentials in social status across diverse domains. I take up and dig into this argument in the Chapter 5, 'Rights and Liberties in Space'. The second argument I want to develop concerns liberty, its interface with rights, and its role in the effective enjoyment of rights. I develop this argument in the next Chapter, where I expand on Hohfeld's account of liberty and the rule of law. These arguments will help me to provide an analysis of the interaction between legal rights and informal jural relations as one explanation for substantial differentials in access to the full benefit of citizens' formal civil, social and political rights.

3.2 *Hohfeld's basic scheme*

3.2.1 *Jural Positions and Relations*

This table shows the relation between eight separate jural "positions" described by Hohfeld (1978, 36):

(a) *Jural Correlatives*

Right	Liberty	Power	Immunity
Duty	No-Right	Liability	Disability

(b) *Jural Opposites*

Right	Liberty	Power	Immunity
No-Right	Duty	Disability	Liability

Relations of correlativity are relations of entailment. In the table of jural correlatives above *(a)*, the jural positions in the vertical columns each entail the other. The relations of opposition (*(b)* above) between Hohfeld's eight jural positions are better understood in terms of contradiction in that they "exhaust the relevant field" in their "universe of discourse": *X* has either a right or a no-right, and there is no intermediate or other position (Glanville Williams 1956, 1135).

I have used 'liberty' in this table rather than 'privilege' which is the term favoured by Hohfeld (1978, 36). Kramer favours 'liberty' (2000, 8). The liberty/no-right correlation (the second column), means where an individual has no-right she cannot appeal to duty to stop the exercise of another's liberty; where she has a liberty, no-one can appeal to a right to stop her exercising her liberty (1978,39). The principal jural relations are the correlation of right/duty and liberty/no-right, and the opposition of right/no-right and liberty/duty. Maintaining and understanding the distinction between rights and liberties, and the necessary role of duty whether in correlation or opposition, will enable us to get a clearer picture of how rights work in practice.

3.2.2 *Secondary Jural Positions and Relations*

In addition to right, no-right, duty and liberty, Hohfeld offers an account of secondary jural positions and their relations to each in order to distinguish them from rights and

liberties. These are powers, liabilities, disabilities and immunities. Hohfeld treats each of the separate jural positions and their correlative/opposite relations as freestanding and lacking internal complexity. Simmonds (2013, 289) describes Hohfeldian relations in terms of simple 'hard' atoms rather than complex 'soft' molecules. Thus a right simply entails a duty, and the opposite of a right is simply a no-right. By contrast, Kantian theories of rights concerned with exclusive domains of individual freedom, such as Steiner's, offer an internally complex 'molecular' theory of rights drawing on a number of jural positions—both primary and secondary—including liberties, powers, duties and inviolabilities (described by Hohfeld as 'immunities'). This complexity is needed in Will Theory because of its emphasis on powers of waiver and enforcement as defining features of rights, and its reliance on a right-holder's active 'control' of third party duty. In Hohfeld's analysis, a right-holder may also (but will not necessarily) hold other legal interests, such as a power or an immunity, each with their own separate entailments and oppositions. 'Powers' enable enforcement of claims, while immunities offer protection against claims. Whereas Will Theory defines powers and immunities as necessary attributes of rights, Hohfeld maintains that powers and immunities are separate positions that stand as 'second order' jural relations to the 'first order' jural relations of right/duty and liberty/no-right.

Although Hohfeld does not himself use the description, these second order jural positions can be understood as 'incidents' of rights in his scheme of jural relations (Wenar 2021, para 2.1). Powers, immunities, liabilities and disabilities are jural positions incidental to rights in the sense that they are related but subordinate to the exercise and enjoyment of rights. The nature of this relationship between Hohfeldian incidents and rights can be explained by comparing them to so-called 'incidents of office'. So, for example, there is a subordinate relationship between the substantive award of a university degree or the appointment of someone as a police constable, and the 'incidents of office' associated with an academic degree or being appointed a police constable. Wearing particular academic robes and styling oneself with a suffix or title (say, Bachelor of Arts or Doctor of Philosophy) are 'incidents' of an academic degree. Wearing a uniform, carrying certain tools of the trade (handcuffs, truncheon etc.) and exercising certain powers (of arrest or detention or search) are incidents of the office of police constable. In both cases, the incidents are entirely derived from the underlying academic degree or appointment. They

give practical force to the award of a degree or the appointment of a police constable. They also stand as a public expression of the status conferred on the individual degree-holder or police constable. Their incidental status means they are not available piecemeal and separately: there is no 'entitlement' to use academic titles, or a constable's powers of arrest, except in the context of an associated award or appointment. They are not in themselves 'rights' to be enjoyed independently—and of course they are not rights as Hohfeld defines a right, because they entail no correlative duty. The scope and content of these subordinate Hohfeldian relations is entirely dependent on the scope and content of the related right/duty.

This 'incidental' understanding of the secondary jural positions associated with rights supports the analysis of rights as claims that I share with Hohfeld. In what immediately follows, I describe incidents in strictly Hohfeldian terms as ancillary (but not essential) to legal rights/duties.

> *Powers* A power is the ability to effect a change in legal relations. The person whose "volitional control is paramount" in bringing about a change in legal relations is said to have a legal power (Hohfeld 1978, 50). A power is one's affirmative "control" over a given legal relation as against another. Powers are typically (but not necessarily) associated with the enforcement of rights.
>
> *Liabilities* The jural correlative of a power is a liability (and liability is the jural opposite of immunity). A liability tends to arise following the exercise of a power leading to a change in legal relations. The exercise of a power by *X* entails the creation of a liability in *Y*.
>
> *Immunities* Immunities stand to powers in the same relation as liberties do to rights. Liberty describes an absence of duty, a freedom from obligation. Immunity is an individual's freedom from another's power to change legal relations.
>
> *Disabilities* Disability describes a lack of power and a vulnerability to a change in jural relations.

Hohfeldian incidents are concerned with both the obligation of duty owed on account of a right, and with the subject matter of the right itself. So, a property right-holder's immunity from adverse claims in respect of her property expresses her status as a rights-holder, but it says more than "I am immune to your adverse claim against this land". It also (implicitly) says why that is so: "I have a right to this land, and you stand in a relation of obligation to me: you have a duty not to interfere with my enjoyment of this property, and you are disabled from bringing an adverse claim against me." Perhaps even more pertinently, jural incidents give practical force to that relation of obligation. They put powers of enforcement into the hands of rights-holders.

3.3 *Rights in personam and Rights in rem*

Hohfeld's formal analysis of rights is an account of bi-lateral domain specific jural relations. I am going to say a bit more about this further below. But first I need to highlight and explain the difference between rights *in personam* and rights *in rem* (see generally Clarke 2019 para 2.1.4). I raise this distinction between the *in rem* and the *in personam* character of different kinds of rights because I consider it points to a substantive question concerning both formal and informal jural relations, and how they work in practice. Just as legal rights are either *in personam* or *in rem,* so too are our informal jural relations. I do not claim that all informal jural relations are *in rem* in character. However, my focus in this thesis is on patterned and pervasive informal jural relations that are binding on members of salient groups. As such, these informal relations are necessarily *in rem* in character, as I explain further in what follows.

In personam rights typically concern particular individuals as parties to legal agreements. A private contract between a builder and a developer will concern a specific domain of activity and this will be apparent on the face of the contract, as will the identity of the parties to that contract. The rights of a consumer of goods and services are rights *in personam.* The scope of such a right and its correlative duty is limited to the particular parties to the contract, who will be bound to the terms agreed between them. By contrast, rights *in rem* have a 'general' character: correlative duties are binding on an indefinite

number of persons. The paradigm *in rem* right is a right to property[37]. Hohfeld acknowledges this as he describes a common misunderstanding about the meaning and scope of *in rem* claims, which have often been taken to refer exclusively to rights concerning 'things' (Hohfeld 1978, 71)[38]. Hohfeld defines an *in rem* right as

"always *one* of a large class of *fundamentally similar* yet separate rights, actual or potential, residing in a *single* person (or a single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people." (1978, 72) (emphasis in original)

Briefly, this means that an individual with an *in rem* right is owed a correlative duty by an indeterminate number of other individuals. In practice, *in rem* legal claims very often do concern 'property' or 'things'—land or chattels. Nevertheless, the defining characteristics of an *in rem* right are not the subject matter of the right but its general character and its indeterminate number of correlative duty-bearers. Thus the imperative duty not to interfere with someone's property, not to trespass upon it, not to steal it, reflects the owner's *in rem* rights against an indeterminate number of people: 'the world' (more or less) is barred from trespass and all other relevant interference with the owner's peaceful enjoyment of her property. But note, the correlative duty only comes into play in relation to a domain defined by the object of the right (the property) and the subject (the particular trespasser/interferer) against whom a claim can be made. So *in rem* rights are still domain specific and bi-lateral. Another instance of an *in rem* right is the right against trespass to the person, against assault. The domain is our own person in a particular space, and the parties are ourselves and our would-be or actual assailant(s). Once we are in the specific domain of an actual or threatened breach of duty, these particular individuals are identifiable.

The distinction between an *in rem* and an *in personam* right has nothing to do with analytic structure. Hohfeld tells us they are each identical in analytic form, being jural relations pertaining between specific individuals in a specific domain. Thus the distinction between *in personam* and *in rem* rights must be extrinsic to their formal structure. But what is the 'extrinsic' difference between these *in rem* and *in personam* rights? One distinguishing feature of *in rem* rights is that they are always 'constitutive'

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[37] Apart from land, chattels, and the inviolability of a person's own body, other *in rem* rights include: intellectual property, rights against defamation, rights of persons relating to other persons (Hohfeld's examples from legal precedents include a father's right to preserve his daughter's chastity and a husband's right to preserve his wide's body against harm (1978, 85)).

[38] Hohfeld proposed that *in personam* and *in rem* rights should be re-named *paucital* and *multital* rights, to capture the *particular* and the *many* to which each applies (1978, 71)

rather than 'consensual' (Hohfeld 1978, 74 fn 23). Which is to say, except as between the named parties to an agreement, *in rem* rights are socially constructed rather than the subject of an express agreement. Hohfeld observes that this constructive account of *in rem* rights makes sense of the fact that most *in rem* duties are negative in character: "it is just and politic to spread such merely negative duties broadcast [sic];" (74 fn 23). Eleftheriadis picks up on this notion of what is "just and politic" in relation to *in rem* duties. He proposes that the *in rem* character of property rights reflects the socio-political status of property, and the imperative to protect that status by prescribing a legal protection that has a general but indeterminate applicability, bringing (all) people within its scope as necessary (Eleftheriadis 1996, 53). We can see why this is so. Locke's analysis of title to property in terms of a person's labour and dominion over land, including common land (2003 V, 39[39]) clearly reflects the then contemporary socio-political status of property (and persons) in England in the seventeenth century, a status that persists into the present. An effective system of property law necessarily requires that all members of society are bound to respect 'legitimate' claims to property ownership. Thus property rights are buttressed by an *in rem* status that speaks to one imperative—the preservation of 'rightful' title to property. Claims to enforce *in rem* rights are often satisfied with remedies ordering specific performance, eviction of trespassers, transfers of property to rightful owners, rather than the orders for monetary compensation (damages) typical of *in personam* claims. In other words, *in rem* claims can require a defendant to make-it-the-case that duty is observed. By contrast, *in personam* legal claims are generally satisfied by an order for monetary compensation reflecting a loss and damage that is quantifiable in cash. This is an important distinction that speaks to the socio-political importance of property and similar rights, and the imperative need for their full protection.

The informal jural relations I am concerned with speak to another (arguably related) imperative—the maintenance and reproduction of social hierarchy through a social dynamic of 'difference' and division. Thus *in rem* informal jural relations serve a socio-political purpose analogous to the preservation of property and rights against assault. These informal jural relations reflect, maintain, and reproduce the social norms that

[39] "[…]but supposing the world, given as it was to all the children of men in common, we see how labour could make men distinct titles to several parcels of it for their own private uses, wherein there could be no doubt of right, no room for quarrel."

support a patriarchal social hierarchy and a popular (even if contested) narrative about binary in/out 'difference' between races, sexes, genders, sexualities, and other sources of division. It is in the maintenance of social hierarchy that deontic status comes into play, reflecting not a universal equality but a persistent differential in relative degrees of entitlement. The failure of formal citizen rights is in large measure due to a tension between, on the one hand, a formal entitlement to an equal share of certain universal 'goods' protected by formal citizens' rights and, on the other hand, the disabling obligations entailed in the functioning of certain informal jural relations. This claim is central to my argument, and I shall return to it in the course of the following Chapters, starting with the next Chapter, on Liberty. The point I make here is that the particular informal jural relations I am concerned with are *in rem* in character, binding a large but indeterminate number of people for the protection of the (broadly similar) interests of members of dominant groups in a social hierarchy.

This concludes my summary of Hohfeld's basic scheme. In addition to setting out Hohfeld's account of jural relations of opposition and correlation, I have described secondary jural positions as incidents of rights, and I have explained the distinction between *in personam* and *in rem* rights. Hohfeld's analysis of jural relations is applicable not only to formal, legal relations but also to an analysis of informal jural relations in the social world. I now take a closer look at this claim, and defend my argument that Hohfeld is equally applicable in this sphere—indeed, I claim that Hohfeld's account of correlative and opposite relations between particular jural 'positions' enables us to identify and account for informal jural relations, and to explain their interaction with the enjoyment of formal rights.

3.4 *Extending Hohfeld*

I am not alone in suggesting that Hohfeld can be used in the analysis of rights beyond strictly formal (legal) rights. Matthew Kramer, for example, asserts that Hohfeld's analysis works as well for moral as it does for legal rights (although he does not expand on this observation):

"…virtually every aspect of Hohfeld's analytical scheme applies as well, *mutatis mutandis*, to the structuring of moral relationships.…"(2000, 8)

Of course, I am not dealing with "moral relationships" (save to the extent such relationships may fall under the informal jural relationships I am concerned with). But (as is implicit in Kramer's assertion) moral relationships clearly have a jural character, dealing as they do with moral rights and duties. If it is accepted that jural relations are not confined simply to 'strictly' legal relations but extend into informal jural relations in the wider social sphere, I still need to justify the extension of Hohfeld's analysis to these informal relations, which include entitlements and obligations beyond the scope of moral relationships. In this section I apply Hohfeld's analysis to instances of social entitlement and social obligation. I use his correlative and opposite relations to show that these informal jural relations work in parallel with (and in sometimes in opposition to) strictly legal relations of right/duty.[40]

Hohfeld describes legal rights (and indeed all "fundamental legal relations" (1978, 36) as *sui generis.* This might suggest his analysis is somehow 'non-transferable'. However, Hohfeld is offering an analytical methodology rather than a substantive theory of rights. This is a 'how to think' (as a against a 'what/why to think') approach to rights. His conceptual framework generates meaning from specific bi-lateral correlative and opposite relations between jural positions. Which is to say, there is no definition of 'right' apart from it correlation to 'duty' and its opposition to 'no-right'. Each jural position is given meaning by its two unique relations of correlativity and opposition. So 'right' can only be understood in terms of its correlation to 'duty' and its opposition to 'no-right' (and *vice versa*). Hohfeld provides a stipulative analytic definition of rights and other jural relations, rather than a descriptive or empirical one. As Kramer describes, Hohfeld is pursuing "analytical purification" in his jurisprudence (2000, 23). Hohfeld says his analysis of jural interests is relevant to an understanding of "practical every-day problems of law" (1978, 26). I rely on this combination of analytic simplicity and practical application to shine a light on informal entitlements and their correlative obligations.

While Hohfeld is used by many in philosophy, he is not always applied (I suggest) as he would have wished. There is (for example) no relation in Hohfeld between the jural

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[40] This claim is not as novel as perhaps it may seem. The entanglement of formal and informal jural relations is recognised by the court when it exercises its equitable jurisdiction: in circumstances where the denial of an informal obligation or entitlement (one without legal force) would result in unfairness, and reward unconscionable conduct, a court will give effect to informal agreements and promises even though they have no strictly *legal* force.

positions ‘right’ and ‘power’. To make a connection between ‘right’ and ‘power’ is to make a substantive rather than an analytic claim (Schlag 2015, 189). And while Hohfeld states ‘claim’ is synonymous with ‘right’, it is not the case that Hohfeld’s ‘right’ is necessarily an enforceable claim. Schlag describes a right as establishing a “predicate for a legal remedy, namely a duty in *B*”, but no more (2015, 202). There may be many reasons why a right is not enforceable, and to find out why (in any particular case) would require a separate Hohfeldian analysis of remedial relations (which is to say relations between Hohfeldian powers, liabilities, immunities and disabilities).

In short, Hohfeld’s analysis distinguishes the form of legal relations from their substantive, non-legal content. This means it can be applied across any rights’ regime, regardless of *who? what? why?* questions about their substantive content and justification. One consequence of this flexibility is that it does not engage with disputes such as the debate between Will and Interest theorists of rights. But a Hohfeldian analysis may tend to undermine some claims at the heart of Will and Interest theory, the former requiring that a rights-holder has powers of waiver and enforcement, the latter that the duty correlative to a right will arise only where justified by an all-things-considered ‘interest’. Schlag notes that our “conceptual economy” often relies on metaphors, images, values and norms leading to what he describes as “concept packing” that has effects and consequences in the “real economy” (198). This is a useful way to think about the way substantive claims can feed into the conceptual analysis of rights, but can be excluded if a Hohfeldian analysis is strictly applied. ‘Concept packing’ adds normative content to basic concepts. These additions lead to the risk of anticipation and foreclosure on questions of construction and interpretation: our analysis is constrained by both implicit and explicit normative commitments. One possible consequence of ‘concept packing’ might be the claim that legal rights and duties exhaust the field of jural relations in the social world. This seems counterintuitive, however, and ignores the force of extra-legal demands—which is to say, the informal jural relations I rely on, which are readily susceptible to a Hohfeldian analysis.

Hohfeld can be applied to informal jural relations because such relations share a common characteristic with formal (legal) jural relations—that of entitlement paired with

correlative obligation.[41] I am concerned with the informal jural relations instantiated in interpersonal behaviour, relations that can be described and understood in terms of entitlement (right) with a correlative obligation (duty). Where that behaviour tracks long-standing norms and expectations, these informal jural relations will stand on quite firm 'normative' foundations—just how firm will vary from case to case. An appeal to morality or etiquette (for example) may be vague or confused, and the notions of right/duty associated with these various bases for behaviour will differ markedly. However, the common denominator will be an exercise of control through the imposition (or perhaps the subject's adoption) of controls on conduct affecting some individuals or groups but not others. Informal jural relations appeal to 'principles' that express social norms ultimately founded upon the maintenance of a structured social hierarchy, governing what may and what should be said and done, and by whom, in any particular circumstance. This argument for the maintenance of hierarchy through norms of behaviour is addressed further in Chapter 6. I am looking at the operation of the informal jural relations where 'correct' (dutiful) behaviour and correlative entitlement tends to converge with and reflect social status within a specific domain (the family, perhaps, or a workplace), or in wider society more generally. Where norms of behaviour are embedded and generalised they will be maintained by informal jural relations that are *in rem* in character, binding a large but indeterminate number of individuals.

One final point about the extension of Hohfeld beyond the legal domain concerns the significant element of voluntariness in many legal domains. So in commerce, but also in family and property matters, parties must *intend* to create legal relations if legal consequences are to follow. Without the requisite intention, there will be no legal relationship. And where someone is appointed to undertake a duty (for example, as executor of an estate) they will be able avoid that duty by renouncing their role. So again, there is a voluntary assumption of duty. A beneficiary who has a right to property may also disclaim the benefit of that right. All of these examples point to the need for a willing (and informed) engagement with legal rights and duties. By contrast, the informal jural relations I am concerned with tend to arise willy-nilly between parties, irrespective and often in spite of intention, and in the absence of agreement.

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[41] I also contend that informal jural relations include all eight of Hohfeld's jural positions.

In answering this question about voluntariness and intention in the creation of legal relations, a question that surely also arises in the creation of informal jural relations, I am going to appeal to the *in rem*/*in personam* distinction once more. The necessarily voluntary legal relationships found in commercial and family legal relations are concerned with rights and duties that are *in personam,* concerning only the parties directly concerned. By contrast, strangers to property transactions will be duty-bound to respect an owner's (*in rem*) rights of ownership. This is not a take-it-or-leave-it jural obligation: it is involuntarily binding on all those who come within the relevant domain. I have touched on this already, in discussing *in rem* duties as *constitutive* rather than *consensual* (see page 53 above). The field of criminal law provides other examples of involuntary jural relations, albeit we may implicitly 'consent' to be bound by the law. So it seems to me that the question of voluntariness and consent is not a bar to using Hohfeld's scheme outside the field of legal relations.

I rely on Hohfeld for his analytic simplicity and transferability across legal regimes which, I contend, also works across other informal jural regimes. I also rely on Hohfeld as an antidote to 'concept packing' as described by Schlag (op. cit. 67, above), which is to say the tendency to skew analytical argument by the tacit (and tactical) adoption of normative principles. Having said that, I am conscious of the need to avoid making the same mistake myself.

3.5 *Widening the scope of 'jural relations'*

3.5.1 *Informal Jural Relations*

I now turn to the type of informal jural relations I am particularly concerned with when I describe entitlement and obligation in the social world. I am going to focus on two case studies in order to establish the general scope of my argument: (1) informal jural relations between children and adults, and (2) informal jural relations between women and men. These two cases show how correlative right/duty relations are reproduced by and through social interaction. Moreover, it is possible to characterise this 'generation' of informal jural relations using Hohfeldian analysis. These informal relations are not necessarily vicious (although I am mostly concerned in my research with those that are). As set out above, Hohfeld's analysis stipulates that rights are defined only by their correlation to

duty (and not by associated powers of enforcement). On this basis, I think my account of social interaction in the following examples is sufficient to show there are informal jural relations at large in the social world, and these can be properly described in terms of (informal) obligations *(*duties) with correlative entitlements (rights).

Using these examples I want to show three things.

- First and foremost, I offer them as evidence of informal jural relations in action, as proof of entitlement and obligation at work in the social world quite separate from formal, legal rights and duties.
- Secondly, I want to demonstrate that these social relations are amenable to a Hohfeldian analysis.
- Thirdly, I rely on them to show that the persistence and reproduction of such relations reinforces and maintains differentials in deontic status. Recall 'deontic status' reflects an individual's relative burden of entitlement/obligation enjoyed in particular domains. I will go on to argue that these status differentials are critical elements in the failure of citizens' rights in contemporary Western liberal democracies.

3.5.2 *Case Study #2: Children*

Children are the beneficiaries of many formal, legal rights including rights to life, to health and welfare, education and the like. This may be under UK statutes (including the Human Rights Act 1998 and the Equality Act 2010) or international law (for example, the United Nations Convention on the Rights of the Child[42]). These rights all entail correlative duties for the benefit of children. In this case study I am interested in the way children are treated by adults who exercise authority over them, including the exercise of authority by parents and by those *in loco parentis* such as school teachers. That such authority *is* exercised over children reflects a fairly ubiquitous, universal although very varied experience. Whatever methods may be adopted by adults, I rely on Hohfeld's right/duty correlation to support what I think is an uncontroversial claim, that children are in an informal relation of obligation to the adults who

[42] **Human Rights Act** 1998. c.42; United Nations. 1989. "Convention on the Rights of the Child." Treaty Series 1577 (November): 3.

exercise rights of authority over them. Adults have a right to command obedience from children, and children are obliged to conform to these demands.

In philosophy, the denial of moral rights to infants and children is defended on various grounds including a lack of moral status stemming from an age-related deficiency in agency, or the absence of a certain degree of psychological connectedness. McMahan (2002), Singer (1983), Tooley (1975) and others argue that babies, infants and children (also some adults: Dworkin (1994)) do not possess the requisite morally significant properties of personhood, and this justifies a denial of certain moral rights, including in some cases the right to life. So far as political, social and economic rights are concerned, minor children stand as a paradigm example of a 'rights' deficit hiding in plain sight, and this is largely unaccounted for and unremarked upon in political philosophy (see for example Griffin (2002)). Balibar (2014, 110) also notes the normalisation of the exclusion of those in their 'minority' from the full spectrum of political, social and economic rights, as I describe above in Chapter 2 section 6. It may well be that the informal relations of obligation and entitlement that I contend underpin relations between adults and children simply reflect a subordinate status that is enshrined in law. Be that as it may, I want to describe the way children are treated by adults, and the way this treatment reproduces a social relation of domination and subordination that reinforces a status differential expressed in an exclusion from certain legal rights.

Children are not equal to adults in their legal and moral standing. They are required to 'respect' those in authority over them, by keeping quiet, doing as they are told, and not 'answering back'. In some contexts they must express 'respect' for adults in their actions and demeanour. For example, they may be required to stand up when a teacher enters the room, and to be silent when told to be so. They are generally required to adopt a respectful gaze when interacting with adults, avoiding 'side-eye', eye rolling, and staring. Their choices are reduced, and they may be presented with either/or scenarios that offer no 'real' alternatives. Their status deficit reflects a subordinate position that is an

expression of the superior, dominant status of adults, whose rights to control children correlate to children's duties of respect and obedience.

The condition of childhood as a state of subordination can be distinguished from (for example) the subordinate position of disabled people in society. Childhood is a universal but transitory state to which we are all subject. Moreover, there are arguments for the exclusion of children from the enjoyment of certain rights (the right to vote, for example) without denying their moral status and adults' obligations to them. The case I am making about an inequality in moral standing, and a status deficit between adults and children, concerns the patterns of social interaction by which that status differential is maintained. These social norms in effect demand that children acknowledge and submit to a sometimes violent and emotionally damaging regime of coercive control. Submission is an expression of conformity to duty, and this in turn is a tacit acknowledgement of the *right*fulness of adult conduct.

3.5.3 *Case study #3: Women*

There are many examples of an imbalance in entitlement vs. obligation between men and women in their informal jural/social relations. I am going to look at one in particular: the effective social control of (public and private) expressions of sexuality in the experience of heterosexual women and men. Whereas in the case of children there is an apparent legal justification for a social practice of domination and subordination given the notion of 'minority' vs. adulthood, there is (now) no corresponding legal status deficit between men and women in the UK[43].

There is, however, a status deficit for women compared to men in the expression of their sexuality, both in public and in private. The question of consent to heterosexual relations is treated as an issue concerning the unilateral act of the woman rather than the consequence of a bi-lateral agreement between two parties with equal standing. This reflects a popular and persistent

[43] This picture is very different globally.

characterisation of heterosexual relations as involving an active male and a passive female. This in turn underpins the toleration of behaviour considered 'normal' in men, such as persistent propositioning of strangers, acquaintances and fellow workers for sex. The same behaviour is generally not tolerated in women, where it is treated as evidence of a deviant promiscuity. All of this speaks to a 'demand and supply' normative narrative about sexual relations between women and men in which men are entitled to demand their right to sex and women are (dutifully) required to comply (Kate Manne argues that men and women are broadly divided into "givers and takers" in respect of "feminine-coded goods and services on the one hand, and masculine-coded privileges and perks, on the other" (2019, 292)). Life is more complicated and nuanced than this picture suggests. But the fact of importunate behaviour by men as a 'naturalised', normal form of conduct, makes access to sex a *de facto* 'right' for men, with a correlative 'duty' to submit in women.

This 'givers and takers' narrative about sexual relations may not reflect a universal experience, but it does contribute to the production and reproduction of the biases and stereotypes that inform public discourse and deliberation. There is in effect a judgmental narrative that maintains the subordinate status of women not only in the press and other media but also in the police stations, the Crown Prosecution Service, and the jury rooms where critical decisions are made about the consequences of disputes between men and women about consent and violence in their sexual relations. In these scenarios the differentials in the status of men and women play out in many ways. In criminal prosecutions women suffer testimonial injustice (Fricker 2007). They are disbelieved, and their 'unsupported' testimony is discounted as evidence and treated as inherently

unreliable[44]; prosecution rates in rape cases are low, and falling; conviction rates for (male) defendants are low[45]; public attitudes 'tolerate' domestic abuse[46].

Women are 'controlled' through all sorts of media, including social media where 'revenge porn' and intrusive photography ('up-skirting') objectify women. While the 'good' woman is a sexually passive creature, her body is persistently identified as a sex object, even when she is using her breasts to feed her baby[47]. Women are required to adopt risk averse behaviour in terms of dress, sobriety, and keeping 'safe' (particularly when travelling at night). This is a response to a recognised threat from men, but it is women who are obliged to change their behaviour. Verbal and physical assault of women by men is a (largely) tolerated expression of male entitlement to treat women as sex objects. Walking alone after dark is not appropriate behaviour for a woman, especially if she is 'inappropriately' dressed, wearing the 'wrong' shoes, and suffering the effects of alcohol. As victims, women are blamed (and shamed) when their risk avoidance fails to protect them.

These claims about children and adults, and about women and men, are offered to support and illustrate my argument. I recognise in practice there may be many and various exceptions to these generalisations.

3.6 *The Enforcement of Informal Jural Relations*

In this section I want to look at the enforcement of informal jural obligations. Again, Kramer proposes that *moral* claims are enforceable, but not in the same way as legal claims are enforceable:

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[44] See for example Jordan, J. (2004). See also Williams (1991) page 50-51 fn 5 in which she describes the frank disbelief she encounters when she tells of her experience of exclusion from Benetton while Christmas shopping (see below page 108)

[45] Rani Selvarajan February 2023 *Violence Against Women and Girls Snapshot Report 2022-23* accessed 25 March 2023 <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2023/02/Final-Snapshot-Report-2022-23-LARGE-PRINT-1.pdf>

[46] Women's Aid 3 October 2022 *Women's Aid releases research on how UK public attitudes 'tolerate' domestic abuse* accessed 21 November 2022 <https://www.womensaid.org.uk/womens-aid-releases-new-research-on-how-uk-public-attitudes-tolerate-domestic-abuse/>

[47] And if she is photographed doing so, she will have no recourse to law for protection against this voyeurism: Ramaswamy, Chitra (2022) "Photographing breast-feeding mothers? It's the mark of a truly misogynistic society: available at <https://www.theguardian.com/commentisfree/2022/jan/07/photographing-breastfeeding-mothers-misogynistic-society-law-voyeurs?CMP=share_btn_link> accessed 21 November 2022

"[a] genuine right or claim is enforceable. (Unlike a purely moral claim – which is enforceable in certain ways – a genuine legal claim is enforceable through the mobilizing of governmental coercion, if necessary)" (2000, 9)[48]

I want to take Kramer's claim about the enforcement of moral rights and treat it by extension as applying also to the enforcement of the informal jural relations I am concerned with. Kramer does not himself address the question just *how* a moral right is enforceable "in certain ways". All he says is that the mobilisation of governmental coercion is not available as an aid to enforcement. I assume, though, that by his reference to Hohfeld's analytical scheme and its structuring effects, Kramer accepts that all of Hohfeld's jural positions, and their relations of opposition and correlativity, have a role to play in the analysis of moral relations (and I would argue, by extension, a role to play in the analysis of informal jural relations). I take no position on moral claims here. I rely on Kramer only to support my contention that Hohfeld's analysis is transferable beyond the strictly legal domain. That said, I think there is at least one significant difference between moral and other informal jural relations. There is an open acknowledgement in civic discourse of the demands of morality in our relations with others, concerning such things as how we should treat neighbours and strangers, and our responsibility for the environment. There is no corresponding acknowledgement of embedded differentials in status reinforced through patterned social relations of entitlement and obligation. Indeed, an ideology of equal rights stands as a rebuke to such an idea. I want to demonstrate how Hohfeld's 'remedial relations' can be transferred across to informal jural relations more generally. It is in this aspect of informal jural relations—their enforcement—that I really need to ground my claims about the deleterious effects of informal 'obligations' on an individual's capacity to enjoy the benefit of her formal legal rights.

Hohfeld's secondary 'incidents' of rights can be mapped on to informal jural relations in order to show how we can understand 'enforcement' of informal entitlement through a Hohfeldian analysis.

Power/Liability Correlative Relation

I have said that a Hohfeldian *Power* is about control, and the overriding ability to bring about change in a jural relationship. In legal relations this is typically

[48]I note in passing Kramer's concern with a 'genuine' right, which he asserts (contrary to Hohfeld) is necessarily 'enforceable'.

associated with an action for breach of contract, or breach of duty in tort. We might think about enforcement in terms of making-it-the-case that a duty is discharged, or that appropriate compensation is made for a duty-breach. *Liability* reflects the effect of a power to change a jural relationship, for example by making a claim for damages for breach of duty. In the two case studies above, concerning children and the sexual relations between men and women, we can understand power in terms of the maintenance of control through punishment, or the threat of punishment. Liability is felt in either an acceptance of an obligation to submit, or in suffering for a failure to do so. But note that an exercise of power is only required in the face of a breach of duty. For as long as an obligation is accepted, and a correlative entitlement is enjoyed, there is no occasion for a power to be used, and no need for a liability to be suffered (over and above 'suffering' the demands of obligation). Consider how most of us think nothing of the fact that we habitually respect our neighbour's property boundaries and do not enter their space except under licence to ring the doorbell, or in an emergency. This reflects an acceptance of a duty not to trespass. Our neighbour's power to enforce our observance of duty is not needed.

An adult's entitlement ('right') to discipline and control a child is also largely accepted without recourse to enforcement. An adult's power, when exercised, generally involves punishment or the threat of punishment. Punishment may be corporal or psychological. It may take the form of sanctions such as the withdrawal of privileges (say, pocket money or access to the internet). Corporal punishment works through pain and the threat of pain, and has the effect of inhibiting future infringements of duty by fear. Psychological punishment works through shame, gas-lighting, intimidation, ridicule and contempt.

Liability will be felt as forced acquiescence and submission, if not pain and suffering. I suggest the same principles apply in relation to the control of women by men in heterosexual relationships. The *status quo* relation of dominance and control of women's sexuality is largely accepted, indeed it is naturalised as normal.

I am aware this account may seem very reductive, perhaps a gross generalisation, and contrary to most people's experience and perception of the world. I make two points to counter such charges. The first is that, for the most part, the jural relations I am describing are internalised, normal behaviours for adults in their authority relations with children, and heterosexual men and women in their sexual relations. There is no need for a demonstrative exercise of power nor the conscious acceptance of liability. In that sense, these are not 'voluntary' relations consciously and deliberately adopted. Rather, they reflect the persistence of established social relations that have been followed and reproduced over generations. It is these social practices and patterns that are the source of the jural relations in question. The second is that I am not giving a one-size-fits-all account of these jural relations. Rather, I am describing a spectrum of behaviours that are found in particular (different) relations to different degrees. Thus a child will experience a range of the very different ways in which adults in authority exercise control. And women will know men who are archetypal sex pests who objectify and diminish them, and men who treat them quite differently (and well).

Immunity/Disability Correlative Relation

Immunity and Disability stand in for status markers in informal jural relations. They determine relative deontic status. Those who enjoy *Immunity* are free from the threat of any adverse change in their jural relations, such as that which follows from the enforcement of claims. *Disability* describes the position of the powerless party in a particular jural relationship. She will have no means to effect any change in the jural relation in question. While I think this is apt to describe the parties to an informal jural relationship, it is necessary to bear in mind that all of Hohfeld's jural relations are domain-specific and bi-lateral. Particular domains need to be defined with a fine degree of specificity. It follows then that intersectionality and its complexities needs to be brought into account (Crenshaw 1989), factoring in the many different axes along which an individual relates to other people. It may be that a person could be subject to a burden of unremitting and universal obligations in her multiple informal jural

relations, but this would be an extreme case indeed (just as there may be some who enjoy an unbounded entitlement in the social world). Most people, I suggest, will experience a mixture of each. Two questions follow: are there are persistent patterns of relative advantage/disadvantage that more or less 'fix' individual deontic status in the social world as a whole? And second, do these patterned distributions aggregate to reflect an uneven distribution of informal entitlement and obligation in the social world supporting a status hierarchy of privilege and disadvantage? I would answer both questions in the affirmative.

3.7 *Conclusion*

In this Chapter I have argued that a Hohfeldian analysis can be used to describe both formal and informal jural relations in the social world. This analytical approach to my research has a number of benefits. It enables me to frame certain social relations as necessarily jural relations, relying on Hohfeld's correlative and opposite relations between jural positions. Thus a social obligation is defined by reference to its correlative social entitlement, and *vice versa.* If we are able to identify an entitlement, perhaps as a corollary of oppression or domination, we can analyse its necessarily jural relation to a correlative obligation. Hohfeld's analysis also supports my contention that these informal jural relations reflect socially embedded norms of behaviour. Given the reproduction of these norms in the social world, I consider it appropriate to treat informal jural relations of this type as *in rem* entitlements and obligations. This reflects their general character, benefiting individual members of particular groups and binding an indeterminate number of people. It also speaks to the maintenance of status differentials in support of a socio-political hierarchy. Status deficits tend to track discrimination affecting members of socially salient groups in their access to the benefits of formal rights, including the citizen rights I am concerned with. Systemic injustice (found in institutional racism, for example) is maintained through informal jural relations of entitlement and obligation that tend to reproduce a social hierarchy in which those with higher status have relatively frictionless enjoyment of not only their informal entitlements but also their formal rights compared to those who stand in relative social subordination to them. I suggest a paradigm of systemic injustice and associated status differentials and denial of citizen rights is plain to see in the *Windrush* scandal in which Black British citizens arriving from the Caribbean

between 1948 and 1973 were caught in the Government's hostile environment and treated like illegal immigrants[49].

Hohfeld's formal analysis of bi-lateral jural relations between eight separate jural positions includes many instances of relations of "pragmatic implication" between different jural positions that are not in relations of correlation or opposition (Simmonds 2000, 150)[50]. There is just such a pragmatic implication in the case of many rights that carry with them the benefit of powers. Any apparent relation between rights and powers is quite distinct and separate from the relations of entailment and opposition that Hohfeld uses to demonstrate the fundamentals of his conception of jural relations. But powers and other secondary jural relations, or incidents as I have described them, are critical in the landscape of practical rights enjoyment, and in the enforcement of claims. It should be noted, however, that if rights are functioning well, if rights-holders are enjoying the benefit of all the correlative duties[51] they are entitled to, they will have no need to resort to the exercise of their incidental powers, nor to assert their immunities. By contrast, if a rights-holder were to find that her rights could only be enjoyed through the actual or threatened use of powers of enforcement and an explicit assertion of her immunity to adverse claims, this might well be indicative of a precarious and partial enjoyment of an 'entitlement' that is being honoured perhaps only in the breach of duty.

This difference in the experiential dimension of rights-enjoyment between those who have no need to 'make claims' in order to enjoy the benefit of formal rights compared with those who do need to do so, justifies my reliance on a 'situated' account of rights and highlights the importance of liberty as a jural relation. The burden of informal jural obligation takes effect as a diminution in an individual's liberty across many separate but related domains. Again, Hohfeld's analysis makes sense of this claim, given the opposite relation between liberty and duty. The practical exclusion of a liberty to do that which is (otherwise and for other people) permitted can be analysed in terms of jural relations. Hohfeld tells us two things when liberty is excluded: first, that *X*'s duty to some *Y* stands in opposition to *X*'s own liberty; secondly, that *X*'s duty is correlative to *Y*'s right. So if

[49] See Wendy Williams (2018) footnote 32 above

[50] I suggest there is a Hohfeldian pragmatic implication between rights and liberty. I address this in the next Chapter.

[51] Be they formal or informal jural relations

X's liberty is restricted or denied in a particular domain, it may be because of some contingent 'interference' but it could be because *X* owes an obligation/duty on account of *Y*'s right/entitlement in that same particular domain. If a relevant liberty is restricted through the effects of informal jural obligation, there's a real risk formal rights will be undermined. Differentials in liberty in the maintenance of a social hierarchy are at the heart of the difference between precarious rights-enjoyment for some citizens, while others are able to enjoy a liberty so expansive they have almost need of their 'rights'. My Case Study #1 (Patricia Williams) illustrates this point very well.

I turn to the important question of Hohfeldian liberty in the next Chapter in which I consider (amongst other things) how the exclusion of liberty for some effectively defines and reinforces the formal rights and informal entitlements of others.

Chapter 4

Liberty

4.1 *Introduction*

In the last Chapter I made two claims in my discussion of a Hohfeldian analysis of rights as jural relations. The first is that Hohfeld can be extended to the analysis of informal jural relations. The second is that Hohfeld's relation of opposition between liberty and duty is key to understanding the critical role of liberty in the enjoyment of our formal rights. While duty is essential to the definition of right, liberty is in play in the active participation by a right-holder in the exercise and enjoyment of her right. If, as I propose, certain informal relations of entitlement and obligation can have a stifling effect on liberty, this may well—for those affected—have a deleterious effect on their access to the full benefit of formal rights. In this Chapter I will show how liberty is at the heart of all our jural (and social) relations, and in many cases it is crucial to the practical enjoyment of rights. 'Right' prescribes duty. But the grant of a formal 'right' is no guarantee of the practical enjoyment of the substance of that right. Leaving aside the risk that the correlative duty may not be discharged, if the right has an active element, this rights-related activity will be expressed in the exercise of a liberty by the right-holder: Steiner (2013, 233). The full measure of rights-enjoyment in many cases will depend upon not only the discharge of correlative duty but also upon the exercise of all relevant liberties. In this Chapter, and in the rest of this thesis, I will generally use 'right' and 'duty' to refer to jural positions in the analysis of formal (legal) rights and duties, and 'entitlement' and 'obligation' as jural positions in non-legal (informal) jural relations. I use liberty in the Hohfeldian sense of the correlate of no-right/entitlement and the opposite of duty/ obligation, so liberty in this sense holds across all jural relations, whether formal or informal.

The contingency of liberty, its practical precarity, is particularly relevant to the enjoyment of those citizens' rights that are universal and equal in their distribution. I propose there is a liberty-gap affecting some individuals more than others. Granted there is an inherent contingency in liberty, this differential in liberty can be explained in terms of the operation of informal relations of entitlement and obligation in practice. Informal obligations stand in opposition to liberty inasmuch as liberty/obligation are Hohfeldian opposites. Thus informal obligation undermines and subverts the practical enjoyment of rights for members of certain salient groups. This liberty-gap is not simply evidence of an unavoidable contingency in action, nor is it just a reflection of the 'choices' people make. It is a vector for both privilege and disadvantage, the means by which a systemic, structural harm is expressed in the reproduction of social hierarchy and division. My intention in this Chapter is first to show how liberty and rights are analytically inseparable, and second to show how liberty and rights have 'come apart' in liberal democracies, leading to differentials in access to the full benefit of rights. The failure of citizen-rights, particularly where this failure affects the individual members of socially salient groups, needs to be understood as a systemic, structural harm, reflecting a patterned differential distribution of liberty in the social world. Here, and in later Chapters, I discuss how informal jural relations work to undermine citizens' rights. In Chapter 5, I show how the phenomenology of liberty in 'space' is radically different for individuals depending upon their deontic status—their relative position in a social hierarchy that reflects informal jural relations of entitlement and obligation. The exercise of liberty for some will be felt as easeful engagement with the world, while others feel exclusion and inhibition.

I start with a focus on Hohfeld, liberty and the rule of law. Hohfeld says liberty is found in the permissive, contingent pursuit of that which is allowed under the rule of law (Hohfeld 1978, 48 fn 59). This includes the liberty implicit in the enjoyment or exercise of a right, and also in the discharge of a duty. Liberty is also found simply in the freedom to do all those things that are unregulated and (tacitly) permitted under the rule of law. Liberty is excluded where it is overridden by duty. Informal jural relations work so that those with inferior deontic status are denied liberty in more domains of otherwise

permissive (lawful) liberty than those with higher deontic status[52]. It might be said there are two ways of 'being' at liberty. One found in the practical exercise of rights. The other in the exercise of a 'bare' liberty to act, or simply to 'be', outside the penumbral protection of the duty that correlatively defines a right. However, Hohfeld does not draw this distinction between two types of liberty, and in my view it is not a distinction that takes us very far.

Rights-enjoyment is a complex social phenomenon, involving not simply the 'principal' liberty associated with the right in question but also any 'subsidiary' liberties that make enjoyment of a right possible in any particular instance. These will include the innumerable ways of being and acting in the world that are not the subject of specific explicit legal rules (or indeed moral precepts). Rights-enjoyment relies on liberties that (for many) are unremarked upon and often taken entirely for granted. So, for example, in the exercise of a right to vote, let's say the principal liberty is the actual casting of a vote by marking a ballot paper and putting it in the ballot box. The subsidiary liberties related to this principal liberty are many and various. They may well include the simple act of leaving home and travelling to the polling station. Or perhaps the posting of a postal vote. They also include, I suggest, the freedom of conscience, and freedom from pressure and undue influence, that are prerequisites to meaningful participation in an election.

Thus liberty is at the heart of our practical relation to the exercise of rights. and interference with the active enjoyment of liberty may well be an interference with rights. Of course, active 'interference' in our liberty may be perpetrated by a duty-bound jural partner, in which case it will amount to a breach of their duty and will likely be characterised as vicious (and unlawful if we're dealing with a legal right). The 'interference' with liberty that I am particularly concerned with is not the necessarily vicious breach of duty that points to a denial of the correlative right. Rights are undermined just as effectively by multiple, often subtle, interferences with the liberty that is correlative to no-right, which is to say the liberty found in each of us making our way in the social world without acting contrary to the formal duty that is correlative to the rights of others.

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[52] This is illustrated in my Case Study #4 Going Topless in section 5 below, page 88.

But what could be wrong with this? Surely what's sauce for the goose is sauce for the gander: real life involves a give-and-take in the social world where we each navigate a way through, weaving between the different paths taken by other people? My so-called 'interference' in liberty surely simply reflects liberty's correlation to no-right—and this is turn accounts for liberty's contingency. Liberty is permissive and contingent because conflict in the take up of permitted opportunities for action is unavoidable. Not everyone can stand in the place with the best view. Some will be latecomers, others will be tall enough to see above the crowd. Others will be blocked from seeing the view by a tall person in front of them. Some will in effect be excluded entirely. Clearly we cannot all be in the 'same' physical space at the same time. Extrapolating from this reductive physicalist account, it might be argued that

- the distribution of liberty in the social world is necessarily and unobjectionably random,
- liberty is only relevantly (i.e. viciously) obstructed by physical obstruction or restraint that is contrary to lawful duty,
- (other people's) liberty has no bearing on the enjoyment of rights generally and, in particular,
- liberty is irrelevant to persistent, patterned differentials in rights-enjoyment.

This picture is incomplete. It fails to take account of the complexity of the social world. In particular, it does not recognise that informal obligations actively govern conduct for the benefit of those with correlative informal entitlements. It does not recognise that such informal obligations exclude liberty in Hohfeldian terms: liberty/obligation stand in opposition to each other. Thus liberty is not simply the default jural position where formal duty is excluded: liberty is not a space of negative 'freedom' in a social world where action is restricted only by legal duty. We need to recognise that informal obligation is opposed to, and excludes, liberty, including the liberties needed for full participation in our formal rights. The sources of possible interference in liberty are multiple. They include psychological, social and other intangible influences on action, such as the operation and power of pervasive norms of behaviour. I am concerned with the effect these interferences have on our enjoyment of liberty, and the consequent impact this liberty-denying interference has on the enjoyment of rights.

I start this Chapter with Hohfeld's account of liberty. From there I go on to describe how liberty is an integral part of our jural relations under the rule of law, whether formal or informal. This is important because it shows how liberty of the kind I am concerned with stands entirely within the overarching domain of the rule of law, a domain that includes conventional rights and their enjoyment. Liberty as a jural position in social relations should not be characterised as a separate 'good' existing somehow 'outside' society, beyond the pale of our formal, legal relations. Finally, I address the role of liberty at the interface between our informal and formal jural relations. I engage with a disconnect in political philosophy, which tends to treat rights as a thing apart from an idea of liberty/ freedom, even in some cases taking the position that rights necessarily diminish liberty. In conclusion I say that 'naturalised' and long-standing differentials in access to liberty reflect the persistence of social hierarchies that are supported by informal obligations and entitlements. This analysis makes a critical contribution to the debate about how and why formal citizen rights are deficient in providing the universal and equal social, political and economic benefits they promise. I acknowledge there is an affinity between my account of the tension between formal/informal jural relations and the arguments of Norman Daniels (1975) and others concerning the value or worth of liberty. I address this in the conclusion to this Chapter, marking a real distinction between my argument and theirs.

Before I continue, I need to anticipate and respond to a question that may be asked about the sense in which I use 'liberty, and whether I rely on a distinction between normative and descriptive accounts of liberty. If we take liberty as a position in the Hohfeldian analysis of jural relations, it makes analytic sense to think of liberty as a normative concept. Thus there is a normative dimension to the idea that liberty describes a permissible action where there is no-right to act. I note this no-right liberty can be explicitly described in terms of an 'ought' of the kind often associated with the idea of normativity, in the following way: in any particular domain, liberty will be excluded by the 'ought' of duty/obligation. At this juncture there might be something to be said about the normative basis of law, as opposed to the normativity of morality, for example. But I do not pursue that here. I take it that the social world is full of normative demands on behaviour founded on a whole variety of bases, including (but not limited to) law and morality. I am concerned with the practical enjoyment of liberty—and hence rights—and what might impede such enjoyment. When I talk about liberty, even when I am describing

what might be taken to be the most trivial of activities (such as taking public transport, shopping, or walking on the grass), I am talking about liberty in a normative sense. I suspect there are very few instances of liberty in political philosophy that are not normative in the sense I am using here. An exception could be made for a thought experiment concerning the freedom (liberty) of a prisoner in a locked cell who is nevertheless free (at liberty) inasmuch as she can raise her little finger if she choses to do so. I am not addressing freedom/liberty used in this (wholly descriptive) sense.

4.2 *A basic Hohfeldian account of Liberty*

Liberty is one of the eight jural positions described by Hohfeld. As such, it is an integral part of a Hohfeldian web of jural relations. Liberty therefore must be understood and analysed as a jural *relation,* and it is this relationality that I want to focus on here. In Hohfeld's table of jural relations, liberty and right are both defined by duty and its absence. *Liberty's* Hohfeldian correlation is with *No-Right,* while *Liberty* stands in opposition to *Duty.* While a right is identified and defined by the prescriptions of duty, liberty is found in the space of no-right and in the absence of duty. Liberty is dependent upon personal inter-action in a field of jural/social relations where *X* may act to the extent that (i) duty does not preclude her intended action and (ii) *X's* action is not anticipated or interrupted by *Y*'s exercise of her own liberty.

In considering Hohfeld's jural correlatives we must always bear in mind that they describe a bi-lateral relation between two parties in separate jural positions in a specific domain, while Hohfeld's relations of opposition describe the exclusion of incompatible jural positions, again within a specific domain. Describing jural relations within specific domains captures the finely delineated specificity of Hohfeld's analysis of relations between jural positions. This is readily illustrated by considering jural relations governed by a two-party contract for services, where *right* and *duty* are determined and defined by the express agreement between the parties. But this same analysis is applicable to all relations between parties standing in relations of entitlement/right and obligation/duty (and other jural relations/positions). The correlations and oppositions between *positions* are the exhaustive definitions of those positions themselves. This applies as much to liberty as it does to rights, even though liberty is defined by a correlative absence of right:

- *Liberty/No-Right* correlation:The No-Right in any third party *Y* establishes *X*'s liberty by the exclusion of any relevant (opposite) Duty restricting *X*'s Liberty to φ; Where *X* has a Liberty, she can be sure there is No-Right in any other or others (*Yn)* to prevent her in the act of φ-ing.
- *Liberty/Duty* opposition: the Hohfeldian opposition between Liberty and Duty excludes *X*'s Liberty to φ where she owes a relevant Duty to *Y*.

There is a relation of pragmatic implication that brings consideration of right to our understanding of liberty:

- if *Y* has a right to exclude *X* from Greenacre, *X* is duty-bound not to trespass upon Greenacre, and her liberty to do so is excluded: thus if *X* wishes to know whether she is at liberty to walk across Greenacre or any other particular space she must consider whether she is under a duty *not* to do so. Here, duty and liberty stand in opposition to each other (again, within a specific domain and relative to a particular right in another individual, *Y*).
- if *X* has a liberty, it follows that *Y* has no-right (within a specific domain).

This "pragmatic implication" of right and liberty is relevant to the way formal and informal jural relations interact with each other. I look at this in section 4 of this Chapter.

Hohfeld is principally concerned to resolve ambiguities in the meaning of 'rights'. He aims in particular to distinguish 'right' from 'liberty', 'power' and 'immunity' (1978, 39-40), saying that these are frequently muddled. That muddle applies especially to the confusion between liberty and right (see 1978, 48 fn 59 for an example). Hohfeld develops his argument by referring to case law, where certain 'liberties' are treated as if they were 'rights'. There are similar examples in the philosophy of rights, where basic liberties (such as a 'right' of 'free speech') are treated and described as somehow inalienable rights. For example, Griffin defends a 'right' to free expression in relation to "anything relevant to our functioning as normative agents" (2008, 239/240). The United Nations Declaration of Human Rights also includes many 'rights' more accurately described as Hohfeldian 'liberties', while Amnesty International describes freedom of

speech as a right[53] 'to seek, receive and impart information and ideas of all kinds, by any means.'

It is worth considering the scope of any 'duty' that might protect such a 'right' of free speech. Ignoring for now the content of 'speech', is it intended that such a right is a warranty that free speech be listened to, or read, or perhaps simply heard? If that is the intention, it is possible to construct a bi-lateral relation between a speaker's right, and a listener's duty. But the suggestion is both impractical and hard to justify. Such a duty seems to require the attendance of an attentive audience, or the commitment of a willing readership. By all means allow 'free' speech, but a 'duty' to listen would itself stand as an unwarranted interference in liberty. Since many forms of effective interference in free speech involve physical restraint or imprisonment, and other physical harms, it is likely the speaker would be protected in any event by rights (with relevant correlative duties) against assault. Most philosophers recognise there are limits to 'free speech', often relying on J.S. Mill's 'harm principle', or a variation upon it (Mill 2015, 13). My point, though, is concerned with the analytic distinction between rights and liberties. On Hohfeld's analysis, free speech is a liberty, not a right. Without a right/duty bi-lateral jural correlation there is no basis for a free speech 'right'. Hohfeld analyses rights simply in terms of the duties owed to right-holders, not in terms of the action (or inaction) of a right-holder. Thus to speak of rights is not to describe the right-holder's action but the duty-bearer's obligation. To be a right, free speech must be protected or enabled by a defined duty. Without such a duty, there is no 'right'. Liberty, by contrast, is the jural position that describes *X* in the act of φ-ing (perhaps in the act of 'speaking freely'). Amnesty International's free speech 'right' describes a number of separate liberties to 'seek, receive and impart information'.

The Hohfeldian idea that rights are two-party relations between rights-holders and correlative duty-bearers is intuitive and easy to grasp. The relationality of liberty is a bit more elusive. Liberty on its face seems to describe an individual's unilateral action and, by implication, the absence of any relation to a third party. Liberty in Hohfeldian terms is

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[53] Amnesty International UK 18 May 2020 *What is freedom of speech?* accessed 25 November 2022 <https://www.amnesty.org.uk/free-speech-freedom-expression-human-right?utm_source=google&utm_medium=grant&utm_campaign=AWA_GEN_human-rights&utm_content=freedom%20of%20speech>

permissive and contingent, an all-things-considered what may be done, the 'what-is-allowed'. I shall take once again the example of people mixing in a public space, such as the beach. Each has the liberty to occupy a particular spot because those around them have no-rights to demand exclusive occupation of any particular place for themselves. Strangers on a beach stand in mirrored jural relations to each other: each has a liberty against the other's no-right, and a no-right against the other's liberty. This is a finely balanced equality, at least analytically. We are each at liberty only to the extent that we are not bound by a conflicting duty. This claim is simply a reiteration of Hohfeld's jural analysis. But it is of fundamental significance to my contention that formal rights and duties are both entwined with and undermined by a parallel system of informal jural obligations, as I explain further below.

In my adoption of Hohfeld's formal analysis of rights I have highlighted the simple and conclusive definition of right as a jural relation that correlates to duty. From this it follows that the existence of a right depends upon another's duty (by act or forbearance), rather than the action, intention or disposition of the right-holder. In an important sense, the beneficiary of a right is passive: she is entitled to her particular right against her correlative duty-bearing partner in a jural relationship, and her *right* stands irrespective of anything she may do or not do, and regardless of her state of mind. Rights describe what a right-holder may demand of others. Talk of a 'right to φ' must be taken as shorthand for the duty in some *Y* not to prevent (or perhaps to positively assist) *X* in the act of φ-ing. Of course, *X* could waive her entitlement, or disclaim the benefit of a right (exercising a power as a right-holder). But her right is not found in (for example) her occupation of property, or in her exercise of the franchise. It is found in her entitlement *vis à vis* a duty bearer. My right to vote in a Parliamentary election stands irrespective of whether or not I actually chose to vote. My right is in this sense simply a formal entitlement that I hold against whatever statutory authority may be vested with the duty to facilitate the effective organisation and transaction of the election. The actual *exercise* of this right is a matter for me: all things being equal, I may vote, or not vote, as I wish.

This example demonstrates that liberty is a pre-requisite for the active enjoyment of rights. Hohfeld's analytic web captures the actual, practical exercise and enjoyment of rights by appealing to liberty: it is liberty rather than right (or control) that describes the

way each of us actually exercises the rights we enjoy. If by reason of my right to vote, I go to the polling station and vote, I am exercising a liberty in that I am doing what I am permitted to do. I have no duty contrary to that liberty, because no one has a right (with a relevant correlative duty) that prevents me from voting. This is the Liberty/No-Right correlation and the Liberty/Duty opposition. If liberty (as Hohfeld describes) is what is permissible, then we see that those who have a right to vote necessarily have a liberty to do so. Moreover, if they are to actively enjoy their right, if it is to be more than simply a formal entitlement, voters must actually partake in that liberty. Whether or not they are able to do so is a critical point in issue in this thesis.

4.3 *Liberty and the Rule of Law*

I have stressed the specificity and particularity of rights/duties, and the way they concern defined domains (Kramer 2000, 10). Hohfeld requires us to consider a right as a relation based on a specific obligation on the part of a duty-bearer *vis-à-vis* a right-holder in respect of a particular domain of action. This particularity also extends to liberties. Just as Hohfeld describes particular rights only in relation to specific correlative duties, he also describes particular rather than general liberties (1978, 49). Again, we can infer this particularity from the 'no-right' opposite of liberty. Thus while liberty undoubtedly describes unilateral action by *X*, which is to say it describes *X* in the act of φ-ing, it necessarily carries the implication of a bilateral Hohfeldian correlation. My Hohfeldian liberty is not unlicensed freedom to φ as I wish. It is a freedom to φ so long there is no one in particular to whom I owe a duty to not-φ. A Hohfeldian no-right expresses the idea that there is no duty owed by *X* to any relevant *Y* that can interfere with *X*'s liberty to φ. So I am at least obliged to consider whether I owe positive rights-related duties to others before I exercise my liberty to φ. The correlative form of rights reflects the burdens placed on duty-bearers. The permissibility of liberty reflects a different kind of correlative burden which requires that we each be open to the possibility of conflict between our liberty and the duties we owe on account of the particular rights of others. Liberty is not an expression of unbridled freedom. We acknowledge the limits on our freedom, and the possibility that duty may stop or curtail us in the act of φ-ing, when we take care not to hurt others while running, skiing, or cycling, for example.

I suggested above that the liberty/no-right opposition appears on its face to describe the lack of a jural relation between a liberty-holder and any other party. I went on to argue that the exercise of liberty actually carries with it at least an implied obligation to consider the duty I may owe to others. Hohfeld goes further and identifies the liberty/no-right jural position as a component part of a substantive jural relation. He says:

"it is difficult to see why as between *X* and *Y* the '[*liberty*]+no-right' situation is not just as real a jural relation as the precisely opposite 'duty+right' relation between any two parties." (1978, 48 fn 59).

In making this argument, Hohfeld appeals to the rule of law as more than a coercive regime that positively forbids or requires its subjects (as duty-bearers) to act or refrain from acting. The rule of law is just as much a permissive regime as a coercive one. That which is permitted, even if only by implication from 'silence' or omission, is just as much part of the law as that which is required. The positive legal duties placed upon those subject to law are the basis for many of the legal rights enjoyed by adult citizens in a liberal democratic state. But the law's domain is not bounded by rights and duties. It also encompasses all that we are at liberty to do, whether or not any particular domain is protected by the obligations that enable the enjoyment of enforceable rights.

Consider the position of two people in adjoining gardens (this example is taken from Hart (1982, 166). Each is at liberty to look over the fence and observe their neighbour since neither has a right *not* to be looked at. By the same token, each is at liberty to ignore the other, since neither can command a duty that they be observed by the other. It makes no sense to describe the action of looking over the garden fence (or not looking over the garden fence) in terms of Hohfeldian rights and duties. To do so would be to require the imposition of a particular duty to refrain from (or to pursue) active observation of the neighbour in the adjoining garden, along with correlative rights. This is an example of human social intercourse that is in a practical sense simply not amenable to legal control through the imposition of duty. Nevertheless, it is still the case that this liberty to cast (or not to cast) one's eye in the direction of a neighbour's garden is important, indeed essential, in a functioning social and political community[54]. Indeed, if our lives were to be broken down and analysed in terms of all the separate liberties that we each enjoy (most of which appear self-evidently trivial when considered in isolation) it is clear that the

[54](Hart describes each neighbour as exercising a bi-lateral liberty-right by which he means a two-pronged liberty, to φ and to not φ—look/not look.)

liberty/no-right jural correlation is at the very core of interpersonal and social relations. As Glanville Williams observes, it is no surprise there is no entry "breakfast, liberty to eat" in the index to *Corpus Juris* (1956, 1130). Where would it end if all our liberties were catalogued and indexed? How could they be? Our personal and social success at large in the world is dependent upon our liberty, whether or not that liberty is protected by the imposition of a right-correlative duty on relevant third parties.

If liberty is understood as an essential basic element in our social/jural relations, including our formal jural relations, I suggest it is easy to see that liberty is not a default, 'natural' or 'factory setting' of individuals in the world. There is no liberty or freedom standing outside society, nor is there a simple dichotomy between freedom and unfreedom. Nozick provides perhaps the starkest counterclaim to this in contemporary philosophy (1974, ix). Simmonds describes the necessary interrelatedness of our jural relations, including the relations between liberty and right/duty, and notes that Hohfeld's analysis reveals how the permissive face of a legal system is just as enabling and empowering as its coercive aspect. This, Simmonds says, means that our

"action is located within a complex field of consequences wherein choice is never excluded, but is equally never without cost: freedom as the pure absence of constraint is revealed to be a chimera" (2000, 167, 168).

All our choices have consequences for ourselves and others. And while choice is 'never excluded', those 'complex […] consequences' may be felt as impediments to action of such weight and seriousness that the 'choice' is effectively illusory. Simmonds' account of action is critical not only because it underlines the precarity of liberty but also because it situates all action in a complex social world.

Understood in terms of Hohfeld's analysis, neither rights nor liberties can be characterised simply in terms of the unilateral actions of individuals. Such an individualistic approach is based in the idea of an autonomous exercise of will, and is defended by those who think of both rights and liberty simply in terms of agency and choice as a feature of persons. This focus tends to validate an emphasis on the flourishing individual rather than the successful social community[55]. In contrast, Hohfeld's account of liberty as a jural relation locates it firmly within an irreducibly social realm. Notions of

[55] Or it may attribute societal, particularly economic, success to the strivings of (free) individuals: Friedman (2017), Hayek (2013)

liberty and rights (and indeed property) are of no use or interest to a solitary Robinson Crusoe marooned alone on a desert island[56].

Liberty as a 'domain of permissibility' is an integral part of the rule of law. I am not here referring to the 'rule of law' as that which protects citizens from arbitrary exercises of power and force by government. I mean the rule of law in the basic sense described by Simmonds as

"a form of association that is partially glimpsed and unreflectively understood in our ordinary juridical ideas and practices" (2007, 8)

Where this rule of law pertains there are no domains of pre- or extra-societal 'freedom'. Liberty is enjoyed as part of an overarching system of jural relations extending beyond a domain of explicit, formal jural relations described in terms of rights and duties. As Hobbes states, it is not possible to make all action the subject of rules concerning what is allowed, and what is not allowed. And to suggest that there is a liberty to be enjoyed that is somehow 'outside' the law is equally misguided. Liberty is found in what we may do, in what is allowed. These liberties *may* be the subject of explicit rights, but liberty is more likely to be implicit in all that is not forbidden or otherwise subject to legal regulation. It is in this sense that "Lyberties […] depend on the silence of the Law" (Hobbes *Leviathan* 1985, 264, 271). We are subject to the rule of law when we choose to eat cereal for breakfast, because we are exercising a liberty, a liberty available to us in the absence of duty to some other person. This is trivial and irrelevant to a breakfaster eating the cereal she has bought and paid for herself in her own kitchen. However, others who perhaps use a cupboard in a shared house may need to take care they do not eat someone else's breakfast cereal. To do so would be to infringe the property right of another.

If all our activity in the social world falls within the 'rule of law', how does this analysis fit with the position of those who are apparently not subject to the law, such as babies, infants, and minors, and those who lack the requisite mental capacity to engage in jural relations? They are included in the jural domain to the extent the law explicitly considers and (in appropriate cases) excludes them by denying their capacity to enter certain jural relations or take criminal responsibility for their actions. In practice this means that they cannot, for example, make valid contracts, or vote in elections. So in some cases they

[56] At least, they are of no use for as long as he remains solitary. Kamm (2012, 480) proposes solitary *A* in the world has rights insofar as they are needed just-in-case someone else *B* were to appear.

may be excluded from rights understood as valid claims. However, there is no sense in which they are outside the rule of law.

Finally, locating individual liberty entirely within the rule of law seems to preclude a critical evaluation of the conduct in question: how can an exercise of liberty as a jural relation within the rule of law be wrongful or immoral? I suggest there are many ways in which lawful action might be harmful or attract moral opprobrium. A system of law is still subject to moral evaluation and cannot in itself be a warranty of rightful (including 'lawful') conduct.

4.4 *Liberty at the interface of formal/informal jural relations*

My argument in this thesis concerns the operation of informal jural relations of entitlement/obligation in the social world, such as the entitlement seen in a parent's right to control a (minor) child and the child's correlative obligation to obey a parent. Apart from establishing that such relations exist (which strikes me as fairly self-evident), I am particularly concerned to show how they interact with and affect the enjoyment of formal civil, social, political and economic rights. I argue that informal jural relations underpin differentials in deontic status expressed in the persistence of social hierarchies. The regime of informal jural relations that I posit is relatively novel in the philosophy of rights, although it fits well with Pierre Bourdieu's analysis of social position and practice in the maintenance of social hierarchy (as I discuss in Chapter 6). In what immediately follows I focus on liberty and consider the implications of a Hohfeldian view that our interactive social relations are all jural relations.

I take it that both the formal jural (legal) relations, including the citizens' rights I am concerned with, and the informal jural relations I have described, operate according to Hohfeld's analytic scheme. I have already noted that courts can exercise an equitable jurisdiction to recognise the force of informal jural relations in certain circumstances (see page 56 footnote 40). My point is that formal and informal jural relations operate together in the world, and neither is wholly excluded by the other. But this means that liberty (whether understood as a formal or an informal jural relation) can in practise be overridden by either or both formal duty and informal obligation. What are the implications of this view of social/jural relations, beyond the field of analytic

jurisprudence? First and foremost, Hohfeld's insistence on the 'realness' of the liberty/no-right jural correlation brings home the practical, day-to-day, person-to-person *relationality* of liberty. This approach to liberty should make us think about the way *all* of our social interaction can be reconsidered in terms of liberty (and its exclusion), both our own and other people's. This Hohfeldian 'realness' also acknowledges the practical importance of the pragmatic implication of liberty in the enjoyment of rights that I have referred to already: our practical enjoyment of rights is an exercise of liberty. The pragmatic implication of liberty in the exercise of rights is critical to a conceptual analysis of rights-enjoyment. It might be thought that the substantial distinction between rights and liberties lies in the protection afforded to the exercise of any liberty directly associated with any particular right, a protection that stems from the imposition of *duty* on (particular) third parties. But the protection provided by duty only goes so far.

All liberties, including principal rights-related liberties, are permissive and contingent. They are permissive because no opposing duty precludes or requires the subject right-holder to φ/not φ. They are contingent because the subject's ability to φ/not φ cannot be guaranteed: experience tells us that other parties, or *force majeure,* or other unforeseen events may intervene. To make it otherwise would require, at least, the imposition of something like Steiner's regime of 'compossible' rights in which all relevant rights-related liberties are protected from interference (1994). Steiner's 'protection' for rights-related liberties would have the practical effect of changing the character of the jural relations from liberty/no-right (i.e. no protection) to right/duty. Even then, bundles of 'compossible' rights of this complexity would not be sufficient to guarantee full access to the promised 'entitlement'. Suppose, for example, a voter sets out for the polling station and meets with an accident that prevents her from voting because she failed to reach the polling station before it closed. Her right to vote has not been infringed in any relevant respect. But her liberty to vote has been thwarted by the unintended consequences of an unforeseen event (the accident). The duty correlative to a voter's right gives her no guarantee of success in actually voting: it does not guarantee accident-free access to the polls. The voter may have recourse to a legal remedy in respect of a breach of some relevant duty by (say) the returning officer[57], but she will have no recourse to a remedy if

[57] Such as a failure to ensure the polling station remained open and accessible.

her failure to vote is in consequence of something other than a breach of a relevant duty. So if voter is assaulted on her way to the polling station, or kidnapped and held against her will, these will be breaches of duty only tangentially connected to her thwarted intention to vote. She will have no remedy for denial of her opportunity to vote. Thus even assuming a particular liberty is not only permitted under law but supported by duty (i.e. it is a 'right') its practical enjoyment remains contingent. If the bundle of liberties requisite to rights-enjoyment are curtailed or extinguished, the right will stand as a formal entitlement only, conferring no practical benefit.

With this in mind, the contingency (and real precarity) of liberty can be understood (at least in many cases) as the result of conflict between liberties. This seems obvious in a discussion about access to the beach at the seaside: it is a finite space, and those who arrive in time will get a place while those who come later will not. No one has a 'right' to a place on the beach at the seaside, and an uncomplicated analysis of this conflict over space seems appropriate. At this level of analysis there seems little reason to suppose that a conflict in liberty might be vicious rather than a simple expression of Steiner's (and Kant's) concern about the necessarily spatial aspect of liberty given the impossibility of two individuals occupying the same physical space at the same time. But this analysis becomes less obvious when it comes to explaining and understanding persistent and patterned differentials in the enjoyment of the benefit of formal rights.

In describing the right to vote, I argued that its successful execution depends not only upon a 'principal' defined liberty ('to vote') but also upon a number of 'subsidiary' (indeterminate) liberties. 'Voter suppression' describes both legal and illegal attempts to interfere with a voter's 'subsidiary' liberties where the practical consequence is that it is harder for some than for others to exercise their 'principal' liberty to cast their vote. Thus, for example, restricting the number and location of polling stations may make it harder to vote for those who rely on public transport and who may also have limited time to get to the polling station. I want to make three points about the way formal rights are disturbed and even denied by interference with liberties, using the example of 'voter suppression' measures.

- the effect of 'voter suppression' measures on voting rights shows that small, apparently marginal changes to practical arrangements can make significant

differences to the quality and quantity of relevant liberty enjoyed by those affected. These small changes may (or may not) be unintended consequences, but if they prevent an opportunity to vote they will be no less effective (and arguably vicious) either way;

- there is a real sense in which there are 'winners' and 'losers' in a 'voter suppression' scenario. Although this is not a direct person-to-person conflict of liberties (over space, for example), the beneficiaries of voter suppression will be those who are able to express their preference in an election—i.e. to vote—particularly where the suppression of other voters affects the outcome of the election. Note that some or even most 'winners' may be unaware of their enjoyment of a greater liberty relative to others, and they may not see the relevance of their relatively easier access to the requisite liberties in the exercise of a right to vote that is (after all) universal in extension and form;
- differentials in the quality and quantity of liberty tend to be produced and reproduced by a deeply embedded hierarchical social structure. This hierarchical structure is supported by and expressed through social relations that reflect persistent patterns of deference and privilege. These in turn mirror differential distributions of liberty. These differentials will likely be evidenced in the way voter suppression affects some groups more than others.

It is this latter aspect of liberty differentials, and the way these can interfere with formal rights, that I am concerned with in this thesis. Entrenched, persistent, intractable, and patterned differentials in the enjoyment of liberty can amount in effect to informal 'exclusions' from liberty. This exclusion can be analysed in Hohfeldian terms as a relation of opposition by which liberty is excluded by duty. The exclusion of liberty points to an entitlement (informal right) in some, and a correlative obligation (informal duty) in others. The world of formal jural relations is relatively simple. Even if legal rights are found wanting, we know their provenance and can agree their content. The generation and reproduction of informal jural relations is, by contrast, contested and complex. I hope to illustrate this complexity, and in particular the way liberty can be (and is) systematically excluded through the operation of informal jural relations, in the following case study.

4.5 *Case Study #4: Going Topless*

'Going Topless' describes a patterned differential in liberty that many people fail to see and make no complaint about even if they do see it. I rely on Going Topless as a paradigm example of how liberty is not simply available to all where formal (legal) duty is excluded. I should say at the outset that I recognise all people, of whatever gender or none, are subject to social norms and expectations that in effect dictate the range of acceptable forms of dress/undress that may be adopted in public. I am using Going Topless as a case study because this form of partial public nudity is generally socially acceptable in men and boys[58] but it is not open to women and girls, except those of a very young age. Women and girls are *de facto* excluded from the practice of going topless in public. I consider this prohibition can be distinguished from other forms of 'dress code'. Dress codes can act as barriers to entry and as social 'sorters': failure to comply may result in exclusion from certain spaces, or as grounds for making people feel welcome/ unwelcome, included/excluded. However, going topless as a 'dress code' offers a stark example of a difference in treatment based entirely on gender/sex, and this in turn reflects gender/sex-based embedded social norms of behaviour. This is so notwithstanding there are some exceptions, for example on some beaches, and in some parks, and in settings reserved for naturists. So, taking the general prohibition on women and girls going topless, what are we dealing with here in terms of social/jural relations analysed in Hohfeldian terms?

Going topless is certainly not a 'formal' (legal) right. Going topless is a *liberty.* Hohfeld tells us that liberty correlates to no-right and excludes duty. Simmonds tells us that liberty is exercised under the permissive umbrella of a rule of law that allows all that is not expressly forbidden, including of course the exercise of rights and the discharge of duty but also including those things on which the law is silent. On this basis, going topless should be universally permissible: in the UK, the law is silent[59]. However, and notwithstanding the foregoing analysis, Going Topless illustrates the way social

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[58] Although not in all contexts. Where Going Topless is *not* socially acceptable it is a 'liberty' denied to all. There are also different norms in different countries, and they are being challenged: see Tailor, Neelan (2023) 'Berlin welcomes topless female swimmers in victory for activists' The Guardian 25 March 2023 <https://www.theguardian.com/travel/2023/mar/25/berlin-welcomes-topless-female-swimmers-in-victory-for-activists>

[59] There are some offences concerned with public nudity under section 5 of the Public Order Act 1986 c. 64 and section 66 of the Sexual Offences Act 2003 c. 42, but these generally require an intention to cause offence. And there are common law offences of public nuisance and offending public decency. But there is no legal prohibition on simply taking your top off and being naked from the waist up.

conventions and norms of behaviour, and indeed a public morality, can and do effectively 'interfere' with liberty, making (formal) lawful behaviour effectively forbidden, at least for some citizens[60].

Note that going topless can be distinguished from the typical (physical) clash between liberties where space is contested. While two people cannot occupy the same space at the same time, surely two people can both go topless at the same time and in (roughly) the same place? If we take it that men and boys are simply permitted to go topless (exercising a lawful liberty), how should we analyse the effective prohibition on women and girls doing to the same thing? We may think we know why women and girls are denied (or perhaps deny themselves) this freedom. One way or another female breasts are considered offensive, indecent, and lewd. But I want to analyse the social/jural relation behind a woman's compliance with this general behaviour of *not* going topless. Is she simply exercising a liberty to keep her top on? Or is she acknowledging the force of a public morality that requires her to keep her top on? If the former is the explanation, if liberty explains an almost universal consensus amongst women that this is how they choose to dress, then it suggests the only jural relation in play is a correlative Liberty/No-right, and the exclusion (by opposition) of Duty: I am free as a woman to wear a top/*not* to wear a top as I choose, because I owe no one any duty that constrains how I dress. In practice, I always choose to wear a top in public (but I can always choose to do otherwise).

I suggest, however, that this 'liberty' explanation for women's decisions to cover up bears little scrutiny given the harms meted out to women who do expose their breasts (or nipples) in public, even accidentally, and even while breastfeeding. There are real adverse consequences for women who deviate from societal norms concerning breasts/nipples and partial nudity. These include shame, guilt, ridicule, loss of 'reputation', sexual assault, other violence, threats, exclusion from public places, and wrongful arrest. These responses are all typical of the repertoire of control through punishment and threat used against women, by women as well as by men, and not only by those motivated by sexism and misogyny, but also by those who consider themselves well disposed towards women and feminism but who nevertheless feel compelled to maintain certain 'standards' of

[60] Public urination is a case of *unlawful* behaviour that is in effect tolerated to some degree (but not without exception) in men and boys but not in women and girls. The act of public urination is a (vicious and illegal) exercise of liberty.

behaviour. The use of social forms of control around women's dress and the covering of female breasts puts this response to female public nudity right at the centre of an autonomy-denying objectification in which (as Langton describes 2009, 228-229) women and girls are reduced to their body parts and their appearance.

It is worth considering the extraordinary and adverse attention paid to women in entertainment who suffer what's described as a 'wardrobe malfunction', typically involving the unintended revelation of a breast or nipple[61]. This speaks to both the objectification and the control of women. I consider Going Topless offers a paradigm of differentials in liberty in practice in the social world. It is clear that in the domain of partial public nudity, men and boys have more liberty—more 'freedom'—than women and girls[62]. Of course, there are social and other 'explanations' for this differential in liberty. However, taking Going Topless as a liberty, we can see that:

- an account of liberty that deals solely in questions of action in time/space typified by advocates of liberty as non-interference such as Steiner, Nozick and others cannot fully explain the differential in liberty described in Going Topless;
- while it may be true that women are not (generally) constrained in their decisions about whether or not to go topless in consequence of an immediate threat of physical interference or restraint, it is not the case that women are 'free' to choose whether or not to walk the street bare-chested; there is a psychic restraint on their behaviour (cf Fanon 'psychic alienation' (1986, 48) and Bartky's discussion of psychological oppression (1990, 22 ff));
- known adverse consequences tend to follow from going topless (whether by accident or design), and knowledge of these adverse consequences has a material impact (as a threat) on women. These adverse consequences effectively limit and exclude women's choices: they cannot go topless;
- Going Topless is just one example amongst many others of patterned differentials in the enjoyment of liberty, in this case affecting women and girls who enjoy a

[61] Janet Jackson's so-called 'NippleGate' is a case in point: see Wikipedia contributors, "Super Bowl XXXVIII halftime show controversy," *Wikipedia, The Free Encyclopedia,* <https://en.wikipedia.org/w/index.php?title=Super_Bowl_XXXVIII_halftime_show_controversy&oldid=1139446505> (accessed March 25, 2023)

[62] This is not confined to public spaces. Women and girls who can be *seen* (through windows overlooking private spaces, or inside private property) tend to be disabled from going topless.

qualitative and quantitative differential in their liberty in this domain compared to men and boys[63];

- These restrictions on women's physicality extend well beyond a liberty to go out in public without a top on;
- These informal obligations restricting women's occupation of space support and reinforce an informal entitlement in men to be more 'at large'—literally and metaphorically— in the social world, relative to women.

Going Topless shows that obvious, gross and persistent differentials in liberty point to the existence of informal jural relations of entitlement and correlative obligation. The existence of these informal jural relations can be inferred where a particular 'liberty' is subject to an obvious, gross and persistent interference such that the subject is effectively disabled from exercising it. This denial of liberty reveals the existence of what is in practice an obligation to conform to a particular social norm. The denial of women's and girls' liberty to go topless is arguably tantamount to a practical exclusion of liberty, almost as if there were an inequality in the law concerning public nudity, making women's toplessness illegal save for a few exceptions. It is not that a woman's liberty to go topless is contingent and it just so happens that this liberty for women is subject to interference on a random basis with such frequency that it might as well be illegal (i.e. no liberty at all). It is that women simply do not have this liberty, while men do. Through the operation of an informal jural relation of obligation/entitlement, women are duty-bound *not* to go topless.

Thus, in Hohfeldian terms, liberty is excluded by duty. Hohfeld also tells us that duties/ obligations entail correlative rights/entitlements. So if women and girls are effectively excluded from this particular liberty, they must be under an informal obligation to refrain from exercising it. And if they are under an obligation, analytically this must be correlative to someone else's right/entitlement. This could be framed as an entitlement in men/society to control women's sexuality, and an obligation of modesty/sexual continence in women. This could also be characterised as an entitlement on the part of

[63] Consider Iris Marion Young 'Throwing Like a Girl' concerning women's bodily occupation and use of space, the restrictions upon it, and the consequences in terms of objectification of women: "To open her body in free active and open extension and bold outward directedness is for a woman to invite objectification" (1980, 154). The qualitative dimension of liberty is one I explore later in Chapters 5 and 6 when discussing phenomenology and the 'affect' of space. The importance of what it *feels like* to be free is relevant in the maintenance of status differentials: Halldenius (2014)

men to express themselves more freely than women—a man's right to go topless. The obligation that women and girls do *not* go topless, that they cover their breasts in public, is correlative to a wider right or entitlement that can be understood in terms of both the social control of women's appearance/behaviour/sexuality and the expression of men's greater social freedom and right to public display. The point is that this is not simply a control that restricts women's liberty. The restrictive parameters of this obligation also define the contours of its correlative entitlement.

Hohfeld deals in jural positions in bi-lateral relations within specific domains. It could be said that the informal entitlement/obligation I describe in Going Topless is difficult to confine to a bi-lateral relation in a specific domain. I will address this problem shortly. First I note that (formal) rights as treated in political philosophy tend to feature in a debate that is almost wholly concerned with 'rights', while relatively little consideration is given to questions concerning correlative 'duty'[64], even though it is accepted as a matter of analytic fact that rights necessarily entail duties. If I am right about the realness of informal jural relations, and given there is a Hohfeldian correlation between duty and right, and opposition between liberty and duty, such informal rights will be found where liberty is denied. Thus analytically, if women's liberty is excluded, women must be subject to some duty/obligation, and that obligation must in turn be correlative to some right/entitlement

But the question then arises 'whose right?' and 'right to what?' Formal jural relations are determinate and codified: this is 'black letter law' that can be ascertained by reference to printed sources. Formal jural relations have defined content and pertain between ascertainable parties within specified domains. Informal jural relations are not only amorphous and fluid, they are likely also to be contentious and disputed. Further, while formal jural relations have fixed boundaries, the domains in which informal jural relations hold sway vary not only in terms of their temporal and physical extension, but also with regard to the identity of those who are subject to them. For example, going topless is a real option for women on the French Riviera but much less so on Blackpool Pleasure Beach. In short, informal jural relations cannot be codified in the same way that formal

[64] Onora O'Neill is a notable exception to this broad rule of thumb: see O'Neill (2000) Chapter 6

rights/duties can. That said, we are used to nation states having different laws, and their citizens enjoying different rights. In the same way, it makes sense to acknowledge that informal entitlements and obligations will vary across physical, geo-political, social and cultural boundaries.

The answer to the question, 'who's entitlement is correlative to a woman's obligation to cover her breasts in public?' is 'men's entitlement'. But which men, and when, where, and how? Where is the Hohfeldian domain and its specific bi-lateral jural relation? In trying to provide a response to these questions, it is helpful to draw a parallel with property rights. Property rights are an instance of rights *in rem* that I described in the last Chapter. Recall the explanation for the *in rem* character of property rights is extrinsic to the formal structure of the rights in question. It is the subject matter of the right and its socio-political status that makes the difference and fixes its *in rem* character. Property owners have rights that hold against 'the world' without there being a direct contractual or similar explicit rights-based relationship between the rights-holder and the particular individual charged with a breach of duty. It is on this basis that a property owner can enforce compliance with her right of exclusive occupation against strangers who trespass on her property. In any particular instance, rights against a 'stranger'[65] who infringes another's property rights will still be bi-lateral and domain specific, involving a particular individual in a particular spatio/temporal circumstance. Just as the socio-political status of property is reflected in the *in rem* nature of property rights, the enforcement of gender and other social norms in the realm of what might be called 'public (patriarchal) morality' dictates that women's informal obligation to cover their breasts is supported by *in rem* remedies. So far as going topless is concerned, a right to control the behaviour of women is correlative to a duty owed by individual women, a duty of 'modesty' and social conformity that requires them to cover up. This duty is enforceable against particular individual women as and when they are found to be in breach. And it seems that enforcement may be undertaken by any bystander who chooses to engage with a particular woman's breach of duty.

[65] This is a 'stranger' to the contract or other legal basis on which the property rights' holder relies for their title to the land.

This ‘bystander enforcement’ brings to mind another aspect of property rights which has a strong parallel with mechanisms used for the social control of women (and others). I am referring to the way individual property rights are protected by a general social vigilance that tends to defend property regardless of who ‘owns’ the property in question. The sanctity of property rights is a shibboleth of Western democratic society such that the theft and destruction of property during civil unrest and riot is a paradigm of chaos and imminent terminal social disaster. Thus there is almost universal ‘respect’ for private and public property, a respect that motivates bystanders to intervene to protect the property rights of others. Recall my earlier discussion of *in rem* rights and the way they protect the socio-political value of property. I suggest there is more than a loose analogy here with the enforcement of social norms and practice concerning the control of women and their behaviour. A general societal vigilance guards against deviant behaviour including unacceptable public display. This model reflects Locke (2003, II.6-8) who proposes that in the state of nature everyone may enforce the laws of nature so that the “rule […] of reason and common equity” may prevail for the mutual benefit of all. I suggest it also appeals to an intuition about the observance of basic moral imperatives. Deviation seems not only gross but irrational.

It is not only in the realm of public morality (or the protection of property) that ‘strangers’ are empowered to intervene in the control of particular women on behalf of society as a whole. In May 2021 the Texas Senate passed a law (Senate Bill 8 “SB8”) that effectively criminalises abortion after six weeks of pregnancy[66]. SB8 includes a novel provision that essentially transfers the law-enforcement role of the State of Texas to private citizens. Breaches of the provisions of SB8 are to be enforced through private prosecution. This means that any citizen so-minded can bring a claim against individuals, including but not confined to pregnant women, involved in procuring an abortion after six weeks gestation. The significance of this move should not be underestimated. As a general rule, private individuals seeking a legal remedy must demonstrate to a court that they have a legitimate interest in their claim, and the legal standing (‘*locus’*) to bring it. Of course, SB8 gives them the statutory right to bring such a claim. But I suggest it also instantiates the principle that we all have an ‘interest’ in controlling women. Imagine the absurdity of a

[66] Bill Text: TX SB8 | 2021-2022 | 87th Legislature | Enrolled. SB8 is still in force but must now be considered in light of *Dobbs v. Jackson Women's Health Organization,* No. 19-1392, 597 U.S. ___ (2022) (which overturned *Roe* v. *Wade*, 410 U. S. 113) But the point about a ‘stranger’ enforcing the law still stands.

law that allowed anyone to prosecute a man for (say) failing to ensure the use of appropriate contraception during sexual intercourse (thus avoiding the pregnancy and any subsequent abortion). Again, in SB8 we have a statutory example of Eleftheriades' contention that the *in rem* character of particular rights reflects the socio-political weight of certain normative claims, such as the primacy of property ownership—or the control of women's behaviour (see previous Chapter and Eleftheriades (1996)).

I have not yet addressed the question of the *content* of men's entitlement that is correlative to women's obligation to cover their breasts in public. Briefly stated, I propose men are entitled to more liberty in deciding whether or not to go topless. The restrictive parameters of women's obligation define the contours of men's correlative entitlement, giving men a greater degree of freedom relative to women. I say more about this at the end of this Chapter. This claim about the social control of women's behaviour is made not as a provocation but as an acknowledgement of the existence of salient intersecting social hierarchies, including a gendered hierarchy that accords a relatively higher status to men as against women, although of course not all men will be 'equal' between themselves. This is the patriarchy at work. Such hierarchies are reproduced through diverse mechanisms that include the operation of informal jural relations. Informal jural relations 'work' because they entail the acceptance of pervasive cultural norms concerning (in this instance) the 'nature' and roles of the different sexes and genders. Social hierarchies persist precisely because they rely on imperceptible, naturalised mechanisms of social control that are accepted as normal. I return to the relation between informal jural relations and the reproduction of social norms and hierarchies in Chapter 6 in which I consider phenomenology, social practice and the 'affect' of space.

4.6 *Liberty and Rights: Some Conclusions*

Liberty describes action that is allowed under the permissive scope of the rule of law. Simmonds argues that liberty depends on an independence from the will of others, an independence that will only be found under a system of legal rules that reliably excludes interference and control by others in at least some domains. The protection of such domains of freedom stand as justification for the rule of law (2007, 142). I concur with this analysis, but suggest Simmonds relies on a construal of 'independence', 'will', and 'control' in terms relative only to the absence of formal (legal) right and duty. The picture

becomes more complicated once we start to think about jural relations that are *not* founded on statute and the common law, including relations of entitlement and obligation that also impinge on an individual's 'independence'. There are excessive differentials in individual freedom in the social world that reflect an individual's deontic status relative to others. Liberty may well describe a domain of independent, free action, but as a Hohfeldian jural position liberty is also necessarily contingent. We are not immune to the permissible interference or pre-emptive acts of others. Moreover, the scope of 'permissible interference' is nothing like as random as the idea of liberty as 'freedom' might suggest. The choices open to us in the exercise of liberty cannot simply be evaluated as moves between positions in our formal jural relations with others. These liberty-choices are also well fenced in and hedged about by the demands of informal jural relations expressed in social norms and conventions, including norms that reproduce a status hierarchy based on persistent class, race, sex and gender, disability, and other bases for discrimination. These norms and conventions can be characterised in neo-Roman terms as interference in the freedom and independence of those in a subordinate position in a social hierarchy: this is in practical terms a denial of liberty, and thus an interference with rights (Halldenius 2022, 231).

Summing up so far, my analysis emphasises the intimate connection between rights and liberty. This connection goes some way to explain how and why rights themselves are characterised by some as the source of a critical diminution in the liberty of those who bear correlative duties. Rights entail duties, and duty excludes liberty. Thus those who owe duties suffer a loss of liberty insofar as they are obliged to act/not act under the dictates of the duty in question. This points to a fundamental tension that finds expression in political philosophy: if rights for some necessarily entail a denial of liberty for others, perhaps rights are best kept to a minimum? This tension between liberty and rights is at the heart of an ambivalence in philosophical discourse about rights and it accounts for a certain disconnect between a philosophy of freedom/liberty on the one hand, and a philosophy of rights on the other. There is from some quarters resistance to state-sponsored action in defence of rights, particularly in the transatlantic liberal tradition. Shiffrin (2005) argues against compelled association (which would, for example, require voluntary associations such as golf clubs to abandon gender based admissions policies). She defends a freedom of choice in deciding who we may (or may not) associate with,

and she does so on the basis that otherwise our autonomy will be compromised, and this in turn will limit the development of our ideas. Shiffrin defends the value of making mistakes, even at the risk of a misuse of our deliberative capacity. A fully developed capacity for autonomous decision making, she argues, is what makes it possible for us to engage effectively with those rights that require us to use our deliberative powers (2005, 872). She argues in particular against certain sorts of anti-discrimination rights. Others pitch their arguments at a more basic level, against rights more generally. In both cases, ambivalence towards rights is expressed in a commitment to the primacy of liberty as an expression of a person's agency and choice. Nozick (1974) uses the idea of liberty as a primary good, acknowledging just a few 'basic' rights in order to defend a minimalist state, one that leaves individual actors to shift for themselves, pitting their individual interests against the interests of others in a contest over scarce resources.

But liberty is much more than an abstract exercise of a freedom to do that which is not legally prohibited. Too often consideration of liberty focusses on the individual and her capacity for reason and choice. This understanding of liberty tends to proceed as if liberty is found where a simple lack of constraint enables free rein to be given to a sheer exercise of autonomy and 'free' will. It fails to take account of the relational nature of liberty. It also fails to bring the complexity of the social world into the picture. A philosophical liberal individualism represents liberty as an exercise of choice: paths taken are represented as 'chosen'. In this analysis, the restraint of duty arises only in relation to certain private (for example commercial) rights and other 'universal' basic statutory entitlements. Social hierarchy and its implications are effectively effaced in this scenario.

Proponents of minimal rights are at one end of a spectrum in political philosophy, from Hobbes to J.S.Mill to John Rawls, that includes an idea of 'equal liberty' (which is to say 'rights') in certain domains. An *ur*-liberal political philosophy demands a measure of political equality in a materially unequal society. This material inequality is defended on various bases: that it is 'natural' and 'fair', that it reflects differentials in skills, in intelligence, in wit, and in risk-taking. Critics argue in response that radical inequality encompassing material differentials in income, wealth, status and power undermine and subvert a formal political equality (Daniels, 1975). My position in this thesis falls close to this basic criticism of the liberal idea of 'equal liberty', a criticism that questions the

'worth' of liberty: of what value is a liberty that is in effect useless because it cannot be exercised? I too am concerned with the social and 'real-world' effects of material inequality on the exercise of rights. My argument implicitly recognises the force of 'equal worth/value' arguments but my particular focus is on the social mechanisms that restrict and deny liberty. Moreover, I am concerned that liberty is not only diminished but actually excluded through such social mechanisms. In this sense I am concerned about liberty in two senses: its quality (reflecting perhaps an 'equal worth' argument) and its quantity. A loss of liberty not only undermines enjoyment of rights, it actually denies those rights. Daniels touches on this aspect of the value of liberty when he considers shyness as an obstacle to public speaking. Could or should this character trait be treated as an instance of a liberty denied? The quick response would be no: it simply describes the disposition of a particular individual. But suppose the individual in question is a member of a social group generally taken to be poor public speakers, a group whose members are not listened to if they try to speak, and who may be ridiculed if they attempt to do so? Would this not perhaps explain a 'shyness' and anxiety about public speaking? And should it not be acknowledged that the consequence of this social exclusion is in effect a denial of liberty affecting a socially salient group (1975, 262 fn 11)[67]? This understanding of the subtlety of structural, social impediments to liberty points to the need for a neo-Roman account of liberty in terms of independence founded on political institutions that acknowledge and respond to the structural flaws in the contemporary social world, flaws that reinforce and reproduce a social hierarchy of greater and lesser respect and value according to social position (Halldenius 2022, 231).

I have described how liberty as a social/jural relation is at the bottom of all our successful engagements in social interaction, including the active enjoyment of rights. Much of this liberty is exercised unreflectively: we might recognise the liberty to cast our ballot in an election as the exercise of a right, but much of what we do day-to-day feels like an unimpeded progress in the world—just getting on with life. Or at least, I think this describes the experience of those who encounter relatively few (if any) impediments to acting on their choices. In such cases, the exercise of liberty and—by extension—the enjoyment of rights is undifferentiated and unconscious: the benefit of rights is real but

[67] I consider the incorporation or 'em-bodiment' of certain habits and dispositions affecting behaviour further in Chapter 6, when looking at Bourdieu.

scarcely *felt*. For example, when I leave the house and take my umbrella I think to myself (assuming I have a thought at all): "I'll take the umbrella." I do not think: "I'll take the umbrella, it's mine, I have a right to it, I have a liberty to use it if I wish." I certainly do not reflect on all the people (the rest of the world) who are excluded from the use of my umbrella without my permission, even though it is by reason of this jural relation between me and the rest of the world that I enjoy the liberty *vis à vis* my umbrella that I do.

There is a certain complacency about liberty and rights, at least in relation to our own entitlements (assuming these are not subject to interference). This complacency, or something like it, has a parallel in the way the fellows and scholars described by Virginia Woolf in *A Room of One's Own* (1929) enjoy their Oxbridge college lawns. The Beadle enforces the rights of fellows and scholars by excluding Woolf (amongst others). It is clear that this particular and exclusive liberty (right) to use the college lawns is what it is precisely because it has been carved out of a correlative denial of liberty (i.e. the imposition of a duty) that requires women and all the other ineligibles to keep off the grass. Entitlement for some is found in a simple denial of liberty for others. Two thoughts spring to mind. First, that the Beadle could tell on sight that Woolf was not a fellow or scholar, relying on his knowledge of the formal exclusion of women from college membership. However, this *formal* exclusion reflects an entrenched *informal* exclusion of women and socially salient others that then and now works just as effectively to keep them more or less in their 'place'. Not only off the grass but also excluded from other spaces both public and private. The same 'placing' effect can be observed (for example) in the assumptions made about Black and other global majority academics in higher education in the UK: that they are catering or administrative staff, that they should take responsibility for 'equality and diversity', that they are students and not faculty members —that they are in some sense an 'imposter' trespassing in a White world[68]. Secondly, while Woolf was quickly made aware of her exclusion from the liberty to walk on the College lawns or visit the College library, fellows and scholars then and now most likely exercise their liberties in these places quite unreflectively, just as I unreflectively pick up my umbrella if it's raining when I leave the house. This matters, because if people are made to *feel* the precarity of their bare liberties, this is almost certainly because they

[68]These and more examples are taken from the Equality Challenge Unit's *The experience of black and minority ethnic staff working in higher education Literature review 2009* accessed 25 March 2023 <https://www.advance-he.ac.uk/knowledge-hub/experiences-black-and-minority-ethnic-staff-working-higher-education-literature>

suffer a relative disadvantage in the enjoyment of those liberties, in contrast to those who live lives of unfettered liberty without a second thought.

It is the denial of liberty to others that gives content to the rights of fellows and scholars to walk on the grass and to use the library. It is the denial of liberty to women and girls that gives content to the entitlement of men and boys to go topless themselves, and deny the same freedom to women and girls. This is important because it provides another way to think about the way informal jural relations of entitlement actually work: they are effective simply because they entail a denial of liberty to others. This denial of liberty produces a status differential benefiting even those who do not actively partake in the liberty they are permitted to enjoy: it is theirs for the taking and marks a higher deontic status in a particular domain. So far as going topless is concerned, I would argue that men simply have more liberty relative to women, and the liberty they enjoy in this domain is qualitatively 'better', not only because it is more extensive relative to women's freedom but also just *because* it is a liberty denied to women. The exclusion of liberty makes women duty-bound to cover up. This duty is correlative to a right in men, an informal entitlement, to greater freedom relative to women in a particular domain.

In conclusion, I argue that substantial, entrenched and persistent differentials in liberty can and do amount in effect to informal obligations correlative to informal entitlements. These informal jural relations operate in parallel with formal (legal) jural relations. The value of this analysis is that it offers an analytical insight into the barriers (and enablers) that affect the effectiveness (or otherwise) of formal rights. If it is the case that formal rights are undermined by the parallel operation of informal jural relations, particularly manifest in systemic and structural denials of liberty affecting members of certain socially salient groups, we can see that a 'simple' grant of formal rights to citizens will not in and of itself be sufficient to promote equal and universal access to the social, economic and political goods to which rights-holders are said to be entitled. This claim undermines Steiner's statement of 'fact':

"that a legal system is understood to be that set of rules that enforceably dominate any other rules prevalent in a group of persons",

a statement he relies on (amongst others) in support of a description of a general "uncontested" consensus in political philosophy about 'rights' (2013, 232, 233). I contend

to the contrary that the legal system does not exclude the possibility of 'other rules' taking precedence over formal rights. And there is no general consensus about rights in political philosophy.

Against the idea that formal rights are in effect 'trumps' in the social world (Dworkin 2013), I argue our conceptual analysis needs to bring to the fore the complexity of rights and liberty as social relations, and all the impediments to their practical enjoyment. These impediments include the reproduction of differentials in deontic status founded upon entitlement and obligation in informal jural relations which undermine the universality of citizen rights. The treatment of rights in political philosophy generally assumes their causal efficacy and fails to take account of the social, spatial, and phenomenological aspects of jural relations more generally. Philosophical accounts of liberty all too often fail on two counts specifically related to rights. First, liberty is treated as a freely available resource, as it were, which is 'there for the taking' by persons exercising their autonomy as choosers. Secondly, philosophers too often posit a false dichotomy between rights and liberty in which duty is treated as an unwarranted or unjustified 'interference' in liberty—and by extension, in a person's autonomy.

In Chapter 5 I look at the spatiality of jural relations. Starting from the obvious, that social relations between embodied persons have a necessarily physical location in space, I consider Kant before moving on to explore the complexity of space.

Chapter 5

Rights and Liberty in Space

5.1 *Introduction*

The main thrust of my argument in the previous Chapter was that formal rights are undermined when liberty is diminished (and this diminishment is both a 'quantitative' and 'qualitative' loss). In this Chapter I show that space is not a neutral environment or *tabula rasa* for human action. I demonstrate not only that the experiential phenomenology of the 'same' space is not the same for all of us, but also that differences in our respective experiences of space have their roots in the informal and formal jural relations that support and reproduce a status hierarchy.

My concerns about citizens' rights have something in common with a (broadly) Marxist or communitarian response to a liberal theory of rights, with its focus on the individual. I share concerns about a failure to acknowledge and address the essential social character of man (Marx, 1844), the adverse effects of inequality and material conditions on access to the benefit of rights, a failed ideology of equality and universality, and the insidious consequences of social hierarchies in reinforcing/undermining the enjoyment of rights (Sandel, 1998). But my approach can be distinguished from these critiques because I focus in particular on an analysis of how jural relations work in practice, how they take effect. Starting from a Hohfeldian analytic, I make three claims.

- First, that all our social relations, and not simply our formal, legal rights, can be usefully analysed in terms of Hohfeldian jural relations, even if that relation is simply one of liberty/no-right.
- Secondly, that our social relations include informal jural relations of entitlement/ obligation analogous to formal jural relations of right/duty.

- Thirdly, that while citizens' rights as formal jural relations express an equality in status, informal jural relations of entitlement/obligation work to maintain status differentials in a social hierarchy, and in so doing they actively undermine and diminish the liberty needed to enjoy the full measure of citizen rights.

This analysis, however, only goes so far. I have already started to discuss the question of *how* these informal jural relations work in practice to produce their effects. In Chapter 3 section 6 I proposed that Hohfeldian incidents of rights—power, liability, immunity, disability—have their own informal jural analogues. I also argued that informal jural entitlements are generally *in rem* in character, binding indeterminate numbers of people, even in the physical absence of a specific jural 'partner'. Legal *in rem* duties reflect socio-political norms and conventions concerning (in paradigm examples) private property and bodily integrity, both of which concern our social relations and behaviour in space. I start this enquiry into the mechanics of informal jural relations at a basic (but essential) level by examining the importance of space in our social relations.

The idea that liberty concerns action in space has a long lineage in the history of philosophy. In the philosophy of rights, space is an essential aspect of jural relations, both analytically and substantively. Kant (who I consider in detail below) situates his account of liberty in space, and treats space as a normative, literal and metaphorical site of conflict between persons, a conflict exemplified in disputes over space as property. That we are embodied creatures in space is generally taken as read: it is a self-evident fact about the world. Space is an implied necessity in our social relations. It is so obvious, perhaps, that it tends to be glossed over in our account of jural relations in practice. My approach makes the case for space itself as a critical variable affecting the enjoyment of liberty. One of the things I took issue with in Chapter 4 is the idea that we should understand liberty simply in terms of non-interference in action. Criticisms of this limited approach cite many other possible sources of interference with liberty including oppression, domination (Pettit 1997) and coercion (Garnett 2014; 2022). Without taking away from these concerns, I am addressing a further objection to this prescriptive 'physical interference only' account of what it takes to block an exercise of liberty: a failure to address the complexity of space, and the way this complexity affects action in space. The significance of the *locus* of action tends to be ignored. I want to establish in principle the idea that jural relations are enjoyed (or otherwise) in contested space where

the phenomenological experience of that space can be critical to the enjoyment (or *de facto* denial) of liberty. And here I am not thinking simply about a physical liberty to act. I include the liberty to exercise the deliberative capacity associated with autonomy and the pursuit of a good life. Jonathan Lear offers an insight into the deep (political and other) significance of space/place in such an ethical endeavour. He shows how the loss of territory and eventual confinement of the Crow to a reservation in 1882-1884 not only deprived them of space but effectively destroyed the conceptual resources that had sustained their way of life for generations and undergirded their very notion of happiness and a good life (2006, 30-33; 54-59)[69]. However, the significance of space is not confined to the extremities of conquest and relocation that Lear describes. We need to recognise the essential role that space plays in our orientation to and understanding of the world in daily life. Space plays many phenomenological roles in this orientation of individuals and social groups to the world around them, working on our affective and imaginative lives to help fashion our response to our physical situation.

The phenomenology of space has both inhibiting and enabling effects depending on the identity and role of the social actors located in it. In this I take a lead from Arendt who contends that the freedom to appear in "worldly space"[70] is a fundamentally political conception that concerns people as actors at large in a "politically guaranteed public realm" (1961, 149). Only those who are free in the sense that citizens of Rome were free —which is to say, free to literally move, speak and act in the world—can actually partake in freedom in this worldly space. Roman citizens were free in that they enjoyed a status as free men and this was a world-grounded reality described by Arendt in terms of a liberation from the "necessities of life" (148). I take this liberation from "necessities" to mean that Roman citizens were free from bondage, from obligation to others, from domestic drudgery, from privation. But Arendt's account is about more than freedom *vs.* unfreedom understood in terms of the paradigm cases of interference, coercion and oppression that might feature in a positive/negative freedom debate. This is not simply a personal liberation. It is a social and political freedom that enables citizens to stand as equals with others who enjoy the same citizen status. The experience of space in the

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[69]Sands, Philippe *The Last Colony A Tale of Exile, Justice and Britain's Colonial Legacy* (2022) London, Weidenfeld & Nicholson offers a contemporary insight into forced exclusion from land (space) and the persistence of claims for restorative justice.

[70] As distinct from a Kantian 'inner' freedom of the will perhaps

Roman world was phenomenologically quite different for different people, depending on their status as a citizen—or their exclusion from this status, as foreigners, women, children, or slaves. Arendt's account of Roman liberty founded on equal citizenship acknowledges a phenomenology of freedom not only in action but simply in being-in-the-world[71]. This phenomenology of freedom chimes with Quentin Skinner's insistence that substantive political equality is a *sine qua non* of individual liberty (1998, 79). In this thesis, I am in a way trying to get to the bottom of what it takes to put that substance into political equality, and why it is necessary that we do so.

A freedom from the "necessities" of life reflects an easeful self-assurance, the enjoyment of a conviction that nothing can interfere with a personal freedom that is not only physical but psychological. This dimension of freedom is at the heart of a neo-Roman/Republican insistence that subservience to another's will makes us unfree, regardless of physical constraint or coercion. There are many varieties of 'subservience', including social roles (within certain domains) that fit a dominant/subservient model such as the adult/child and male/female relations I described in Chapter 3. But the question of *how* such subservience is maintained still needs explanation. Phillip Pettit speaks of being "at the mercy" and "in the shadow" of another:

"uncertain[…] about the other's reaction and in need of keeping a weather eye open for the other's moods" (1997, 4-5).

This watchfulness has a servile and fearful character that may undermine deliberative freedom and lead to restrictions in physical liberty as well. But how does this unfreedom come about, in the absence of physical restraint and immediate threat? How does subservience take effect? It cannot depend entirely on the physical presence of a dominant other. My claim is that there is a phenomenology of (un)freedom in space, and this is what I want to highlight in this Chapter. This Chapter is intended to set up the case for including space in our analysis of how jural relations work in practice, where space itself has an effect on the enjoyment of rights and liberties even in the (physical) absence of a particular jural partner.

Here are two starting points for thinking about space:

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[71] I anticipate here Chapter 6 in which I introduce Martin Heidegger's *Being and Time* (1997) and his concept of *Dasein,* and its foundation in phenomenology.

1) the first concerns the Going Topless case study I presented in the previous Chapter where I described an informal entitlement that enhances the liberty of men and boys to go topless while diminishing the liberty for women and girls to do the same. A common (and necessary) feature in all the examples and counterexamples of gender-based differentials in access to a liberty to go topless is that they concern 'action in space'. This is unremarkable, perhaps, as we take it for granted we are embodied beings who necessarily act in space. So space tends to be overlooked as a factor in the reproduction and enforcement of informal jural relations. But it is the spatial aspect of this jural relation of entitlement/obligation that often seems to dictate who can, and who cannot, go topless: "You can't dress like that *here*!". Enforcement relies on a shared understanding of normal behaviour, and—critically—the effect of simply being in a particular space. Space itself shapes our experience and can dictate our action. Many informal jural relations of entitlement/obligation are *in rem* in character[72]. The paradigm *in rem* right is the right to property. Property rights are, by and large, protected by social norms generally without recourse to threats of coercive enforcement. Property rights are so obviously spatial it is easy to overlook how the physical division of space has a phenomenological effect, producing the anxiety a trespasser feels even when she is entirely hidden from sight, and the security felt by those who feel protected and secure because they are 'at home' in their own property.

2) The second way we might think about space concerns our affective and psychological selves. There is a mental, psychological analogue to our physical, embodied experience of space. This affects our mental 'interior' space, the way we feel, what we think, and the choices we make. One way to extend our idea of space beyond the physical is to look at how and why we use space as a metaphor for our mental interior. Such metaphors catch how we think and feel. We conceptualise our mental processes in terms of our physical embodiment in space. We describe needing 'space to think'. We talk of lacking 'mental space'. We say we don't have the 'bandwidth' for new ideas. We 'file' ideas and find 'connections' between ideas. We complain we 'can't think *here'*. Our mental

[72] see above page 52ff

> space can be filled with an idea—perhaps a worry or anxiety—that seems to exclude other ideas, or deny us 'the space' to entertain feelings of happiness or wellbeing. The contemporary understanding of 'safe space' describes not only a physical place of safety but also a refuge from mental suffering. Restrictions and impositions on our mental space can be felt as restrictions on a physical space, imposing limits on what we can think and consequently on what we can do, while denying us access to the enjoyment of physical space has an affective counterpart in our psyches.

Teresa Brennan appeals to "energetics" to explain the affect of space. Energetics concern "the energetic and affective connections between an individual, other people and the surrounding environment" (2000, 10). She notes the modern conception of subject/object relations detaches the subject from her environment and the others in it. One consequence of this in the West is the "uniform denial […] of the transmission of affect". "Energetic connections" between people are felt now unconsciously rather than consciously as they were in pre-modern times. In modernity, there is in some quarters a strong resistance to the notion that we are affected by our environment, and the idea that the phenomenology of space has an affective impact on our individual psyches. This resistance to an affective connectivity between us and our environment mirrors a liberal (and philosophical) commitment to the primacy of subject/object relations. A focus on the 'subject' is behind an idea of freedom explained almost entirely as the exercise of (free) will through autonomous action. But, as Brennan says, the subject is not entirely and exclusively a self-starting agent: she is "energetically connected to, and hence affected by, [her] context" (11).

We can see this in Joe Feagin's description of the constant, daily anxiety felt by a Black professor worried by the threat of racial violence facing her teenage son and adult Black partner whenever they are away from home—outside in public space. This anxiety about the risk to her loved ones is alleviated only when her male family members are in a safe space, back home. The professor notes this threat is something her "very close white friends […] simply don't have to worry about" (1994, 113).[73] While her partner and child face hostility and threat in a public space outside the home, she faces threat and anxiety at

[73] cited in Clarke (2019, 55)

home, because she has less ‘space’ to think about anything other than the safety of her family. She is preoccupied with a burden of anxiety that she shares with other Black women concerned about the safety of their families.

In a racial social hierarchy, White people have more ‘space’, both mental and physical. Patricia Williams describes the stressful mental and physical consequences of being shut out of a Benetton shop by a sales assistant’s refusal to release the lock on the door, relying on the power to ‘buzz’ people in, and exclude ‘undesirables’. Meanwhile, White shoppers enjoy their normal shopping privileges inside the shop (1991, 44-51). Sharon Sullivan uses Williams’ account of her shopping expedition to differentiate an idea of space as a neutral environment lacking boundaries between inside/outside, such as might typically be the experience of a White person, as against a racialised notion of space, one in which there are clear boundaries between inside and outside, as Williams describes (Sullivan 2006, 144-147). Sullivan notes that the Benetton space has an apparent racial neutrality for as long as it is peopled only with White bodies. The intervention of a Black body reveals a raced space, with a hard boundary between ‘inside’ and ‘outside’, inclusion and exclusion. Sullivan argues that space is never a neutral void. Any appearance of ‘neutrality’ is a product of the habitual social practice that underpins a largely unconscious White privilege. That privilege includes an expansive occupation of space that is denied to non-White people. This point goes to my concern with a loss of liberty: Williams’ opportunities to live and act in space are diminished by her exclusion. Moreover, through her exclusion she is objectified and forced to confront herself *as an object* rather than as a self-directing subject. This is felt as an exclusion from a liberal paradigm of personhood.

In a hierarchical society the maintenance of relative ‘difference’ between social strata relies on social norms, including informal jural relations, that take effect through many vectors, including the ‘affect’ of space. The phenomenology of space matters because it undermines the effectiveness and force of formal grants of equal and universal rights. These ‘spaces’ may be actual physical locations, but they may also be metaphorical, describing institutions or professions, for example. In institutional terms, certain places (such as police stations, hospitals, a pub, shop or library) will be ‘felt’ very differently by different people, engendering anxiety, shame, embarrassment in some, professional pride

or comfort in others. Repeated discomfort (or worse) experienced in relation to particular spaces (again, literal and metaphorical) will produce habits of mind that exclude even considering being in that space, let alone actually being there. Restrictions on access to physical space work through mental as well as physical barriers: in a simple case, signage outside lavatories is generally enough to exclude (or include) different social groups without setting up any physical barrier. Ignoring or making a mistake about such signs can produce shame and anxiety, even fear. But other spaces are felt as 'off limits' without any need for signs. This is evident in many domains. For example, social stratification of retail shopping seamlessly divides shoppers according to a complicated semiology which excludes/includes people across generally binary categories including: male/female; Black/White; young/old. Feeling excluded from a physical space has a mental space analogue that may disable the liberty to contemplate entering a space felt as hostile or exclusive. This self-policing exclusion extends beyond physical places (such as shops or restaurants). It also works in institutional, professional and educational domains, such as politics and philosophy, where individual members of socially salient groups pre-empt their likely exclusion, to avoid the risk of being excluded by others.

A rich conceptual account of rights and liberty needs to include the role of affective space. Hohfeld provides a practical analytic tool to describe the operation of a positive system of law in the world. But Hohfeld's terminology of jural positions and relations is, like legal terminology generally, figurative or fictional (Hohfeld 1978, 30). He describes positions taken in conceptual, abstract relations. The point of Hohfeld's analysis is that it can be mapped on to actual jural/social relations between individuals in space. But this 'mapping' analysis does not explain differentials in the take up of rights and liberties, and gives no clue to why some citizens suffer persistent and systemic exclusion from a full enjoyment of their rights, notwithstanding the formal protection such rights offer. Furthermore, the prescriptions of Will and Interest theories are as fictional or figurative as Hohfeld's analytics. They describe place-holders, not real people in a complex social world. Even assuming we identify a person with the requisite powers of autonomy and choice-making and/or the requisite interests for a particular right and its correlative duty, we are far from an understanding of rights and liberty as jural relations that are in practice located in Arendt's 'worldly space'. Disparities between individuals in the value or worth

of their liberty[74] will have a part to play in understanding these differentials and systemic blocks to the enjoyment of liberty. The point of my focus on space in this Chapter is to bring to the fore the relevance of a real-world social phenomenology in our understanding of formal and informal jural relations. This is in addition to other critical engagements with a liberal individualistic account of liberty and freedom.

Meaningful engagement with liberty and rights is dependent upon particulars not only of *who* we are but *where* we are—which particular space we occupy at any one time. These variables will affect the phenomenological experience of space as a neutral, welcoming or hostile place, one in which a person may move with difficulty or perhaps with ease, depending largely upon her social standing—her deontic status—within that space. People who are physically disabled are literally excluded from public space that is open to others[75]. Thus the denial of liberty expressed in exclusion from public space is, by extension, repeated in an exclusion from an everyday entitlement to live, work, socialise, and engage in politics like 'the rest of us'. Variables (of *who* and *where*) associated with an underlying history of rights-denial[76] are of particular salience to this phenomenological differential in the experience of space, and to the exercise of rights and liberty within that space. Recent contemporary events concerning violence against women and girls in the UK, and in Iran, and of lethal and non-lethal violence against Black citizens at the hands of the police (and others) in the USA, stand as exemplars of radical differentials in the experience of shared public spaces. This differential is overwhelmingly dependent on membership of a salient social group, in these cases defined by gender and race. In each case, this differential amounts to a denial of liberty, while others enjoy a privileged entitlement to simply 'be' in a social space. It was not just the formal status of Rome's citizens that gave them the freedom to step into the public forum. It was also the social practice that mirrored that status. The relatively recent history of exclusion from 'full' citizen status in Western liberal democracies that I discussed in Chapter 2 is part of the

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[74] In the previous Chapter, on Liberty, I noted an affinity between my concern about exclusion from the benefits of formal rights and a critique of liberal rights founded on equal worth/value of liberty arguments (Daniels 1975) (page 97, above).

[75] See for example O'Dell, Liam (2022). "I'm done saying sorry for being deaf - I want to change how society treats people like me" The Guardian 25 November 2022 available at: <https://www.theguardian.com/commentisfree/2022/nov/25/apologising-deaf-society-hearing-aids-ableist?CMP=share_btn_link>

[76](affecting say—this is not an exhaustive list—women, Black, Asian and other (global majority) ethnic populations, immigrants from former colonies, non-conformists and Catholics, jews, the LGBTQ+ community, and people who have physical, mental, or developmental disabilities)

explanation why, for some, there is a persistent phenomenological experience of warranted unease and mistrust in certain spaces.

This Chapter proceeds as follows. I begin by examining Kant's explicit treatment of rights and liberty in space in *The Doctrine of Right* (Part 1 *Metaphysics of Morals* (2018)). As I explain, his formal account of Right as a means to secure liberty through consensual coercion fails to address the complexity of space in the world, despite his acknowledgement of the essentially social/spatial nature of rights. I conclude with a brief defence of the phenomenology of space as a feature of the social world that needs to be accommodated in our analysis of jural relations, pointing to the next Chapter in which I consider phenomenology in more detail.

5.2 *Kant*

Kant's analysis of Right is pertinent to my argument for two reasons. First, he acknowledges the social and spatial aspect of liberty and rights. Secondly, he considers the problem of conflict between rights and liberty. This conflict, and its resolution, is at the heart of Kant's Universal Principle of Right[77]—the principle of freedom from subordination to others under universal law (Ripstein 2009, 12). Critical aspects of Kant's analysis are still reflected in contemporary Will/Choice Theory, notably in Steiner's theory of compossible rights (1994). In *The Doctrine of Right* (*The Metaphysics of Morals* 2018), Kant addresses questions of space and interpersonal (external) relations in his account of our innate right to freedom. His emphasis on conflict in space and its resolution arguably supports my claim that our conceptual analysis of rights and liberty requires the inclusion of a phenomenological and anthropological perspective. However, Kant rejects this (2018, 6:230), relying exclusively on the *form* of our external relations as the solution to the problem of an individual exercising a power of choice consistent with the freedom of other individuals to exercise their choice. Kant's moral and political philosophy explicitly eschews consideration of anthropological and empirical claims in defining its guiding principle, arguing that this rejection is justified "by the law of freedom" in practical reason's pursuit of the "*synthetic a priori*" (2018, 6:255).

[77] "Any action is *right* if it can exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." (Kant 2018 6:231)

5.2.1 *Kant's ontology of Space*

Kant's transcendental idealism underpins his account of the ontology of space. He says that space and time are objects of our *a priori* intuitions. Intuition for Kant is a term of art that describes a subject's immediate objective representation of the world. As such, these are (mental) representations of the world that reflect objective phenomena. However, these representations do not give us access to the reality of the phenomena that we call space and time. Kant holds that just as our representation of any object outside ourselves (say a tree, or a pig) is no more than the representation of the appearance of the thing, rather than a representation of the thing-in-itself, so too is our representation of space and time no more than a representation of appearance. However, space and time must be distinguished from other 'things' outside ourselves because space and time provide an essential contextual framework for our apprehension of the appearance of objects: "space is a necessary *a priori* representation that underlies all outer intuitions … [it is] the condition of the possibility of appearances" (Kant 2009, A24/B38-9).

Kant describes our 'basic' relation to space in terms of a subjective view of

- our relation to our own bodies (in extension in space),
- our relation to our property (in space and itself having a spatial dimension and relative position in space),
- our contractual relations (moving things through space) and
- our relation to the State (occupying a spatial area on the earth).

Kant identifies a critical problem for freedom—in space— in the world. This is the question how to resolve conflict between different individuals' liberty. Kant needs to reconcile individual liberty and the Universal Principle of Right[78]—the principle of freedom from subordination to others under universal law. Kant explicitly endorses the idea of freedom as relational in a social sense in that he recognises that the demand for freedom from dependence on the will of others will tend to create conflict in the exercise of liberty (liberty here understood as a Hohfeldian relation in which the no-right correlative applies). Kant further identifies a spatial dimension to liberty as he sees conflicts in liberty arising from the impossibility of two people occupying the same space at the same time. Physical (or as Kant puts it 'empirical') possession by both at once is

[78] see footnote 77

impossible. One person's freedom to occupy a particular piece of the pavement is another's *un*freedom to occupy the same place. Kant is concerned about individual freedom in any domain, but he uses the individual in space to define the problem of conflict that he seeks to resolve. Kant's Universal Principle of Right concerns the external law governing a plurality of persons represented as occupying space (Ripstein, 2009, 12). As Ripstein says, Kant's normative arguments for the resolution of conflict in liberty/ space consistent with freedom of choice is of interest even to those who do not accept Kant's broader project.

5.2.2 *Kant's The Doctrine of Right*

Kant's overarching concern in *The Doctrine of Right* rests on the normative claim that each of us is entitled to be 'master' of ourselves in the sense that none is subject to the will of some other. This 'mastery' is a claim to an innate right to freedom as the "only original right belonging to every human being by virtue of his humanity" (2018, 6:237). This original right has three prongs: self-mastery, a presumption of innocence, and a right to speak for oneself. It is a singular right concerned with what is "internally [...] mine or yours". As such, this innate right precedes any imposition of positive law concerned with things exterior to our persons, and it is the normative yardstick against which any external law is judged as *Right*:

"Right is […] the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (2018, 6:230).

Kant's stipulated *innate right of freedom* is the source of all other rights, and these are always subordinate to that fundamental right to be free as an independent person. This derivative account of civil laws and institutions means that they cannot be conceived in terms of their instrumental efficacy in serving some other value[79], and they are conceptually abstracted from empirical conditions such that these are irrelevant to any consideration of how and why rights are enjoyed, and by whom. *The Doctrine of Right* is about the expression of this innate right in relation to other people in the world. Kant's solution to the problem posed by a right to freedom enjoyed by all of us at large in space is founded on public legal institutions that regulate "what is externally mine or yours" (6:238). Kant defends the imposition of a civil regime of coercive control through

[79] Justice, for example.

public duty by appealing to a mutuality of interest in the protection of our innate right to freedom. Kant's proposed institutions are the necessary and only means to ensure the rightful conduct of each of us in our interaction with others, consistent with the Universal Principle of Right (Ripstein, 2009 pp. 4-12). External relations between human beings are relations of right and duty, since it is only between those who hold the same innate right to freedom that obligation arises. This is "[…] the possibility of connecting universal reciprocal coercion with the freedom of everyone" (Kant 2018, 6:232).

Kant's principal focus in *The Doctrine of Right* concerns conflicts over property and, in particular, property in land: space. He argues that the rightful possession of things external to oneself cannot depend upon physical possession, on *holding* the object (or land) in question. Rather, it requires a concept of *rational* possession which describes the possibility of something being mine or yours even though we are physically separated from it. He distinguishes *holding* from *having,* separating the empirical from the conceptual. In making this move, Kant abstracts rightful claims from the spatial and temporal features of the things claimed ("sensible conditions" as he describes them) and relies on the choice or will of the holder whose declaration of possession ('this is mine') is sufficient in a civil society to bind all others in an obligation to refrain from interference. This is the difference between physical occupation of land, or physical control of an object, as the basis for a claim to possession and even ownership, and the assertion of a right to ownership that is accepted by the rest of the world as a binding duty of non-interference. This move from *holding* to *having* is made possible by inference from the postulate of practical reason[80] which enables us to understand how things external to ourselves can be understood to be *mine*—or *yours*. This is "purely rational possession without holding". Kant says that:

"practical reason extends itself without intuitions and without even needing any that are *a priori,* merely by *leaving out* empirical conditions, as it is justified in doing by the law of freedom" (his emphasis) (2018, 6:255).

How might such "rational possession" of land and things work in practice? Kant would argue that the Universal Principle of Right makes it the case that such rights will be

[80]This "postulate" is "a *theoretical* proposition, though one not demonstrable as such, insofar as it is attached inseparably to an *a priori* unconditionally valid *practical* law". The postulate of pure practical reason is the immortality of the soul, and it is necessary because "the highest good" (and "the moral vocation of our nature") requires the endless existence of "the same rational being" (Kant, 1999, 5:122).

respected. I have already highlighted the importance of *in rem* rights for our understanding of rights which bind 'the world' (see Chapter 3 section 3.3), albeit such rights still concern action in specific domains and in relation to specific jural actors. Property rights are a paradigm example of *in rem* rights, and Kant's description of rational possession illustrates how a system of freedom consistent with 'self-mastery' can protect property rights through a combination of mutual coercion and mutual benefit. The mutual benefit in upholding *in rem* rights to property through laws that have a universal reach means that such laws are accepted as much as social conventions as they are as coercive obligations. This reinforces the relation between self-mastery and mutual obligation: independence cannot be understood in terms of the solitary individual. It is something enjoyed *vis à vis* other people. Just as 'dependence' describes a relation, so too does 'independence'. Critically, independence is something given to a person by other persons. It cannot be self-generated. It describes by implication what others must do or refrain from doing in order to secure the independence (which is to say for Kant, the freedom) of a person.

What Ripstein describes as Kant's commitment to a "*practical* metaphysics" (2009, 6/7) (his emphasis) is used to explain how the claim that each person is her own 'master' puts limits on the conduct of others. 'Equal freedom' at perhaps its simplest requires that our actions do not pre-empt the exercise of some other person's choice (2009*,* 15). Ripstein argues that Kant's argument can withstand reflection on its application in the real-world. He says that what distinguishes Kant's political philosophy from others' is his non-instrumental conception of the law and public institutions: they are necessary not as enablers of freedom but as an expression of freedom. But this account of our relations with each other is too thin, as I shall explain.

Kant (in common with others) distinguishes mere *wishes* or desires from *choice*. This distinction is founded on the critical difference between a 'faculty' to do as one wishes on the one hand, and (on the other hand) such a faculty combined with the subject's "consciousness of the ability to bring about its object by […] action" (Kant, 2018, 6:213). These notions of choice, action, and power each beg many questions concerning the limits of an account of rights that is circumscribed by the idea of an innate right to freedom protected by a mutually coercive legal regime. Kant seems to assume that

potential conflict is the default setting for human interaction in society, and coercive threat is the best form of resolution for conflict when it arises, even a coercion based in a mutuality of benefit (a mutually-assured-perfection, perhaps). Kant analyses such conflicts more or less simply in terms of persons-in-space in direct interaction (at its simplest, he considers people potentially in conflict over occupation of the same physical space). And Kant's prescription for the resolution of this conflict is the imposition of a coercive (though consensual) regime of law to ensure 'rightful conduct'. Kant's analysis is oversimplified, even granted an analytic account is necessarily simple. It seems to assume the equality that grounds our innate right to freedom is somehow projected on the external world as we each exercise a well-developed faculty to make choices.

The external world is necessarily, and relevantly, more complex than Kant allows. The phenomenological differentials I have described affect access to space, broadly construed, and have a direct impact on the freedom to make choices and to act in the social (including the political) domain. If 'choice' is limited not by the preemptive action of some particular 'other' but because of a *de facto* exclusion from space, it is not sufficient to say that our freedom—liberty—is unfettered because no choice has been 'denied': we cannot choose to do that which we are in no position to do. If, as I argue, space itself is a factor in excluding some people from acting, Kant's defence of ability/choice seems to rest on a systemic disability affecting members of socially salient groups. There are forces at work upon us in "worldly space", including psychological factors internal to ourselves, and leaving aside physical 'interference' by others, that circumscribe and limit our powers, and limit our actions. Those forces are unequal in their effects, such that some people have more freedom than others. The promotion of individual autonomy as a particular kind of rational self-reflection that grounds moral status and underpins moral action, seems blind to the possibility that there are other constraints on choice and action, including the phenomenology of being-in-the-world in a particular space. Nevertheless, this Kantian view is reflected in contemporary philosophy, for example by Christine Korsgaard who exhorts us to constitute ourselves as the cause of our ends and take control of our will in the teeth of possible distraction from temptation, terror and timidity (2008, 59).

5.2.3 *Kant: Some Conclusions*

Ripstein acknowledges that Kant is wary of using examples as substitutes for argument and does not accept philosophy has to account for itself by reference to particular instances of what really happens in the world. This abstraction from particulars is justified by his concern with the *form* of person-to-person interaction. Conduct between individual persons will be 'rightful' if their mutual independence is assured. And this 'assurance' of mutual independence relies exclusively on public law and institutions, and the mutual coercive control they represent. Equal freedom is enjoyed by independent people who are free to make choices within the limits of their power to exercise their abilities. Kant is not concerned with the particulars of an individual's purposes, nor with the abilities available to any particular person. An overriding concern with practical rationality lies at the heart of Kant's disregard of empirical and anthropological questions. The point is that each person is autonomous and thereby independent.

Analysis of our jural relations should not be abstracted from the reality of the world. Conflict, even literal conflict over space, is rarely if ever simply 'physical', and conflict resolution requires more than formal 'legal' action, however consensually coercive that may be. Kant neglects our hearts and minds and the environment around us as material influences on our social lives, for all that he recognises jural relations are explicitly spatial and social:

- Kant treats space as an inert medium, providing no more than an abstract *locus* for conflict or cooperation. The assumption that the coercive power of the state is sufficient to protect everyone's freedom may be analytically persuasive but it neglects the complexity of space, and the formal and informal social/jural relations in play in real communities and societies.
- Mutuality of benefit wears a bit thin in a society with significant material and status inequality: the content of 'formal' rights equally distributed is not sufficient to enable 'choice' where circumstances exclude real opportunities.
- Kant fails to recognise that space itself, and an individual's position in the social world, has an impact on the exercise of freedom. Arendt (and also Brennan) see that not all are *equally* free to enter the public forum in a society with status differentials, and it is this sort of freedom that is a prerequisite to public engagement in politics and

civic freedoms. This freedom/unfreedom in worldly space stands in priority to any question about the exercise of the will.

- Kant's approach to rights is endorsed by Steiner (1994) in his advocacy of a regime of compossible rights, a jural system in which the practical enjoyment of rights is 'guaranteed' by a protective circle of liberty-denying duties. But the society in which such a system might work could not offer anything like the complex citizen rights I am concerned with. It is no coincidence that Steiner favours a negative, physicalist account of freedom in which, 'but for' physical restraint, we are all 'free'. This account of rights and liberty does take account of space, but it reflects an ideal that ignores the complexity of the social world as it actually is.
- Kant relies on either an impossible ideal of mutual coercion, or an impossible ideal of freedom, or both. How likely is it that any jural regime could ensure the rightfulness of an action on the basis that all our choices are unimpeded by the choices of others?

The variable phenomenology of space is critical to the enjoyment of rights and liberty in a way that is not susceptible to state intervention through coercive laws, consensual or otherwise. Kant's account of an innate right to freedom through 'rightful' consensual coercion privileges the individual will and the exercise of a capacity for choice. Legal coercion, which sets limits on the exercise of our 'outer' freedom (which is to say, our relations with other people in space), is justified by a universal enjoyment of inner freedom expressed in the exercise of free will through choice-making. But Kant ignores the real world phenomenology of social/spatial constraints and the way freedom is experienced to varying degrees by different actors in the world. He does not accommodate the possibility that differentials in the enjoyment of liberty might represent something more than a variation in the capacities and dispositions of particular individuals and might instead reflect patterns in the world that systematically privilege some at the expense of others. Kant assumes that all are equal in the exercise of freedom under a universal law. This assumption has a contemporary resonance in the rhetoric of 'equality of opportunity' founded on a universal access to 'equal rights'. A situated account of rights will factor in the phenomenology of the conditions under which these rights are actually enjoyed, in spite of the universality and equality expressed in descriptions of their form and function.

5.3 *Conclusion: Kant, Space and Affect*

In my defence of a situated account of rights in Chapter 2, I say that an analytical approach that confines itself to consideration of formal, legal rights will fail to account for the conditions required for the enjoyment of those rights: an explanatory account of rights must consider the experiential dimension of rights and liberty in practice. The persistence of some sort of Kantian idealism in much rights' theory may account for a failure to consider the historical and social context in which rights have been, and might be, enjoyed. It perhaps also allows, almost by default, the idea of rights as 'property' of 'persons' to foreclose a proper consideration of rights and liberty as essentially relational (see Griffin, 2008, for example). By this I mean to say that a commitment to rights as an expression of the moral status of persons fails to give due regard to the jural/social relationality that stands at the heart of formal Hohfeldian analysis. I do not want to overstate my case. I acknowledge both that Kant says rights are necessary precisely because we share a political and social space: our conduct *vis à vis* others must be Rightful. I also accept that (most) rights' theorists generally agree on the adoption of a Hohfeldian (or similar) analysis of rights that is necessarily relational. But still, if rights and liberties are taken as relational all the way down, always involving at least two subject actors without an overemphasis on the primacy of a rights-holder (and her moral autonomy), then we can better appreciate that the practical exercise of rights and liberties has a spatial, phenomenological and social aspect that could and should be reflected in our account of what jural relations are.

The foregrounding of the idea of rights as property offers at least a partial explanation for the disregard of the experiential dimension of rights and liberties in rights theory. Locke propounds the idea that rights are 'property' of the individual person, and that this is a feature of being human which is fundamentally 'equal' in its distribution to all persons. We all have property in certain basic rights that are 'property' of the individual in the same way that our bodies are our 'own' (2003, 11.123). This view remains an influential way to think about rights as bound up with self-ownership, and it is reflected in J. S. Mill's concern with autonomy (2015) and in Joseph Raz's view that only those whose well-being is intrinsically valuable can have rights, such rights as they have being grounded in their interests (1984). The 'natural' equality of rights-entitlement is also

expressed in the United Nations Declaration of Human Rights[81] which (in its preamble) acknowledges "the inherent dignity and […] inalienable rights of all members of the human family" and in its Article 1 declares "All human beings are born free and equal in dignity and rights". Here we can see the persistence of the idea that rights are part and parcel of being human: they are 'inalienable', and we emerge into the world as rights-holders. This view straitjackets rights' theory by assuming that rights are in some essential sense fundamental, to be taken as a 'given'. But as I have already observed, some rights' theorists add to this 'givenness' of rights a chicken/egg requirement that the rights-holder must be endowed with certain psychological properties consistent with personhood. And while in jurisprudence rights are described analytically in terms of formal (social) relations, rights-as-property are stand alone properties of persons, abstracted from any particular social and spatial context. The dominance of this view occludes the conditions necessary for the emergence of rights, and the time taken for such emergence. It obscures the social and spatial context in which rights and liberty are enjoyed, and treats the *de facto* exclusion of many from the enjoyment of rights and liberty as an empirical 'fact' irrelevant to any formal (or other) analysis of jural relations.

A situated account of rights will include the phenomenological impact of affect in space. Sara Ahmed argues that the everyday phenomenological experience of social space affects social action. She focusses on how *White* space is experienced by White people, and the radically different experience of that same White space by Black and other global majority people. If we consider the particulars of the phenomenology of specific spaces, we will gain an insight into the often unnoticed processes and ways of doing things that make those spaces comfortable for some, and uncomfortable for others thereby enabling, or disabling, social action. Or to put it in terms of jural relations, facilitating or disabling liberty, as the case may be. Ahmed says:

"A phenomenology of whiteness helps us to notice institutional habits; it brings what is behind, what does not get seen as the background to social action, to the surface in a certain way" (2007, 165)

This phenomenological approach can be combined with the Black feminist theory of intersectionality to make sense of the radical gulf between the ways different people

[81] United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948

experience what is superficially the ‘same’ space. Intersectionality helps us to understand this divergent phenomenology using overlapping salient social groups, based on race, gender, class, and the like (extending Crenshaw (1989)). Ahmed (2007) focusses on how it feels to be Black in a White space, and how space itself works to make White people feel ‘at home’, while Black people experience exclusion. I return to Sara Ahmed in the next Chapter. For now I make the point that phenomenology is relevant to my account of informal jural relations because it speaks to the affect of space as critical to the hidden social mechanisms that drive the enjoyment (or otherwise) of liberty in the social world. Space has an affective dimension that supports and reproduces informal jural relations and the status hierarchy that relies on those relations. Space affects behaviour. Thus Black people in White space adopt strategies and tactics in their everyday behaviour to minimise the risk of harm from hostile social encounters, including suspicion and shunning. In one critical respect, there is nothing that can be done to mitigate these risks, short of not entering the hostile space: blackness cannot be disguised, and it is often the only feature of a person that is seen.[82] The need to adopt such strategies represents not simply an interference with the choices a Black person might make about how to conduct herself in public, and what route to follow as she pursues her own path. It also represents mis-recognition, a loss of self respect. This is a ‘tax’ on ‘freedom’, a form of interference that others who are not Black do not have to bear.

A useful analogy can perhaps be drawn between *White space* and *White philosophy*. Charles Mills criticises the whiteness of political philosophy which takes itself to be addressing an abstract, theoretical and necessarily all-inclusive, general concern with the human condition. This view is colour-blind, relying on a universal abstraction from a social reality that is taken to be analytically irrelevant. As Mills argues, however, to the extent that political philosophy is ‘blind’ to race, it aligns itself with a White point of view in which the philosophical person is “culturally and cognitively European, [a] racially privileged member[…] of the West” (2015, xv). Just so, those with relatively higher deontic status[83] in a social hierarchy are content to take it for granted that rights

[82] Celebrity encounters with routine micro-aggressions reinforce this point - see Gabbatt, Adam (2013) ‘Oprah Winfrey given Swiss apology for ‘racist treatment’ over handbag’ The Guardian 9 August 2013 <https://www.theguardian.com/tv-and-radio/2013/aug/09/oprah-winfrey-swiss-apology-racist-treatment?CMP=share_btn_link>

[83] Recall, deontic status is measured by the balance of entitlement/obligation enjoyed in both formal and informal jural relations: see Chapter 4 (and also Chapter 7)

and liberty are not only formally but actually in fact distributed equally in the social world, ignoring the reality of that world, including the phenomenology of space. They are blind to their status privilege.

There are many ways to explain this 'blindness', one being that it is necessary to deny differentials in social status in order to maintain them. In Chapter 2 I said a history of status-denial cannot be overridden by a new formal equality: the history of that exclusion will be felt as unease in all the places from which the new 'equals' were once excluded. For example, White people enjoy greater relative freedom in the social world, and this is experienced as a freedom in space. Men generally enjoy greater relative freedom to be out and about in public space compared to women. In both cases, those who enjoy a deontic status advantage in a particular domain tend to be more or less oblivious to that fact, and fail to appreciate that their advantage stands relative to the disadvantage of others. We can think about this unfelt privilege in another way, as an everyday normality for those who are entitled to *mind their own business* in a particular (public) space. Raymond Geuss uses the principle of 'disattendability' to describe a (tacit) civic code for acceptable, unostentatious behaviour in public (2003, 14). This entails behaving in a way not to draw attention to oneself in a public place where unknown others may happen to be passing. Offensive and otherwise 'odd' behaviour will violate this principle. So too, I suggest, will an individual who seems 'out of place' in a particular space. This civic sensitivity to the sensibilities of others, and the imperative to avoid upsetting them, may lead—in certain spaces—to a self-exclusion by some people as the only way to ensure the principle of disattendability is satisfied. In other words, the only way not to draw attention to oneself is to be entirely absent. While we are all likely to find ourselves at risk of drawing (bad) attention to ourselves in some place at some point in our lives, there is a great deal more at stake for some than the social embarrassment of (say) a man inadvertently walking into a women's lingerie shop. Children in their school uniforms know where they should not be seen, for their own safety. So too do (unaccompanied) women and girls. So too do Black people. The condition of simply *being* a member of a socially salient group can (in the 'wrong' place) amount to a social stigma founded upon a 'natural' feature that cannot be altered (Geuss 2003, 15): it causes offence and leads to exclusion[84]. This can have a

[84] See also Sara Ahmed (2006, 160) on the disturbance caused by a "body of color […] being in spaces that are lived as white".

profoundly deleterious effect on the enjoyment of liberty and rights. A Black person in White space will feel less 'out of place' if they are performing an 'appropriate' role—say, as a cleaner or caretaker—than if they come into that space in a professional role considered as 'normally' or 'properly' the preserve of a White person. The experience of Black women Members of Parliament in the UK is a case in point here: they are frequently taken to be ancillary staff, not MPs[85]. This experience fits the "unconscious habit and irrational urge" (Du Bois 1984, 296) that underpin racist assumptions about who Black people *are*, what they can *do*, and *where* they should be.

The limitation in thinking of rights-denials simply in terms interpersonal acts of discrimination and/or breach of duty (whether at the individual or the institutional level) is that it fails to address the way space affects the whole lives people lead, privileging some at the expense of others, such that liberty and rights are neither equal nor universal. I suggest it is instructive to think of the spatiality of the network of social relations we are bound in, including networks of formal and informal jural relations that describe our rights and liberty, as the air we breathe in an environment we all share. It seems as though we are all breathing the same air, even while some of us are also inhaling an odourless, tasteless poison. Just so, when we occupy the 'same' space, some feel at ease or even empowered by their surroundings. Others experience feelings of exclusion and hostility. The space appears the same for all, but it isn't. I propose there is radical difference in the phenomenology of rights and liberty for different actors in the social world, and this is dependent on an individual's relative deontic status. If I am right about this, the idea of 'liberty' as a default position in the liberal democratic polity—the idea of liberty as the 'remainder over' once our formal duties are discharged—is fundamentally undermined.

In this Chapter I have considered the necessarily spatial aspect of jural relations, and differentiated my account of liberty in space from Kant's. I have argued that we need to understand social space in phenomenological terms such that particular individuals will have a different phenomenological experience of the same 'space'. The 'difference' moreover will tend to track membership of socially salient groups and position within a social hierarchy. The phenomenology of space is not (simply or otherwise) a matter of

[85] See, for example, "Black MP Dawn Butler 'mistaken for cleaner' in Westminster" BBC News website 29 February 2016: <https://www.bbc.co.uk/news/uk-england-london-35685169>

empirical observation of contingent facts about the world. It is fundamental to our understanding of jural relations in practice. In the next Chapter I draw on Martin Heidegger, Pierre Bourdieu and Sara Ahmed to offer a conceptual analysis of phenomenology, social practice and (dis)orientation in space as I consider affective space and its effects on the differential enjoyment of rights and liberty.

Chapter 6

The Sociology and Phenomenology of Rights

1. *Introduction*

In thinking about rights and liberty, I consider a *helpful* analysis would seek to explain at least two things: (1) the production of deontic status and (2) what it is, and how it feels, to enjoy higher/lower deontic status and thus better/worse access to the liberty that enables the enjoyment of a full measure of citizen rights. By 'helpful' I mean an analysis that includes some explanation of real world differentials in the enjoyment of rights and liberty. Such an analysis requires an engagement with the phenomenology and social practice that underpins deontic status and its relation to the exercise of liberty in the world. Liberty is enjoyed to differential degrees depending upon an individual's deontic status. An individual's deontic status is in turn dependent on a balance between entitlement and obligation: those who are relatively more 'entitled' in any particular domain have higher deontic status and will accordingly be able to enjoy more liberty. This relation between deontic status and liberty might perhaps be described in quantitative terms. The higher our status, the more liberty we have. What does it mean to have 'more' liberty? Might there be units of measurement of liberty? I doubt we can agree how to measure liberty (not even by the application of isomorphic formulas intended to enumerate the overall balance of instances of physical action in space/time (Carter and Steiner, 2022)). But we can at least try to give a phenomenological account of liberty as experienced in the world. It is for this that I turn to Martin Heidegger, Pierre Bourdieu and Sara Ahmed.

In this Chapter I put some more meat on the bones of my claim that we need to include 'space' in an account of the practice of rights and the enjoyment of liberty. 'Space' here embraces both our experience of the world and our relations with the people we

encounter in it. I have already given examples of how informal jural relations have an effect on social behaviour in space. In this Chapter I address the affective properties of space in terms of phenomenology and sociology. Martin Heidegger and Pierre Bourdieu offer complementary accounts of the phenomenology of (social) space. Heidegger addresses the phenomenology of Dasein—being-in-the-world. Bourdieu offers a sociology of that phenomenology expressed in *habitus.* Heidegger and Bourdieu are relevant to my analysis of jural relations because they each offer an explanatory insight into the way social hierarchy is reproduced and status differentials are entrenched. Sara Ahmed focusses on our *orientation* to the world around us, the way we tend to follow particular paths in our lives, and the phenomenology of *disorientation* felt in deviation from the norm.

Heidegger, Bourdieu and Ahmed each speak to the complex social/spatial environment in which the practice of rights and liberty is situated. Heidegger tells us we are irreducibly social, to the extent that everyday success in the world is found in total absorption in the projects we set ourselves, projects we experience as a unitary spatial phenomenon of being-in-the-world. Bourdieu offers an insight into our social relations and behaviours as the expression of patterns in action that we adopt unconsciously from birth. These patterns tend to reinforce and reproduce social hierarchies, reflecting a ubiquitous tendency in human society to classify and 'place' ourselves within those social hierarchies and necessarily in relation to others. Ahmed's focus is on our orientation in space: how it feels to know where we are, where we are going, and the difficulty faced in deviation from the path ahead. I rely on each of them for a revealing and relevant account of people's differential experience of liberty and rights in space, including the experience of persistent differentials in liberty notwithstanding the universal distribution of equal rights to citizens in liberal democracies.

6.2 *A Phenomenological Account of Space: Heidegger*

Heidegger's *Being and Time* (1997)[86] draws on Kantian notions of phenomenology to provide an alternative approach to our understanding of *what there is.* This includes an ontology of space and spatiality. Heidegger's notion of space contrasts with Kant's

[86] References to *Being and Time* are to the Blackwell 1997 edition of Macquarrie and Robinson's English translation but the pagination I refer to is that found in the seventh edition of *Sein und Zeit* published by Verlag Max Niemeyer in 1953, shown in the margins of the Blackwell 1997 edition.

transcendental idealism. It also eschews Cartesian descriptions of space in terms of geometry, and the idea of bodies in space described in terms of geometric extension. In *Being and Time* Heidegger explores the phenomenology of our experience in order to distinguish the ontological from the ontic, where the ontic concerns facts about entities, and the ontological captures *a priori* transcendental conditions that shape our experience. Heidegger's ontology concerns the fundamental structure that produces our experience. His account of phenomenology has two necessarily complementary aspects. The first is concerned with the transcendental *a priori.* The second offers us a hermeneutic resource, a means by which we may analyse what there is in the world and the nature of our existence *in the world* through our experience *of the world*. Such a hermeneutic enquiry requires a sensitive and painstaking attention to our experience, an attention that is applied in an "existential analytic" of Dasein *(*1997, 11-13). Da-sein (literally *there-being*) is a Heideggerian term of art that can be understood as a description of the "distinctive type of *entity* that human beings as such are" (Michael Wheeler, 2020). This is not a description of the 'biological' human being nor of a 'person'. Michael Wheeler (2020) cites Haugeland's description of Dasein as "*a way of life* shared by the members of some community" (2005, 423) (author's emphasis). Dasein does not describe a subject/object relation, and Heidegger argues that the world is not experienced in terms of subject/object relations. Rather, the phenomenology of Dasein consists in three modes of experience of the world that together describe a holistic network of connected interrelations.

These modes, and the relations and connectivity between them, are revealed to us through the "existential analytic" of phenomenology I mention above. The first mode is captured in a description of the successful execution of a task such as writing, sweeping, carpentry, cooking, polishing, drawing. Each task involves the manipulation of tools to some purposive end. This mode is felt as the experience of an effective and successful encounter with another entity—say, a hammer, in Heidegger's example. These encounters are not robotic or automatic but they are in a practical sense unreflective such that we do not consciously differentiate ourselves from the entities we encounter, which are felt as extensions of ourselves. It is this lack of differentiation that founds Heidegger's rejection of subject/object relations as the foundation for our experience. This mode of experience, which Heidegger calls 'readiness-to-hand' (1997, 69), tells of experience and skill, and an

easy relation with our surroundings such that we know how and where to place ourselves in relation to the space around us (and the entities in it) in order to achieve our ends.

Heidegger describes the next mode of experience as 'presence-at-hand'. Contemplation of the equipment we might need to engage in a project will bring that equipment present-to-hand. While he rules out a subject/object analysis of our experience of the world, he says a derivative subject/object relation is found in our reflective consideration of tools and equipment, be they the precepts of natural science or hammers and chisels. For Heidegger, the present-to-hand are 'things' in the world that we relate to as objects of contemplation. The third of the three modes of experience is 'un-readiness-to-hand' (73-74). This describes an experience of disruption to 'readiness-to-hand', such that the practical, successful relation to another entity fails. In this failure we encounter a different relation to our surroundings and the entities we find in the world. Arguably this un-readiness-to-hand describes or at least implies something more akin to a subject/object relation in that it requires us to address the interface between ourselves and our immediate environment (including particular tools in that environment) in order to remedy the failure, if we can. Un-ready-to-hand things are not only unusable in the sense that they are broken or defective. In the context of a particular project, a tool may be simply missing, and the more sorely we miss it, the more un-ready-to-hand it feels. Moreover, the otherwise ready-to-handness of the equipment we've actually got for a project starts to feel obtrusive and almost unready-to-hand, given the lack of other necessary equipment (74).

Taken together, these three modes describe the totality of Dasein as an experience of present-ness, of being-there, in the world. But what is it to be 'present'? Where, how, and to what are we present? Heidegger stresses that being-in-the-world is not to be understood in terms of a spatial relation between Dasein and the world. Being-in-the-world is not to be taken conjunctively: it describes existence in terms of a unity. He argues that the 'in' and the 'world' of in-the-world do not describe a relation between something and its physical location. It can perhaps be understood in terms of the difference between our complex relation to the place in which we 'dwell' as opposed to our relation to a place where we just happen to be. 'Dwelling' is not simply a mode of occupying a particular space, or being-in as 'containment'. 'To dwell' carries by

implication not only the idea of a way of life but also the idea of a particular sort of place, somewhere that has been made into a home where people live, somewhere that is most likely in a community.

Dasein concerns a shared world in which Dasein is unavoidably bound up with Mitsein (being-with): "Being-with is an existential characteristic of Dasein" (1997, 120). We have a "primordial familiarity" with other Dasein in that we *just know* how to relate to others as Daseins (Wrathall and Murphey 2013, 11). This is expressed (for example) in a propensity to make constant comparison of ourselves with others, measuring ourselves against them to see how we differ (a practice Heidegger calls distantiality (*Abständigkeit*) (1997, 126-129). Dasein engages with entities in the world around it, and it has a particular concern and care for other Dasein. This sense of care and solicitude for other Dasein grounds our sense of ourselves. This shared world is one into which we find ourselves 'thrown', such that we take the world as we find it with all its cultural and historical features. We arrive *in medias res*. Dasein makes practical sense of the world into which we are thrown by choosing between possible courses of action that may be pursued. In this sense, Dasein as being-in-the-world entails ways of *not*-being-in-the-world (paths not taken). These paths-not-taken provide a balance between our 'thrown-ness' (which is beyond our control) and the freedom implicit in the contrast between an actual and a 'what-if?' future. This freedom is described as 'projection'. Any project we may wish or choose to pursue will be limited its by "totalities of involvements" (*Bewandtnis*) (83-85). At bottom, our relations with others as Dasein, and with the equipment (as Heidegger describes the things we use in-order-to pursue our projects) and the strategies we adopt, are all 'involvements' that are governed by social practices. This is a shared world in which what we do is necessarily impressed with our relation to other Daseins.

At this point I want to return to the complementarity of the two facets of Heidegger's phenomenology as both a hermeneutic resource and a concern with the transcendental *a priori*. Thomas Sheehan (2013) elucidates this idea by emphasising how Heidegger's 'being' equates to 'meaning'. Sheehan proposes that we should read Heideggerian 'being' not in an ontological sense but in terms of phenomenology, as 'meaning'. He argues that Heidegger's phenomenology is concerned not with the subjective consciousness and its

relation to phenomena but with our embedded situation in-the-world as human-beings. It is from our being-in-the-world context that we make sense of our experience by giving meaning to everything. This recognises that human-being necessarily entails that we understand the entities we encounter in the world by giving them meaning, and that everything immediately appears to us in its particular context loaded with meaning. Things have meaning to us such that to say there *is* such and such a *thing,* to say that such a thing *exists,* is to say that it makes sense to us as humans. In this way, Sheehan says, *meaning* is fundamentally a matter of a thing's relatedness to a human community. *To be* —being—is to have *meaning*. Sheehan's argument is that Heidegger's phenomenology is concerned with the way being-in-the-world for us as human beings concerns making sense/giving meaning. This points to an explanation for the relation between the two facets of Heidegger's phenomenology: that it is concerned with both the transcendental *a priori* and with hermeneutics. Dasein as a process of meaning-giving expresses the essential nature of Dasein itself.

Sheehan argues that we are always (until death) engaged in the "meaning-process": we are "structurally hermeneutical […] always and already thrown into the ability and need to make things meaningfully present" (2013, 388). Within this existential account of humankind as able and always inclined to make sense of the world, there is an "*a priori* givenness of meaning" that is "*intrinsically hidden* from understanding" (emphasis in the original). Meaning-giving is itself, by its nature, opaque to our understanding. At a very basic level, sense-making is simply what we do, and cannot help but do. We are not constantly surprised by our capacity to give meaning to the world. It is not something that can be switched off and examined, or dispassionately observed from some impartial pan-optical perspective. We forget ourselves in the very process of making sense of the world. This forgetfulness means there is no possibility of abstraction, no possibility of making sense of sense-making without an inescapable circularity in argument. The practical upshot of this is that the "*a priori* givenness of meaning" is overlooked, forgotten. This phenomenological account of meaning-giving is something I come back to in Bourdieu.

I turn now to consider Heidegger and spatiality, focussing on his treatment of space in his description of the world and the entities we encounter within it in everyday life. The world cannot be understood in terms of a space in which we encounter substances or

objects with properties. Such a world might be thought of in terms of geometry where objects are present to us as extended in space and in terms of their relative location and distance. This seems to describe a world we know, one in which we encounter things as distinct from ourselves and think of them as possessing occurrent properties. In such a world, distance is an abstract metric. However, as I have described, Heidegger tells us that we do *not* experience being-in-the-world in terms of subject/object relations defined in terms of measurements of 'space'. If notions of 'near' and 'far' can be understood within Heidegger's phenomenology, they stand as metaphors to describe how we relate to other Dasein and other entities in-the-world. Of course, there is a place for geometric measurement but geometry cannot describe our experience of space.

Heidegger describes the spatiality that constitutes Dasein in terms of an everyday experience of 'readiness-to-hand'. In this context, 'closeness' is not a spatial relation measured by distance. It is a closeness pertinent to successful engagement with a task in the pursuit of our for-the-purpose-of involvements. To have things 'ready-to-hand' is to have them in the 'right' place—where 'right' is not a particular location but an appropriate relation for a certain task or action. Heidegger identifies two related dimensions that characterise Dasein's spatiality: 'orientation' (or 'directionality') and 'de-severance' (or 'de-distancing') (1997, 105 *ff*). Orientation/directionality concerns our position in the world and direction of travel. It reflects our 'thrown-ness' and 'projection'. De-severance is used by Heidegger to draw a distinction between our relationship with the things we encounter understood simply in terms of metrical proximity in physical space, and Dasein's experience of things as ready-to-hand. A proximate object in space is 'severed' in the sense that it is separate from us. However, Dasein ordinarily encounters entities in a *de-severant* fashion. De-severance describes Dasein's apprehension of an entity not as physically proximate but as more or less available for practical purposes. I return to Heidegger's account of orientation further below, in my discussion of Sara Ahmed.

Heidegger's complex account of Dasein's total and undifferentiated absorption in space stands in stark contrast to Kant, and requires us to bring into account the empirical and anthropological conditions in the world that affect our relation to other Daseins. Dasein's three modes of relation can be applied to rights and liberties, and a de-severant relation

with other entities shows how it is that the 'same' space can be experienced quite differently as, for example, when Patricia Williams found herself excluded on the pavement outside Benetton while White shoppers were inside, shopping (see page 108, above). She felt the hard inside/outside boundary while White shoppers did not.

6.3 *Bourdieu's Analysis of Social Position and Social Practice*

Bourdieu's theory of social practice has Heideggerian roots in that it describes a holistic way of being in the social world. However, in contrast with Heidegger, he describes an individual's "relative position" within social space in terms of a (spatial) hierarchy—above, below, in the middle (1989, 16). This space is both literal and metaphorical. Literal in the sense that it concerns bodies extended in space between whom there are 'external' relations. Metaphorical in that 'relative position' does not describe a distance between subjects, or a difference in their physical elevation. Rather, it mirrors the way we think about hierarchy in terms of a spatial relation with a 'top', a 'middle' and a 'bottom'. A social hierarchy reflects this 'ladder', assigning status according to relative position, with those at the 'top' dominating those at the 'bottom' through the exercise of power, a power that is lacked to a greater degree by those in relatively subordinate positions. While Bourdieu distinguishes literal and metaphorical notions of space, he relies on both as descriptive of social reality. Social space is relational in both senses: it concerns literal physical relations and metaphorical hierarchical relations.

The 'invisible relations' Bourdieu describes are a key element in his theory of habitus. Habitus is a concept drawn from Aristotle (*hexis*) and Thomas Aquinas. For Bourdieu, it describes an individual's (unconscious) incorporation or internalisation of structures and 'positional properties' through involuntary, unreflective processes (Bourdieu, 2018, 71). Habitus describes the 'em-bodiment' of the social practice through which our social structures are reproduced. Habitus is reflected in social hierarchies, and is the basis for social 'classification' and social positioning, both by the individual and the group. There is a connection between Bourdieu's account of habitus and Heidegger's conception of Dasein, "thrownness", and distantiality (*Abstandigkeit*). Both Bourdieu and Heidegger describe how we 'find' ourselves in a world not of our choosing in which we unconsciously acquire ways of being-in-the-world. Just as Heidegger describes (1997,

126 *ff*), Bourdieu says we give meaning to our lives by engaging in constant comparison of ourselves with others. In this way, we come to 'know' our place.

Bourdieu describes how people acquire social properties that are expressed physically, through their bodies, by the 'incorporation of structures'. The wearing of a uniform or other insignia of office may endow the wearer with social esteem and power, while other clothing may carry a social stigma that marks an inferior social status. Just so, *incorporated* physical behaviours—such as accent, bearing, and eloquence on the one hand, or a down cast gaze and hesitant speech on the other— are telling markers of relative status. They count for a lot in the classifications we make of others, and will tend to be used to confirm biases even in the face of contrary evidence. These incorporated physical behaviours also reflect disposition, based on habitus, and make sense of behaviour we take to be characteristic of certain 'types', including people described in terms of membership of socially salient groups. Of course, there are variations of degree in these behaviours within social groupings. A high status individual may have a demeanour generally associated with someone of lower status, and self-confidence and timidity are not distributed in the population strictly according to social standing. Nevertheless, habitus is expressed in a bundle of behaviours and it is manifest in the choices people make. Generally, we betray ourselves to others. Their classification of us will most likely accord with our own self-assessment and be broadly accurate within an accepted social hierarchy.

The acquisition of social position through incorporation is an unconscious process from birth. Habitus is expressed in practically invisible ways that appear as 'natural' behaviours, and are likely to be described as such. It is on account of habitus that we adopt particular practices and positions, and reflect upon our place, and that of others, in the social world. Bourdieu argues that a sociologist's (or anyone else's) attempt at the objective classification of the social world is an aspect of the human proclivity for interpersonal classification: we put people (including ourselves) in their 'place'. A *truly* objective theoretical account of social reality would have to reflect the way social subjects represent the social world to themselves—through habitus (2018, 67). Bourdieu stands in contrast to theoretical accounts that choose to discount or simply ignore common experience of the way the world is and instead seek to construct 'objective'

accounts of social relations that bear little or no relation to our actual lived experience. This chimes with the motivation behind my endeavour to provide a 'situated' analysis of jural relations, one that tries to give a more 'accurate' reflection of our practical experience, and the sometimes radical differences between each of our subjective experiences of the world.

Bourdieu argues that the "construction of visions of the world […] themselves contribute to the construction of this world." (18), as I describe in more detail in the next paragraph. He describes how there is no universal or objective perspective that can account for the 'reality' of the social world. This is because our endeavour in the construction of such a vision of social reality is itself subject to socially generated structural limitations. Moreover, this is not an individual but a collective shortcoming, something we unwittingly share with others. We cannot see the wood for the trees, nor our own particular perspective from the vantage point from which we make our observations (1989, 18-19). In an analysis that chimes with Heidegger's phenomenological account of meaning-giving, Bourdieu remarks that our social interactions may appear to be susceptible to empirical analysis founded on direct observation but they

"[…] mask the structures that are realized in them [because] the visible, that which is immediately given, hides the invisible which determines it"(1989, 16).

Habitus more or less 'fixes' us in a social hierarchy through our unconscious adoption of 'structures and positional properties' (Bourdieu 2018, 71), and these in turn colour the way we represent the social world to ourselves, and give it meaning. Each particular view will depend on social position and interest, and upon habitus, which both produces and reinforces social position and interest. Again, Bourdieu echoes Heidegger and his account of meaning-giving and its hidden processes. Since there is no truly 'objective' theoretical account of social structures and social systems available to us, it follows that privilege will not (and cannot) acknowledge its role in the reproduction of its own status and power. Appeals to the progress represented by a proliferation of formal structures of equality and rights in Western liberal democracies are part and parcel of that reproduction of privilege.

Habitus produces not only *practice* but also *perception/appreciation,* and both of these express the social context in which they arise. Thus, for example, habitus not only accounts for the huge variety in 'ways of eating' (the different use of cutlery—learning the 'right' way to hold a knife—, whether to use cutlery at all, or fingers, whether to eat at the table, or in front of the telly, whether you call your meal 'tea', 'supper', 'dinner', whether you prefer to eat 'homemade', 'takeaway', or 'ready-made' food) but also produces the different ways of characterising those ways of eating in terms of a social hierarchy. This is reflected in a shared classificatory and evaluative system in which only those agents who understand a shared social code are able to participate, with 'judgments' about social practice that still carry notions of relative 'merit' attaching to agents accordingly. 'Middle class' may be a term of approval or contempt, but it still speaks of relative position in a social hierarchy in which "agents classify themselves [and] expose themselves to classification" (1989, 19). This entanglement in systems of classification fixes agents 'in position':

"[T]hey choose, in the space of available goods and services, goods that occupy a position in this space homologous to the position they themselves occupy in social space." (19)

We understand this social space as "a world of common sense, a world that seems self-evident" (20). But Bourdieu's analysis here points to a problem with an understanding of rights (and liberty) in terms of the autonomous person making choices. The liberal notion of the person making choices is undermined in the reproduction of a social status hierarchy, notwithstanding the person's formal entitlement to rights and liberty. It is clear not only that 'choice' is a product of circumstance, affected by where we find ourselves and the resources available to us, but also that we are affected by how we think of ourselves and our understanding of what sort of things people like us might chose to 'do' in the world. It is, for example, no random coincidence that only 1% of the children of Irish Traveller families go on to further and higher education[87].

If we acknowledge room for some plurality in our understanding of the social world, given it does not strike us as either "pure chaos [nor as] totally constructed", how can we

[87] The European Union reports the Irish Traveller community faces the worst poverty and discrimination in Europe, and are suffering a mental and physical health crisis see: Page, Chris & McGlinchey, Chrissie (2022) "Irish Travellers 'mental health crisis' driven by discrimination and deprivation" BBC News website 18 April 2022: <https://www.bbc.co.uk/news/world-europe-61117469> accessed 19 April 2022

account for the appearance of this "highly structured reality" (19)? Bourdieu argues that our perception of *difference* has a signifying, structural effect on "the reality of social life" (20). Thus for example a hierarchy of difference in educational and technical achievement and qualification reflects a social structure in which 'merit' is measured in terms of success in 'academic' disciplines (say languages, mathematics, 'hard' sciences) while 'poor' achievement is associated with qualifications in 'low-skill' 'vocational' subjects associated with trade and 'care'. There is a "double structuring" of the social world in an objective/subjective dialectic. The objective appearance is of a social space in which differentials in social status and life styles symbolise a "logic of difference" that underpins the attribution of particular properties to individuals. This is a "logic" of difference in the sense that the end result appears not only ordered and rational but necessary.

The distribution of difference, and what that difference represents, produces and reproduces social structures. On the subjective side, our perception and appreciation of difference is expressed in a binary language of opposites that carries evaluative significance (hard/soft, sharp/dull, high/low, male/female, black/white). We associate certain properties with certain sorts of people: do you enjoy the opera, or bingo? What does the answer to that question say about you? The answer expresses relations of symbolic power and (in consequence) relations of power more generally (1989, 20). Symbolic power is, in effect, the power to control the *meaning* of social difference. Thus when any particular individual's habitus is weighed in the balance (as it will be), it is given a value relative to others' value: it will be given a positive value or it will be found wanting. This process of evaluation is both an expression of symbolic power and the means by which cultural and social place is determined and reproduced. It is through symbolic power that cultural and social domination is maintained. Note that it is not simply that higher social status commands greater control of symbolic power and thus reinforces the status quo. It is also that all of us contribute to the (re)construction of the social world through the expression of our own habitus.

Bourdieu is criticised for the determinism that seems to be implicit in this description of the unlearnt acquisition of attitudes as the basis for an individual's habitus. There is something in this idea that Bourdieu is a determinist, at least to the extent that he is

critical of those who invoke the idea of freedom, of the 'person', and the subject. This invocation simply "enclos[es] social agents in the illusion of freedom" (Bourdieu and Chartier 2015, 20) because it fails to take account of habitus. Habitus reflects an internalised social structure that informs the way we classify ourselves and others, and leads us to adopt patterns of behaviour and conduct that extends to all, or almost all, domains or fields (as Bourdieu describes them) of activity, including taste, culture, and the practical 'life' choices we make. This illusion of freedom is embraced most particularly by intellectuals who resist the thought that they are straitjacketed in how and what they think (20), but blindness of this sort has consequences in all fields of enquiry, including philosophy and jurisprudence. It is reflected, for example, in the idea that accounting for racism as a social construct is sufficient not only as an explanation but also as an answer to the 'problem' of racism. Tommy J. Curry cites Richard Delgado's observation that the adoption of a social constructivist account of race is not sufficient to disrupt the reproduction of White privilege and the racism it relies on. Telling even well-disposed people that race is a social construct will not of itself enable them to divest themselves of the social practice and attitudes that racism relies on: the construct is not so easily dismantled. And to assume that such an analysis *is* sufficient for this purpose only serves to cast those who doubt the efficacy of ideal solutions as deficient ("de-rationalize[d]") thinkers, people who lack that certain kind of rationality associated with an Enlightenment subject. Reliance on explanatory theories without more tends to justify an ideal theory that ignores lived experience and silences those who live it (Curry 2011, 9).

Bourdieu does allow that individuals have some agency, and in this sense distances himself from a determinist's view. He argues there is room for autonomy, noting that there is no automatic correlation between an objective social space and any particular aesthetic, religious or political stance (2018, 71). In particular, Bourdieu argues that the 'political' social space enables relative autonomy which in turn produces heterodox ideas about how the world is, and how it might be different. Such ideas do not map onto fixed objective classifications and as such they enable a diversity in representations of the social world.

Bourdieu's account of habitus and social position enables us to form a picture of a social world in which we can make sense of social group hierarchies of relative privilege and oppression. This analysis is consonant with my description of both informal jural relations and deontic status. It also allows us to expand our analysis of rights and liberty as social relations in a way that offers an explanation for the failure of a formal regime of civil, social and political rights to secure the goods that such regimes purport to promote.

At the same time, Bourdieu's theory echoes or at least calls to mind Heidegger's account of Dasein as 'giving meaning'. It also accords with Heidegger's description of our *thrown-ness* into a world that is not of our choosing and with Heidegger's notion of *Abstandigkeit* (distantiality) whereby we stand in perpetual comparison to others, measuring ourselves against them. Bourdieu emphasises the way our perception of difference, and our partiality for expressing that difference in binary terms, has a signifying, structural effect on our perception of the social world. I now turn to Sara Ahmed's account of (dis)orientation in social space as an expression of social practice and Heidegger's phenomenology of space at large in the world.

6.4 *Sara Ahmed and (Dis)Orientation in (Social)Space*

Sara Ahmed examines the phenomenology of space in terms of Heideggerian *orientation* (2006; 2007). She cites Henri Lefebvre's conclusion in *The Production of Space* (1991) in which he says of *orientation* that it describes a sort of perception or sense of direction in making forward progress in life (Ahmed 2006, 12 quoting Lefebvre 1991, 423). We each sense our particular orientation in space, and this reveals our position and our direction of travel. This sense of orientation in space matters because the place we occupy in space determines both our (relative) orientation to the rest of the world, and our particular perspective on that world. This is not to say that orientation is a subjective matter concerned with an individual subject's 'bird's eye view'. Space is a social phenomenon that can be carved up in a multiplicity of ways (physical, geometrical, temporal, economic, cultural, political, public, private, social—it's a portmanteau category with flexible boundaries). However, the orientation of any particular subject is determined to a large degree by the social space she occupies, and orientation in space necessarily carries the notion of relativity.

Starting from a relative position in social space, it is the *directionality* of orientation that Ahmed particularly focuses on in *Queer Phenomenology* (2006). Directionality brings into focus the importance of embodiment in our understanding of space: we get a sense of direction from and through the relationship of our bodies to the lines or paths we follow as we move through space (13). Ahmed argues that the notion of 'orientation' offers a way to make sense of the 'sensational' phenomenology of space. It is this *feeling* of (dis)orientation that is relevant to the practical experience of liberty and rights, and the way this experience is dependent upon an individual's orientation (which Bourdieu would describe as an aspect of their habitus). We are each determined by our orientation, and the way we 'turn'. Ahmed notes Judith Butler's use of Louis Althusser's 'hailing' as central to the constitution of subjectivity, as a person recognises themselves as a subject and 'turns' in response to "hey, you there!" (Althusser (2014, 264). Butler argues that this 'turning' describes a response to hearing oneself addressed as a subject (1997, 33). But Ahmed stresses the importance of the directionality of the 'turn', and the force of 'hailing' to the emergence of subjectivity (2006, 15). We are orientated to follow those paths that lie "in front" of us, pursuing what is "available" to us (2006, 14). The path ahead defines the field of possibility to the extent that there is no consciousness of 'paths not taken' (even though our choices are given context by these unfollowed alternatives). This brings to mind both Heidegger's notion of 'projection', the limitations placed upon our choices by both our 'thrown-ness' and our relation to other Dasein, and the 'inheritance' of access (or otherwise) to 'space' that Ahmed describes (see 6.5 below). It also reflects Bourdieu's habitus and its role in the maintenance of a social order that seems to 'fix' social position and hence the paths we follow. Recall Bourdieu's description of the way habitus tends to direct people to make choices that are 'equivalent' in terms of a social classification to the 'place' they occupy in a social hierarchy (1989, 19).

We follow in the footsteps of people like us who have gone ahead, and in doing so we recreate the line that others then follow after us. Ahmed remarks that this makes the lines we follow performative in the sense that the work of others has made a path we follow, even though this work is hidden from us, and we (unwittingly) continue that work as we proceed (2006, 18). This is 'orientation' as it relates to the directionality of space, but orientation also has a temporal aspect. It is not just that actually treading a path (and

living a life) takes time, and the longer it takes the more 'fixed' in its trajectory it is likely to become. It is also that 'orientation' is a turning 'towards', an embrace of one's space that speaks to a process with an extended temporal dimension such as that reflected in the notion of 'dwelling' (2006, 20 citing Heidegger "making room" (1997, 111). This 'orientation' in 'specific directions' again calls to mind habitus and its directional effects, and Heidegger's emphasis on natality and thrown-ness as fundamental to Dasein as being-in-the-world. This sense of being 'at home', of 'dwelling in', is clearly not confined to the occupation of a home. It extends to the world around us, a world where to be 'out of place' is to feel an experience of diminished agency that limits self-expression. (In 'This is what it feels like to be black in white spaces'[88], Elijah Anderson describes Black Americans' experience of 'everyday discrimination'. He places particular emphasis on the experiential aspect of discrimination: this is about how discrimination makes a person *feel*. As Anderson describes it, Black people in White space feel vulnerable to suspicion if not active hostility.)

If orientation tends to point the way forward, it also tends to bar the pursuit of alternative paths to different destinations. There are possibilities for divergence, for 'turning' from the path ahead. To take an alternative route is to 'deviate' (and become 'deviant') in a world in which our embodied selves express and reveal the effects of the paths we have taken in the course of our lives. To find oneself off the path and out of place, in the 'wrong' space, is to suffer, as Ahmed proposes, *disorientation*. Ahmed draws particularly on a discussion of racism and the racialisation of space to show how it works to "orient[…] bodies in specific directions, thereby affecting how they take up space" (2006, 24). She argues that occupation of space produces racialisation, as when a hostile white gaze *makes* the body black: black bodies in a white world are disorientated, and this causes "diminish[ed] capacities for action" (2006, 111). It is not that others pre-empt our liberty (which is always necessarily contingent). This diminishment in a capacity for action is not a simple expression of liberty's contingency. It is a foreclosure or denial of future possibilities. This conclusion chimes with my argument that the relative weight of informal jural obligation/entitlement—deontic status—will tend to determine an individual's access to liberty, in both quantitive and qualitative terms.

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[88] Anderson, Elijah (2018). "This is what it feels like to be black in white spaces". The Guardian 9 June 2018 see: <https://www.theguardian.com/commentisfree/2018/jun/09/everyday-racism-america-black-white-spaces?CMP=share_btn_link> (accessed 18 February 2020).

The importance of (dis)orientation and its impact on our 'experience' of the social world and space is not reflected in most philosophical treatments of the form and function of rights. I consider Ahmed's description of what we find 'in front' of us as determinative of the 'paths' we follow has important implications for questions of rights and liberty. As Ahmed says:

"Given that some lines more than others are lines of privilege (i.e., that following such lines is "returned" by reward, status, and recognition), then the loss of certain futures becomes a political loss […]" (183, fn 8)

Just so, privilege, status, and recognition are reproduced, as are injustice, discrimination, and inequality. This idea that some enjoy relatively more liberty in consequence of a diminished opportunity for action in others is critical to my account of jural relations in which I propose that *informal* jural relations of entitlement and obligation reproduce these patterns at least in part through a phenomenology of space.

Ahmed addresses the effect of disorientation on the differential enjoyment of rights and liberty, drawing on Heidegger's description of how the ready-to-hand characteristic of equipment, such as a hammer, is found in its successful use in Dasein's engagement with hammering. This readiness-to-hand is not confined to simple proficiency and success in hammering. It also speaks to the 'role' of the hammerer (she may be a carpenter, or a mechanical engineer, for example). In this way, the hammer is employed in the 'project' the hammerer is engaged with: the hammer itself is endowed with a "pragmatic character" that points towards its "in-order-to" character (1997, 68). The hammer is not simply a tool, an object. Its use is integral to being-in-the-world, which is to say it is integral to Dasein. Readiness-to-hand is experienced by Dasein as an absence of conscious engagement with equipment, such that it feels not just as though it is an extension of the hand but as if it is integral to and undifferentiated from the body. If the hammer were to break, its "in-order-to" character would be lost. It would become "present-to-hand", an object of contemplation, no longer felt as integral to the carpenter and her task. As such, the hammer will then be seen to have properties as an object, such as heaviness. My claim is that rights can be understood in terms of equipment that must be "ready-to-hand" if their "in-order-to" character is to be effective, as I describe further below.

Ahmed proposes that present-to-hand properties are relative to particular subject/object relations ('this hammer is too heavy *for me*', for example) (2006, 50). She describes a successful relation to equipment (the experience of readiness-to-hand) in terms of orientation: being in the 'right' place and on the 'right' path for the use of the equipment in question. That place and that path will be constituted through social practice—Bourdieu's habitus comes to mind—and the pursuit of certain roles in a particular network of relations. Divergence or deviation from these paths produces a feeling of unreadiness-to-hand, a sense of disorientation. Ahmed describes great variety in the experience of *disorientation*: it can be felt as failure, as displacement, as crisis. She focusses in particular on the way disorientation "involves becoming an object" (2006, 159). Ahmed argues that disorientation reveals bodies as objects. She cites Fanon's description of the Black body as an object under the White gaze (*Black Skin, White Masks* 1986). She says the queer body reveals deviation from or between paths that should not meet. It is this "'deviation' [which] makes queer lives queer" (Ahmed, 2006, 161). Implicit in the idea of disorientation as deviation and objectification is the fact of exclusion from a dominant culture, a culture that is reproduced to a large degree through the network of formal and informal jural relations I describe in Chapters 3 and 4.

So how does the successful use of equipment, its ready-to-hand, pragmatic and in-order-to-do character on the one hand, and the phenomenology of disorientation and present-to-hand subject/object relations in the use of equipment on the other, fit into my account of the problem with the differential enjoyment of formal rights and associated liberties? Formal rights-relations are 'equipment', albeit this equipment does not have the extension in space we see in hammers and other physical equipment. As equipment, formal rights have a clear pragmatic and in-order-to-do character. They enable and protect liberty in action, and they serve practical purposes in the social world. Such purposes could be broadly broken down into, say, political action, cultural involvements, the enjoyment of family life, employment, education, a 'social' life. Successful engagement with formal rights is (as Heidegger describes) relative to specific roles and in-order-to-purposes. Moreover, successful ready-to-hand engagement with rights—just like successful engagement with hammering—is an unreflective, unconscious exercise of liberty. It is felt as a natural 'reflex' action in which the 'right' to act is an undifferentiated 'use' of liberty. Those whose rights are ready-to-hand exercise the relevant liberties without being aware

that they are 'using' their rights. By contrast, those who consciously assert their rights will often do so precisely because their engagement with this equipment is *not* ready-to-hand but rather present-to-hand. They may attempt to act in exercise of a right, but find their liberty to do so is denied or diminished. They will feel ill-at-ease, disorientated. This phenomenology has both a literal and metaphorical spatial dimension. There are places that literally make people feel welcome/excluded. There are social 'spaces' that are open to some and closed to others. As Ahmed describes it, deviation from paths that become fixed over time is felt as disorientation and exclusion (and I think Bourdieu's habitus helps here, with its analysis of how social position and roles are embodied and hard to disrupt).

6.5 *Affective Space*

Ahmed offers an analysis of how the phenomenology of space affects and controls (and restricts) the possibilities for deviation or divergence from those unconscious, deep-rooted social relations, structures, and practices that are characteristic of the social/spatial world described by Heidegger and Bourdieu. The world, and our orientation to it, is unchosen, a 'given' that we have to deal with from birth. This is not simply a matter of genetic inheritance. We are also given our history, a legacy from past generations. These are the narratives we rely on to make sense of the world. We also inherit ways of being-in-the-world, including our sense of what is within our grasp, our reach, and what is not. Ahmed describes how those who are at ease in a particular place feel that space as an extension of themselves: they dwell in it, it envelops them, offering a feeling of comfort. Proximity to others like them reinforces this feeling of comfort, of being 'at home' (2007, 153-155). Disorientation describes the phenomenology of deviation, which is felt as discomfort and unease. I now address the transmission of this 'affect' in space and its relevance to our understanding of rights and liberty, drawing on Heidegger, Bourdieu and Ahmed.

The enjoyment of rights and liberty requires effective social connection. It is by and through our relations with others that we experience the enjoyment of rights and liberty, or the lack of it. Dasein's effective social encounters with other Dasein is an undifferentiated experience of "*with-like* being-in-the-world" (1997, 118). In the social context of being with others, Heidegger draws on notions of 'atmosphere' or mood as a

reflection of a group cohesion in situations in which we share a sense of social immersion that cannot be explained in terms of subjective feelings or consciousness. Hubert L. Dreyfus points to Heidegger's *The Fundamental Concepts of Metaphysics* for an explanation of the way "shared attunements […] repudiate the Cartesian self" (2013, 147). This 'repudiation' reflects the absence of any felt sense of subject/object relations in the experience of Dasein. Dreyfus cites Heidegger's description of the contagion of moods or 'attunements' as a basic, fundamental way of being, and of being with other Dasein (2013, 147 citing Heidegger 1995, 100-101). Note how the phenomenological aspect of this account is necessarily spatial because it concerns how it feels to be in a shared social space. This marks a critical difference with, in particular, a Kantian analysis of liberty and right in terms of deliberative choice and an exercise of the will.

Dreyfus' idea of our social experience of moods as an unconscious, unreflective contagious infection chimes with Heidegger's account of 'readiness-to-hand' as an unthinking state of absorption in a task. But in this instance it concerns an absorption in the social world of being-with-others rather than the execution of a task. Dreyfus shows how Heidegger's account of attunement in social behaviour is supported by work on 'mirror' neurons in neuroscience (2013, 149). Mirror neurons are behind the observation of unreflective resonance in behaviours between members of social groups. This is seen in the contagious nature of laughter and yawning but is also observed in a range of other behaviours. Dreyfus cites Bourdieu in support of his claim that social norms are transmitted through unconscious imitation of action. The adoption of these social norms is em-bodied such that it is hidden from conscious deliberation and thus not amenable to attempts to change it (Bourdieu 2013, 87 and 94 cited by Dreyfus 2013, 154 and fn 20).

All of this speaks to both the habitus of Bourdieu and to Heidegger's Dasein as 'dwelling'. But it also acknowledges our thrown-ness into a place in history not of our making. There are spaces in the (social) world in which some of us will not feel at ease, spaces where, for some, things feel beyond their reach. In these spaces people experience a feeling of disruption and discomfort, an un-readiness-to-hand, of exclusion, of confinement and stasis. I am not proposing that those with a relatively higher social status tend to feel generally more 'at ease' compared to their social inferiors (although this might be the case for some). All of us can feel out of place in an unfamiliar and possibly

hostile social space. But there are clear political implications for this phenomenology of space. These are acknowledged by Ahmed (2007, 162) as concerned with social mobility. For all the practical and rhetorical solutions offered to solve the 'problem' of social mobility, none explicitly confronts the easy progress made in places that *matter* by those who maintain a privilege founded on a *feeling* that they are free to move through the world and occupy spaces of power where they have always felt not only 'at home' but also entitled to be there.

Rights and liberty as jural social relations are not evenly distributed in social space, nor evenly distributed to all: disorientation affects people differently as they occupy the same and different spaces, and affects some more than others. It hardly needs saying that being-in-the-world is not by any means a homogenous, universal experience. It is important to recognise not only how the enjoyment of rights and liberty is affected by those who experience discrimination, but also to see by contrast the way rights and liberty are experienced by those who enjoy rights and liberty as 'ready-to-hand'. There is a seamless connection between people just 'being themselves' and those same people enjoying formal rights and associated liberties. This explains how some people are able to enjoy civil rights to *habeas corpus*, to due process before the law, to freedom from arbitrary arrest and imprisonment, to freedom from state sponsored violence quite unreflectively as a norm that can be taken for granted as a default position whose disruption is virtually unimaginable. It is to say that the right to work as an expectant and actual parent can be assumed. It is to say that success in employment and politics is taken to be merit-based, unaffected by religion, disability, sex, gender and race. I am trying here to capture the *experience* of unreflective entitlement that distinguishes the lives of those who have no cause to stop and think about their relative privilege. They feel well-orientated in the enjoyment of rights and liberty. This phenomenology should be reflected in a situated account of what it takes to have practical enjoyment of rights and liberty.

6.6 *Conclusion*

Bourdieu and Heidegger offer different but complementary analyses of the social world that have significant points of convergence. Both rely on a social ontology in which being-with-others is fundamental to an understanding of being-in-the-world. They each locate the individual in her particular social and historical context: Heidegger in the idea

of thrown-ness and Bourdieu through habitus. Each of them see social practice as determinative (to a greater or lesser degree) of social 'place'. Both are concerned with the embodied individual. They share a preoccupation with 'space' in both figurative and metaphorical senses. Each places critical importance on the hermeneutic challenge that faces individuals seeking to make sense of their lives in the social world. Ahmed provides a critical phenomenological perspective on the 'outsider' experience.

I am not attempting in this Chapter somehow to synthesise a unified theory from a combination of Heidegger, Bourdieu and Ahmed. But I hope my consideration of their analyses of our experience of the social world offers an explanation of the deep-rooted processes that underly our social involvements and our social/spatial relations. This reflection on the social world, I suggest, points to one good reason to call into question the efficacy of 'rights' (in the formal sense) as a panacea for 'injustice' in whatever form it might take. The super-structural imposition of formal 'relations' on existing social/ spatial structures is by no means sufficient to change the distribution of symbolic power, nor to subvert existing informal social relations founded on habitus and thrown-ness within a social hierarchy if those relations are at odds with the new 'formal' relations in question. This means an extension in the suffrage, for example, will not have an instantaneous effect on the political engagement and power of those previously subject to exclusion. Not only are we in relations of complex social dependency, we are also responsive (for personal good or ill) to a multitude of phenomenological affects from the social world around us. Given this is so, it is necessary to question the efficacy (without more) of a set of formal citizen rights as key to equality and justice.

In this Chapter I have looked at the phenomenology of social relations, the challenge posed by thrown-ness and habitus, and the phenomenology of disorientation. My focus has been on the complexity of the social world, and the adverse effects of (dis)orientation, at least for some, in relation to the enjoyment of 'universal' rights. An individual's habitus and a particular Heideggerian 'orientation' may well restrict her ability to really partake in the benefit of formal rights. The feeling of disorientation may inhibit deviation from the path being followed, and limit any success in changing course. It will be apparent, however, that orientation works 'both ways'. It limits horizons and dictates which way to go, whatever status we may enjoy, and wherever we may be placed in a social hierarchy.

For some, this limitation on horizons simply reproduces privilege and relative dominance, while for others it reproduces disadvantage and subordination. Wherever an individual may stand in relation to others in a social hierarchy, divergence from the 'expected' path may be felt as disorientation, even if the consequences of deviation in terms of material (as opposed to psychological) welfare and well-being will likely be different. In the next Chapter I move away from the disorientation found in the difficult endeavour of stepping outside a socially determined position and turn instead to consider the phenomenology of easeful entitlement.

Chapter 7

Entitlement and Privilege in Jural Relations

7.1 *Introduction: Deontic Status and Differentials in Liberty*

In this Chapter I want to develop further the connection between two points I have already made: the role of liberty in the enjoyment of rights and its relation to the deontic status of individuals in a social hierarchy[89]. The importance of the notion of an individual's deontic status is that it provides a key to understanding both practical and theoretical access to rights as contingent upon one's position in a complex network of social relations. This analysis will show how the notion of 'privilege' is relevant to rights-enjoyment. I use 'privilege' to describe position on a scale of relative 'entitlement' and disadvantage[90]. Privilege speaks to a position of advantage compared to those whose access to liberty and rights is blighted by an entrenched and persistent disablement.

In the last four Chapters I have presented a situated account of jural relations that foregrounds the necessarily relational nature of both liberty and rights, and locates citizen rights in a complex social world. I highlighted the critical role of liberty as a prerequisite to the effective exercise of rights. I argued that the operation of informal jural relations reflects and reproduces differentials in an individual's 'deontic status' (following

[89] I do not intend to make a claim about the role of hierarchy in society (cf Jonathan Wolff (2019)) but I note that even those who support hierarchies of individual status and esteem, or defend the beneficial effects of a symbolic hierarchy as 'necessary' for a well-functioning civil society, do not defend the perpetuation of group hierarchies based upon arbitrary distinctions related to (for example) skin colour, or gender. As for the 'source' of hierarchical structures (described by some as 'natural' and therefore 'unavoidable') I rely on embodied patterns of social behaviour reinforced by a tendency to individual and group classification according to a dominant symbolic power that fixes the meaning of social difference. See also Craig Brown (2019, 408) "Despite their modernist commitments to autonomy and (some version of) equality […] rational and empirical critiques of hierarchy have difficulty elucidating the sources of hierarchy that have conditioned its renewal by those political projects most deeply committed to its abolition."

[90] (So I am not using 'privilege' as a Holfeldian synonym for 'liberty' — but see below at 7.4)

Brännmark 2019, 1053). In the previous Chapter, on the sociology and phenomenology of rights and liberty, I sought to show how these differentials are maintained by appealing to Heideggerian phenomenology, Bourdieu's habitus and social practice and Ahmed's account of (dis)orientation. I proposed that jural relations, including the liberty and rights we associate with citizenship in liberal democracies, can be understood as equipment or tools for living in society. For some, the liberties needed for a 'full' engagement with rights are ready-to-hand: they are deployed unreflectively, as extensions of the self. For others, engagement with rights and liberty is fractured and frustrated. This unreadiness-to-hand is not (as in a typical example from Heidegger) a consequence of a one-off failure in equipment, comparable to the way a broken pen nib stops the flow of ink and impedes writing. It is the outcome of embedded patterns in social practice, and of 'position' in a social hierarchy, as described by Bourdieu. Unreadiness-to-hand for members of socially salient groups catches the likely diminution in access to the liberties needed for a full engagement with rights.

This rights-deficit stems directly from the relational character of liberty and rights, which depend for their success on the particular dynamics of interpersonal social/jural relations. Liberty and rights are not simply 'there for the taking' like fruit on an ever-giving tree. They are necessarily the product of a successful social relationship that has at its heart a mutuality of recognition of the other as a liberty-holder and rights-bearer. Deontic status describes relative differences in the extent to which people enjoy liberty, which in turn affects access to the benefits of both formal, citizen rights and the informal entitlements that maintain social hierarchies in different domains in the world. In this Chapter I want to show how relative privilege in deontic status is enjoyed even while its benefits are overlooked and explained away. A significant defect in liberal rights theory is, I suggest, the failure to appreciate and accommodate the wide variation in access to liberty experienced by those of lower deontic status compared with the relatively privileged.

The enjoyment of relative privilege in deontic status is illustrated by this Diary piece by John Lanchester[91]:

"I remember, back at the start of lockdown, trying to draw up a rough mental ledger of things I would miss. The idea was to try and anticipate difficulties so as not to be

[91] Lanchester, John (2020) "Diary" London Review of Books (Vol. 42 No. 16, 13 August 2020)

blindsided by them. My list was heartfelt but unoriginal and consisted mainly, now I look back at it, of various blessings of city life that I had come to take almost entirely for granted. Seeing friends. Going for a walk round the block or across the common or through the middle of town whenever I felt like it. Buying any foodstuff known to man at more or less any time of the day or night. Shops selling everything in the world, visitable at one's convenience. Going to the movies whenever. Eating out whenever/wherever. Espresso machine coffee. Bookshops. What it all boiled down to, close to complete freedom of movement and choice".

John Lanchester acknowledges not only the benefit of something like 'complete freedom' in the enjoyment of his various 'blessings'. He also admits an engagement with these liberties that is frictionless to the extent that hitherto he had taken it 'almost entirely for granted'. While Lanchester's list of 'blessings' may seem trivial, he speaks to the seamless engagement with liberty and rights that I have tried to capture in my Heideggerian account of rights and liberty as ready-to-hand equipment for living in social space. By contrast, relatively low deontic status (and an unreadiness-to-hand) is expressed in the Black footballer Danny Rose's account of everyday racism, as reported in the Guardian[92]:

'Rose has now opened up on his experiences in wider society [beyond professional football], saying he was first stopped by police as a 15-year-old and it was still happening to him at 30. "My friends have been there with me a lot of the time when it's happened," he told the Second Captains podcast. "The last time, last week, when I'd just been at my mum's house, I had pulled up in a car park so the engine was off. The police pulled in and they brought a riot van, three police cars and they questioned me. They said they'd had a report that a car had not been driving correctly."So I'm like: 'OK, so why does that make it my car?' I got my ID out and they breathalysed me. It's just one of those things to me now. What can I do? Fifteen years of this on and off the field happening and there's no change whatsoever." Rose described being stopped by police as a regular occurrence. "Each time, it's: 'Is this car stolen? Where did you get this car from? What are you doing here? Can you prove that you bought this car?'"

There is an obvious and perhaps banal difference between a life lived as an exercise of unlimited small 'choices' as against a life pockmarked by offensive interference in 'choice'. But there is another contrast between these two accounts of contemporary life that I want to highlight. John Lanchester's reflections were prompted by a radical disruption to "normality" that enabled him to identify and name "choice" as the source of his happiness, he drew up a "ledger" of "things [he] would miss"; these were "blessings"

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92 Hytner, David (2020) "Tottenham's Danny Rose tired of police stopping him to ask if car is stolen" The Guardian 3 August 2020 see: <https://www.theguardian.com/football/2020/aug/03/tottenham-danny-rose-tired-of-police-stopping-him-to-ask-if-car-is-stolen> accessed 10 September 2020

that he took “almost entirely for granted”. And he came to realise (apparently for the first time) that he enjoyed something “close to complete freedom of movement and choice”. By contrast, Danny Rose gives an account of the racism he has faced all his life. This is his ‘normal’. It has always been apparent to him and required no extraordinary event for its revelation. Rose identifies racism as the reason he “can’t wait” to walk away from his career in football. It is difficult to think of anything that could pollute a male professional footballer’s experience of success in such a way, apart from racism and perhaps homophobia or sexual abuse, and make them look forward with pleasure to walking away from a prestigious and financially rewarding career. Rose does not say in terms that racism has blighted his exercise of choice, but I suggest that conclusion is implicit in what he says. His everyday decisions including what car to drive, where to go, and when to stop are persistently undermined by institutional racism that profiles Black men as criminals, just as his choice of career has been blighted by a racist public and an historically indifferent management.

These two cases show a differential in deontic status reflected in the relative privilege of a White man over a Black man in a particular domain—being out and about in public space. Rose’s problem stems in part from his ownership of a car that is taken to be ‘beyond his means’: he is stereotyped and treated as a criminal. He is in effect being told that he should not have the money to buy such a car. These cases concern a radical contrast in the freedom each is able to enjoy in a shared social space in which Lanchester’s relatively higher deontic status is (heretofore) taken for granted and Rose’s lower deontic status is constantly in the forefront of his thoughts. Entrenched privilege in jural relations is a structural fault, the flip side of the institutionalised failure of formal rights experienced by members of socially salient groups. The lived experience of privilege is an unconscious taking-for-granted of the benefits of differentials in social status, benefits that are rationalised by an ideology of opportunity, choice, and desert. In the context of jural/social relations, privilege is found in an easy access to liberty, which in turn enables a maximal enjoyment of rights. Lanchester shows how this is experienced as an undifferentiated exercise of simply ‘being’ in the world. Low deontic status may be the product of instances of wrongful discrimination. But as Bourdieu shows, and Ahmed recounts, it is reproduced through social practice and a phenomenology of unease and exclusion. The ‘paths not taken’ by members of socially salient groups are not necessarily

barred by explicit discriminatory acts. Rather they reflect a divisive social practice, a learnt acceptance of the social 'order'. This is relevant to my account of privilege and status differentials as an explanation for the failure of citizens' rights to deliver substantive political equality. Rights-failure is too often treated as a 'simple' problem of discrimination, whether person-to-person or structural, while the idea of 'civil rights' has been subsumed and boxed into a right of non-discrimination (Altman 2022). This reduction ignores the complexity of the informal jural relations and social space that I describe.

Wrongful discrimination[93] (hereafter 'discrimination'), including discrimination in relation to rights, tends to be treated as a deviation from a norm or standard of behaviour that notionally pertains when all have an equal access to the benefits of rights. This 'norm' is implicitly characterised in terms of an ideal social world in which there is a 'blindness' to race, gender, and all other bases for discrimination as described in anti-discrimination legislation[94]. To talk of 'discrimination' is to make a normative claim about how civil society should be. But this normative background is under-determined or simply stipulative. It does not engage with the social mechanics that might make it the case that citizens have equality in rights enjoyment. It does not consider why it is that in contemporary liberal societies, some groups and individuals *do not* suffer discrimination while for others there is a persistent systemic group-based exclusion from the full enjoyment of rights. This indifference to the source of inequality in rights-enjoyment seems to be expressed in the proliferation of *more rights* as a principal response to discrimination. *Anti*-discrimination rights now stand as an expression of deontic status and privilege, marking higher and lower status in a social hierarchy. Those who are given

[93] I am not here talking about the discriminatory cognitive attitudes that may fuel hate crime, for example. I am considering discrimination as it tends to be characterised in political theory and philosophy: a 'wrong' or 'harm' that involves the differential treatment of certain socially salient groups related (in whole or in part) to membership of the relevant group (Altman 2020)

[94] Equality Act 2010 section 4 lists protected characteristics as follows:

- age
- disability
- gender reassignment
- marriage or civil partnership (in employment only)
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

recourse to anti-discrimination rights generally have lower deontic status and a lower position in the social hierarchy, subject to variations on account of intersectionality.

Relatively high deontic status within certain critical domains explains how and why some citizens enjoy liberty and rights without, or virtually without, interference—while others experience a poverty in liberty and an effective denial of rights. 'Critical' domains are those associated with authority and status in wider society. No-one has unfettered 'freedom': liberty is relative and domain specific. The relative privilege of (say) John Lanchester reflects particular social expectations about what it takes to lead a 'good' life, what it means to be successful. As Bourdieu describes, our appreciation and perception of the world is socially constructed, and we cannot abstract ourselves from that process. It is in this context that privilege does not (indeed cannot) acknowledge its role in the reproduction of its own status and power. Lanchester will be excluded from the enjoyment of liberty in certain domains, and he will feel the phenomenology of the exclusion. But the point is that (by and large) these are not domains of action that he would choose or desire to enter. They are not associated with the privileged status he enjoys. This is relevant to citizens' rights and their effective enjoyment because privilege enables individuals to make choices in favour of exercising the liberties associated with social, political, economic and cultural rights. By contrast, lower deontic status is maintained not only through the overt disruption of choice-making we see in the arbitrary police interference described by Rose, a disruption that is also seen (for example) in discriminatory hiring practices in employment. Lower deontic status is also maintained at a psychological level, in two respects. First, it restricts the field of options open to the individual by forcing her to take account of actual and/or threatened exclusion from certain domains. Thus she may think twice about walking alone at night, or going into certain neighbourhoods. It also informs the individual's understanding of herself as a person to whom only certain options are open while others, in general, are not. So she may reasonably expect to find employment in the beauty industry, or in the care system, or as a nurse, or in public transport, as a driver or cleaner. She may not reasonably expect

to be an airline pilot or an engineer[95]. Choices may concern day-to-day decisions about how, when, and where to move through space (driving the 'wrong' car while black leads to trouble). Or they may be about substantive 'life' decisions concerning ambitions in education, employment, and lifestyle. In this Chapter my focus is largely on the liberty associated with higher deontic status. I rely on the epistemic and hermeneutic *in*difference to and ignorance of privilege illustrated (and acknowledged) by John Lanchester to support an argument about the persistence of differentials in deontic status and the implications this has for the enjoyment of liberty and rights. I begin by looking at how deontic status affects access to liberty. I conclude by considering anti-discrimination law as a response to systemic exclusion from rights.

7.2. *Deontic Status as a source of Privilege*

7.2.1 *Liberty and its relation to Deontic Status*

I have previously described how liberty is not simply an individual freedom. It is relational inasmuch as most liberties can be curtailed by the actions of others, directly or indirectly. If liberty is denied or restricted, there is a risk this will impinge on the practical enjoyment of rights. I am thinking here of both active rights, such as the right to education, and passive rights such as the right to be free from physical assault. In the former case, enjoyment of a right to education entails (at a minimum) the liberty to make choices, and this in turn presupposes the existence of a field of possible of options. In the latter case, freedom from assault entails a liberty (or basic freedom) to move through the world without unwarranted (or indeed illegal) interference.

I suggest that those whose liberty is hobbled relative to the privilege of others face checks on their choice-making and restrictions on their freedom generally. Liberal theorists are understandably keen to frame autonomy in choice-making in terms of 'real' options that take account of 'cost' and 'opportunity' (I have referred to Kant in this regard page 115ff)[96]. My argument about liberty and the making of choices is that the quantity and

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[95] I take it that women's ambition and choice-making broadly tracks the actual patterns of employment for women: see Buchanan, Isabel, Pratt, Alison and Francis-Devine, Brigid (2023) House of Commons Library Briefing Paper *Women and the UK Economy* accessed 23 March 2023 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi4s82Lut7rAhVATBUIHe6fBxwQFjAAegQIBBAB&url=https%3A%2F%2Fresearchbriefings.files.parliament.uk%2Fdocuments%2FSN06838%2FSN06838.pdf&usg=AOvVaw0yw5m1V0pwS4ZHo5zftEOV>

[96] And I return to this in my consideration of Sophia Moreau and anti-discrimination law, below.

quality of real options is determined by the width/narrowness and depth/shallowness of an individual's liberty to do as she wishes. I am not making a point about material inequality, although of course that too has consequential effects on the enjoyment of liberty. My claim is that regardless of relative wealth, what may be 'real' options for some are simply not open to others. This may be unobjectionable in particular cases, but in some—perhaps many—it will reflect structural prohibitions (and inhibitions) that are embedded in social practice (as Bourdieu's account of habitus explains and Ahmed's focus on Heideggerian phenomenology demonstrates). This will play out in social relations that perpetuate deference and preference on the one hand, and exclusion and discrimination on the other. Foucault's account of disciplinary power as a process of division offers another perspective on this social practice: exclusion is founded upon a discourse of objectification based on social categories and a process by which "a human being turns him- or herself into a subject" (2000, 327). The malign effects of disciplinary power are expressed through a multi-dimensional process of division and exclusion—in terms of both physical and psychological space. As Bourdieu observes, we share a "a predilection […] for *binary thinking* […] which always refers back to an oppositional relation between social positions or social groups" (emphasis in original). These are "structured alternatives" that are "objectively political" (1991, 80). These oppositional social divisions entail differentials in the enjoyment of liberty. Privilege opens up the world and its possibilities, while diminished status narrows horizons and denies people access to opportunity and choice. Wendy Brown neatly summarises the benefit of privilege in the exercise of rights:

"the more social resources and the less social vulnerability one brings to the exercise of a right, the more power that exercise will reap" (2002, 420)

The practical consequences of this in (say) education is an apparent freedom of choice that in practice tends to reproduce existing social categories and distinctions. Following Bourdieu's observation concerning binary thinking and the perpetuation of social divisions, 'choice' in education tends to be expressed in the adoption of gendered, raced and social class based 'roles'. As for the 'right' to be free from physical assault, its precarity or security is often dependent upon whether a would-be assailant chooses to exercise a vicious liberty. This is a liberty to act in direct contravention of the legal rights of others: to deny the duty owed to them as fellow citizens. This liberty is seen in action

when police officers use disproportionate, excessive (and illegal) force in the arrest and detention of Black men. It is also the liberty of men who use violence, or threat, against women, or simply assume consent to sexual relations. In both cases, the liberty of those who face this systemic, structural subordination is curtailed not only by the violence itself but also by the ever-present anxiety engendered by the anticipation of violence and threat, both physical and psychological (Manne 2019, 68-69). The point I am making here is that the anticipation of threat and violence, as well as actual violence and threat, tend to reduce the options, the choices, open to those affected, and hence their liberty. In practical terms, free movement is curtailed, and certain spaces are put 'out of bounds', whatever formal rights a person may have.

I make this argument to illustrate the relation between liberty and rights-enjoyment: where liberty is undermined, so too is the enjoyment of rights. Rights do not guarantee a protected domain of liberty[97]. The enjoyment of liberty and rights is necessarily dependent upon the situation of the particular individual in a social context in which her formal right is just one amongst many competing formal and informal jural relations. Brännmark (2019) describes the micro-level actions and reactions that together constitute the performative reality of racism and sexism in society. He notes that the constraint of duty means that one individual's liberty is curtailed for the benefit of another's enjoyment of a right. Brännmark describes jural relations as structuring, noting that those who command duty are free to exercise a greater degree of liberty because of the correlative imposition of duty on others (2019, 1053). This is unobjectionable within a system of formal rights founded on principles of equality in the enjoyment of the benefits of citizenship. Hohfeldian jural relations are domain specific, just as a positive system of law prescribes domain specific rights. If all citizens enjoy the 'same' formal legal rights, they also share the same burden of correlative duty or restraint. However, if our social relations are analysed in Hohfeldian terms as both formal and informal jural relations, the citizen's equality of boon/burden is upset and unbalanced. Lower deontic status is found where an excess of duty/obligation excludes liberty. This will tend to limit choice and opportunity, and restrict access to the benefit of formal rights.

[97] In making this point I acknowledge the force of Steiner's concern with 'compossible' rights and protected domains of liberty (1994). But I still maintain this is not a self-evident analytic claim, as Steiner proposes (see page 35 above)

There is room for complexity in this analysis. It can accommodate, for example, the imposition of duty on those who command the highest deontic status. This finds expression in the notion of *noblesse oblige,* the ethics of responsibility that attends privilege typified perhaps by the British Royal Family—particularly the late Queen Elizabeth II. This should not be taken as an argument against the potency of deontic status. While the most privileged in society may bear burdens that others are spared, those burdens are not such as to diminish or efface their status relative to others of lower standing. Indeed, it may enhance their position, as displays of conspicuous wealth applied for public benefit often do. Secondly, it seems to me that while the patronising exercise of *noblesse oblige* may be waning, there is no obvious concomitant reduction in the exercise of privilege by those whose elevated status is founded on wealth and who use their resources to protect the exercise of their rights as citizens (Ivison 2008, 183).

An individual's status and relative position in a social hierarchy is reflected in the 'balance' between the jural relations of entitlement/obligation she is subject to, be they formal or informal. All-things-being-equal, her formal rights will be supported by other people's performance of their correlative formal duties. Where duties are accepted (whether requiring performance or forbearance) there will be practical 'rights-recognition' in any particular jural relation. But if things are not equal, formal rights may be undermined by a (possibly vicious) exercise of a liberty that may amount to a breach of duty and denial of the correlative right. This is a straightforward case of non-observance of a formal duty imposed in virtue of another's right. Depending upon the right in question, there may be a remedy available for breach.

While persistent breaches of formal duties are clearly a problem, my concern is with those informal jural relations that constitute the minutiae of social obligation and entitlement. 'Balance' in this type of jural relation tends not to be equal between individuals occupying different places in a social hierarchy. In practical terms this means that some people enjoy a preponderance of entitlement over obligation, with a corresponding entitlement-deficit for duty-bound others. Where this is the case, some will enjoy a relatively larger degree of liberty to make choices about what they want to do, including which of their formal rights they wish to exercise or enjoy, and which of their formal duties they choose to observe. In this way a person's formal duty (which may

require an act or forbearance on her part) may be negated by as she chooses to exercise a liberty to do just as she pleases, whether by positive action or by default. By the same token, those in relatively lower positions in a social hierarchy may be effectively deprived of the benefit of their formal rights by reason of interference in their liberty more generally. For example, racial profiling means that Danny Rose cannot enjoy the almost 'complete freedom of movement and choice' that John Lanchester took for granted until he was deprived of it. I contend there is a broad correlation between position in a social hierarchy and relative degrees of liberty. I say 'broad correlation' to accommodate exceptions to a general rule, but also to acknowledge the domain specificity of this claim. In general then, higher social status confers greater liberty. Lower status tends to result in an excess of obligation over entitlement, and an individual with lower status in the social hierarchy will be subject to relatively more restrictions on her liberty.

7.2.2 Deontic Status

There is both a qualitative and quantitive aspect to liberty: it is not simply an all or nothing question about freedom/unfreedom. In proposing that we consider 'quality' I am in part responding to a 'nothing's stopping you' account of liberty as freedom from physical interference. But more than that, I am concerned with the phenomenology of easeful enjoyment of liberty. The 'best' quality liberty is exercised quite unreflectively, as a matter of course. But if the quality of liberty is sufficiently degraded it will be experienced as struggle, and the quantity of liberty will be in effect reduced if not nullified. This may perhaps be seen in an attempt to cross a river: there is nothing to prevent the attempt but success depends on the skill of the individual concerned, the equipment and support she has and the conditions encountered in the river. An attempted crossing by an unsupported, unskilled and ill-equipped individual in poor conditions is almost bound to fail, while another may succeed with support, skill, and appropriate equipment. All instances of attempted crossing from riverbank x to riverbank y can be characterised as an exercise of liberty. But for particular individuals the prospects of success may be so poor that their liberty is illusory. The question is, what makes it the case that some individuals can draw on support (trainers, navigators, crew, civil engineers), are able to develop the necessary skills (swimming, boat handling), and can access appropriate equipment (wetsuit, breathing apparatus, a boat, meteorological resources), while others cannot?

In the river crossing example, it might be thought that at bottom, all the necessary elements for success can be put down to the individual: so it is a matter of personal character, ambition, endeavour, innate ability, hard work, access to her own or other's material resources—and luck. However, if we think of the river-crossing as an instance of finding employment in a difficult jobs market, the support, skills and equipment required for success turn out to be 'soft' social/relational goods that are not obviously 'produced' by the individual candidate. 'Support' in this context is access to the kinds of social networks that provide introductions, contacts, and inside information. 'Skills' are found in a personal history of similar success and/or appropriate (even if not job related) achievement in education. 'Equipment' for success includes a way of moving in the world, immersion in a particular cultural milieu, 'good' referees, a certain sense of self-worth and entitlement—all of which are aspects of a superior deontic status. I want to stress that status carries with it the social and relational equipment that includes an ability to assert oneself *and be recognised.* I should qualify this account by acknowledging the complexity of our interpersonal and wider social relations. Once again, I stress the domain specificity of both rights and liberty. Deontic status is also domain specific, although characteristics of gender, class, education and employment will likely be predictive of high (alternatively low) status across multiple related domains. Against this, there are exceptions: for example, a successful criminal enterprise may well involve high-status individuals within a criminal milieu who lack standing within (say) mainstream politics[98]. Deontic status is predictive of an individual's prospects of success in the exercise of liberty in different domains.

7.3 *Case Study #5: Back to School*

The complex operation of deontic status in practice can perhaps be illustrated by looking at social relations within an archetypal 'small world' hierarchical society, such as a school. A school offers a useful example of a structured environment in which there are rule-based rights and obligations reinforced by a multitude of less formal but no less powerful social norms that can, I suggest, be thought of in terms of informal jural relations. I shall describe a rather old-fashioned, formal, co-educational school with a

[98] Although consider the influence of the Mafia, other organised crime, and hostile state actors on 'mainstream' politics: this speaks to a privileged access not obviously associated with high deontic status. I suggest though that status in these cases is covert rather than absent.

mixed ability intake of pupils, and I am going to talk about the sorts of hierarchies likely to be instantiated in the pupil-body in that school community. Foucault describes the "micro-physics of power" that controls bodies in space through disciplinary practices (1977, 29). This speaks to a mechanics of control but perhaps treats all bodies alike, failing to acknowledge different modalities of embodiment. A finer-grained consideration of the phenomenology of disciplinary power explains differentials in status within an apparently homogenous community of school children and shows how the 'docility' Foucault observes in disciplined bodies affects the male and female body to substantially different degrees (Bartky 1990, 65).

I shall start by addressing the school's formal hierarchy. Pupils will be arranged in a highly structured pupil body. First and foremost there is a hierarchy based on age: the arbitrary age discrimination that marks the child/adult distinction is applied in finer grain to differentiate status within the ranks of children where seniority counts for a great deal, and new entrants will really feel their subordinate status. This hierarchy will be reinforced by formal privileges. For example, uniform requirements will dictate who may wear what type of clothes, and these rules will change with progression 'up' the school. Access to facilities within the school and in the local neighbourhood will be licensed or denied by reference to age group, with some spaces 'out of bounds' for some pupils but not others. The pupil body will have formal divisions, as for instance a line drawn between the 'junior' or 'lower' school and the 'senior' or 'upper' school. There may be a 'house' system dividing the whole pupil body into a number of houses for the purposes of discipline, pastoral care, school sports, inter-house competition in the arts (drama, music) and the like. The house system will likely divide the genders and may also provide an environment in which senior pupils are given opportunities to take leadership roles (as 'Head of House' or house prefect), mirroring a prefect system covering the whole school. Within year groups, pupils will be divided (for at least some subjects) into 'sets' based on a judgment about their academic ability. These sets may well be ranked numerically (where 1st denotes superiority) and referred to in hierarchical terms of 'top' and 'bottom' (with most somewhere in between).

The pupils' informal hierarchy will operate in parallel to the formal school hierarchy, sometimes supporting it, sometimes undermining it. Social success as a pupil at school

requires a particular kind of learning. A pupil needs to acquire arcane knowledge of the school's past and present from a pupil-perspective. She needs a practical knowledge of school idioms—such as the 'nicknames' of staff, and in-school slang names for places and practices. Ignorance will have consequences. She will need to be able to identify and name dominant and/or senior pupils. Whether she conforms to it or not, she will be aware of an ever changing and dynamic informal dress code (including the wearing of school uniform) and style guide for hair and general appearance which will focus as much on what is wrong as on what is right in an individual's appearance. The pupils' informal hierarchy will be complex and multi-faceted, working vertically and horizontally: within the whole school, within forms and sets, within school houses. These are separate but overlapping domains. There will be a hierarchy of prowess (and its lack) in sport and physical education, with the selection of individual pupils to represent house and school in competition conferring status on those concerned. Exclusion from this status, particularly by those who only just fail to qualify, will be keenly felt. In parallel (and sometimes in opposition) to the elevation of physique, fitness, and team sports there will be a hierarchy of exceptional academic achievers. Status in this hierarchy will not necessarily transfer to other domains (and some high status members will be variously labelled as 'nerds' and 'teachers' pets', or some such pejoratives, reflecting what we might today call a 'culture war').

Although this last characterisation of two (potentially) conflicting hierarchies may sound like the back drop to an American teen movie, it reflects a real issue for school pupils who struggle to find a niche, to 'fit in', to win the approval of their peers, their parents, and their teachers: these are often irreconcilable goals. Pupils that dominate hierarchical structures within the separate domains I have described will enjoy informal entitlements within those domains. These will be things like sitting where they choose (requiring others to vacate seats), queue-jumping, having first pick in the dining room, excluding others from nominally 'open' spaces, and the like. This is an informal extension of formal 'out of bounds' rules governing the occupation of space. Senior pupils, and those in other dominant positions, will jealously guard both their formal rights and informal entitlements, policing junior pupils who seek to share or otherwise undermine them. Once formal rights are acquired, any former complaint about exclusion tends to be forgotten. Pupil policing of rights-privilege will often involve verbal and physical violence, and

psychological harm, through practices such as ostracism and boycott, threat, humiliation and ridicule. Subordinate pupils will tend to learn their 'place' quite quickly. They will avoid sites of conflict. They will maintain a low profile and literally seek to minimise their physical presence: they will shrink and hide.

In addition to each of these formal and informal hierarchical structures in the pupil body, there will hierarchies of ethnicity, gender, sex, sexuality, disability and religion. Overarching the pupils' hierarchies is a whole-school hierarchy. Generally speaking, pupils will defer to all staff but to differing degrees. Marks of deference by pupils will include giving way to staff at entrances/exits, falling silent or at least lowering the volume of talk in their presence, adopting respectful modes of address ('Sir','Miss'[99]), observing rules about exclusion from certain spaces (the staff room, for example), not questioning the right of staff to exercise authority over them. Marks of deference by staff to other staff will take a similar form, just as it does in pupil to pupil deference.

It might be thought that this description of hierarchy is too much, too complex, and that a little parsimony is required in my analysis. I defend this complexity because, I suggest, it is an apt depiction of the complexity of individual lives. This complexity must be acknowledged: as Patricia Williams remarks: "That life is complicated is a fact of great analytic importance" (1991,10). When an individual child joins a school community she has to learn how to negotiate her place in the school world. There are many rules about where she may go, and what she may do. There are places she may occupy, and others from which she is entirely excluded. There are activities and pastimes that are permitted in some places and at some times, but not in other places and at other times. There are things that some people may do, but she never can. As she navigates her way in this new world, she will bring with her the patterns of behaviour and belief she has learnt in her home and in her community, and these too will be brought into account as she 'finds her place'. Those with the lowest deontic status in the school will have the least liberty to go where they choose. They will not only be excluded from the spaces from which everyone in their cohort is also excluded, they will also be excluded from places they have a formal 'right' to enter, or at least a 'right' to share on some equitable basis. These spaces could

[99] 'Miss' has an uncanny way of marking a subtle disrespect.

include the best seats in the dining room, in the classroom, and in recreational space. It is their low status in an informal hierarchy that in effect licenses others to exclude them. This is not simply the product of *particular* jural relations (although any one instance of exclusion may be instantiated in an express ejection by a particular individual). It is also the consequence of entrenched patterns of social behaviour, patterns that the pupil will unwittingly reproduce through her own action.

I have used a school for this case study partly because a school usefully captures the complexity of society, horizontally and vertically, and its multiplicity of separate yet connected domains. But my choice also nods to the central role of pedagogy in Bourdieu's theory of habitus. This is learning that relies on bodily imitation and immersion in social practice. We need to acknowledge our total, unreflective immersion in habitus as a physical, bodily expression of our place in the social world:

> "The whole trick of pedagogic reason lies precisely in the way it extorts the essential while seeming to demand the insignificant: in obtaining the respect for form and forms of respect which constitute the most visible and at the same time the best-hidden (because most "natural") manifestation of submission to the established order, the incorporation of the arbitrary abolishes […] "lateral possibilities", that is, all the eccentricities and deviations which are the small change of madness." (Bourdieu 2013, 94-95)

7.4 *Deontic Status and Privilege in Rights-enjoyment*

Success in both formal and informal rights-enjoyment will be found where a subject has a sufficient degree of deontic status in a social hierarchy to give her a positive balance of entitlement (as against obligation) in her favour. Brännmark describes "significant deontic inequalities" between people, noting the relative freedom of those with a balance of liberty in their favour who are not only free from social obligation but entitled to make claims on others (2019, 1060). I see the importance of an individual's deontic status as key to understanding how access to the benefit of rights is contingent upon one's position in a complex network of social relations. I distinguish my position from Brännmark's in two particular respects.

First, I am not persuaded deontic status necessarily simply reflects "correlative social position[s]", or at least not in the way Brännmark describes it. Brännmark's examples of "correlating social positions" are "man"/"woman" and "white"/"person of color" (1060). I agree that informal jural relations work as instances of particular Hohfeldian correlative

and opposite jural positions played out in the social world. That said, it does not follow that in any particular instance deontic status will track "correlating social positions". The specific domain of action will, for example, have a material impact on the parties' relative deontic status within it. But I think Brännmark would probably agree with this. My concern is that Brännmark treats the cumulative effect of individual pairs of correlative social/jural positions as the source of a patterned distribution of privilege. These 'patterns', he says, maintain social institutions (such as racism) through an intuitive understanding of interpersonal boundaries and social expectations (2018, 1). Brännmark's analysis relies on specific individuals in particular correlative social positions: in a male/female conversation, for example, we may find an instantiation of the male/female relative deontic status. While Brännmark sees this as a specific instantiation of deontic status at work, I consider this exemplifies Bourdieu's argument concerning division and classification, and a binary of 'opposite' relations that reflects symbolic power in the social world. Indeed, Brännmark says his description of 'social position' is thinner than identity but expresses our shared tendency to put people in social categories about whom we have learnt to have certain expectations (2018, 9). Nevertheless, I am concerned Brännmark's analysis fails to acknowledge the complexity of the social world described by Bourdieu. Bourdieu endorses our tendency to categorise and divide, but critically he also offers an analysis of the symbolic power that invests those divisions with meaning (1989, 20/21). I consider this needs to be brought into account in our analysis of deontic status as an expression of differentials in the enjoyment of rights/liberty. In particular, we need to acknowledge the role of ideology in the symbolic power that maintains social practice. Brännmark's account of deontic status does not address this.

My second point of divergence from Brännmark concerns his account of the reproduction of a status hierarchy and his failure to address the 'process' by which deontic status is produced and reproduced. Brännmark gives us an account of social institutions, relying on our intuitions about social expectations and 'boundaries', and our experience of inequality in the distribution of deontic status. But he seems uninterested in the source of that deontic status differential, and the social practice and ideology behind it. Brännmark asks too much of individual jural relations as *the* source of social institutions such as racism and misogyny. His focus on constraint (including both formal and informal 'rules') as the source of social institutions is too narrow. His object is to understand social

institutions in terms of Hohfeldian relations, and in particular to analyse both formal and informal correlative relations of right/duty and liberty/no-right as governed by norms and conventions that aggregate in relatively stable systematic or institutional constraints amounting to 'social institutions' that enable a few to enjoy relative privilege at the expense of those in subordinate social positions. I think more is needed if we are to understand how it is that the introduction of formal citizens' rights has failed to unpick a social status hierarchy notwithstanding a liberal ideology of equality and universal rights. It is significant, I suggest, that formal differentials in status in a strictly hierarchical society have been abandoned only relatively recently, during the course of the twentieth century. Moreover, legislation and case law have in the twentieth and twenty-first centuries been used to undermine the formal citizen rights of Black and Asian British citizens in the UK[100], and abortion rights in the USA. My point is that the adoption of a regime of liberal rights in the twentieth century has not dismantled a status hierarchy, even formally let alone informally.

Differentials in deontic status are indicative of more than Brännmark's stable aggregation of individual pairs of 'correlative' social relations. Take, for example, the racism and misogyny expressed in the response to women MPs on social media platforms in the UK. Women MPs (and particularly women who are Black or of some other 'minority' ethnicity) can be and frequently are subject to threats of extreme violence and death in response to their engagement with social media. This is a particular form of social 'policing' that in effect seeks to silence women, and Black women in particular. This silencing can be analysed in terms of jural relations: gender and race are predictive of an MP's liberty to be heard on social media platforms without threat of violence and intimidation. MPs who are men (and particularly White men) have greater practical access to a liberty to make their voices heard than women MPs. MPs who are men enjoy more effective protection from their right not to be threatened with violence and death compared to women, especially Black women, when they engage with social media. In the distribution of jural obligation and entitlement, White men have a balance of entitlement in their favour in this domain. I expect Brännmark would agree this describes

[100] The British Nationality Act protected a right of entry to the UK for citizens of Britain's colonies. This right was curtailed by successive statutes: Commonwealth Immigrants Act 1962 c.21, Commonwealth ImmigrantsAct 1968 c.77. These were both found to be racist in effect by European Commission of Human Rights (Application number 4403/70) (1981) 3 E.H.R.R 76). They were followed by the Immigration Act 1971 c.77, British Nationality Act 1981 c.61, and Immigration Act 1988 c. 14.

something more than the aggregation of patterns of behaviour between pairs of particular individuals in jural relationships that correlate to social position. It is clearly more complex than that, and reflects a social practice and phenomenology of being-in-the-world that reproduces particular roles in a status hierarchy.

One particular aspect of Brännmark's analysis that needs to be expanded concerns the interaction and interface between formal and informal jural relations. This is critical to my concern with a situated account of rights that brings into account the actual practical enjoyment of formal rights in liberal democracies. Brännmark observes there is an inequality in the distribution of deontic status in society reflecting the balance of duty/ right that individuals enjoy. He includes both formal and informal rights and duties in this analysis. However, I do not think he takes sufficient account of the failure to produce an equal enjoyment of rights in those domains governed by formal jural relations. This brings me back to where I started in this section: liberty. Liberty is exercised by those who fail to discharge formal duties, and this vicious exercise of liberty may reflect a relative advantage in deontic status. Even when formal rights are respected in that they are not undermined by a breach of correlative duties, nevertheless those who have access only to a diminished, poor quality liberty will be undermined in their enjoyment of many formal rights. 'Jural inequality' effectively sabotages the enjoyment of formal rights by those citizens who stand at a relative disadvantage in deontic status overall, taking both formal and informal jural relations into account.

Deontic status within a social hierarchy is complicated and domain specific. Status in one domain does not necessarily transfer across to another. Within a school, deontic status will change and vary. Moving 'up' in seniority with age will tend to improve status for pupils, at least relative to those 'behind' or 'below' them. Pupils may enjoy esteem in one domain while being generally low status in all others. It would be a mistake to suppose that deontic status is static and the same across all domains. Outside the school it is clear, for example, that an individual's deontic status within (say) her family may well be different (for better or worse) than her deontic status at work. However, the intersection of subordinate status across domains will compound the experience of oppression and subordination, as Kimberlé Crenshaw describes in relation to race and gender (1989). It is this intersection of diminished individual deontic status across domains that enables us to

define socially salient groups, and to make comparisons about relative deontic status between them. So far as any particular group is concerned, claims about rights-enjoyment may be supported by statistics measuring outcomes and participation across education, health (including mental health), criminal justice, wealth, employment, violence, property ownership, earnings, culture, housing, representation in local and national government, and much more[101]. However, comparative exercises of this type tend to focus on the effects of discrimination, looking at the relatively poor outcomes experienced (for example) by members of Black, Asian and global majority ethnic groups in the UK, rather than the privilege of effective enjoyment of rights and liberty. I now turn to consider how privilege understood in terms of relatively higher deontic status in certain domains is in effect 'defined' by the contours of anti-discrimination law.

7.5. *Anti-Discrimination Law as an Expression of Entitlement and Privilege*

The final part of this Chapter concerns anti-discrimination rights as an expression of privilege and entitlement. The enactment of anti-discrimination law speaks to the persistence of entrenched differentials in deontic status and the consequent deficits in access to and enjoyment of formal rights. There is an obvious tension in the notion of a 'right' not to be discriminated against in the enjoyment of the civil, political and social rights that are fundamental to our understanding of equality in citizenship in a modern liberal democratic state. I suggest anti-discrimination rights reflect a cognitive dissonance at the heart of the political community. They are a gnomon whose shadow points to privilege.

In general terms, a moralised concept of discrimination can be understood as the wrongful differential treatment of individual members of socially salient groups relative to non-members (Altman 2020 para.1.2). Discrimination describes conduct, actions, policies, and attitudes directed at individuals on account of some characteristic they share with other members of a salient social group. *Salience* reflects relevance to the social relations that pertain between individuals in the population at large. So, for example, we know that people are treated differently dependent upon their ethnicity and/or gender. By

[101] See for example Cabinet Office Race Disparity Unit *Summary Findings from the Ethnicity Facts and Figures Website* accessed 16 June 2020 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686071/Revised_RDA_report_March_2018.pdf>

contrast, and for example, people tend not to be treated differently in their social relations in consequence of their lactose (in)tolerance. There are intermediate markers of group identity, for example left-handedness or red-headedness, that may have historically marked a difference relevant to exclusion and discrimination in social relations, or may still be regarded by some as of significant social salience. The shared characteristics within any particular salient group—the 'typical' markers for discrimination—are more or less apparent to outside observers. They are race or ethnicity, gender, sex, sexuality, maternity, pregnancy, religion, mental and/or physical disability, and age[102]. They are all more or less associated with historic exclusion from political and social status. Infancy and childhood remain grounds for explicit exclusion from some rights.

The salience of these social groups lies in relational differentiation rather than in substantial characteristics attributable to group members. Individual members of salient social groups are affiliated in groups only in an analytical sense in that it is possible to generate data concerning (for example) a broadly shared experience of discrimination that affects individual members. There are ways of thinking about salient groups in circumstances where there is a case for a group-based claim to remedy injustice. For example, women denied suffrage rights *qua* women, and those whose sexuality is criminalised, could make group claims for justice (and in respect of these two groups, an individual claim would not make sense). But I do not think these examples are cases of discrimination in the social/jural relational sense I am trying to analyse. I would emphasise first and foremost the impact of discrimination on individual members of salient groups. Discrimination is not univocal in its impact. It is experienced to different degrees by individual members of the same socially salient group (again, Crenshaw's intersectionality is in point here). The remedy for the harm of discrimination requires recognition of each member of a group as an individual. However, it also requires an acknowledgement of the roots and sources of discrimination's harm which are embedded in a social status hierarchy. The 'salience' of group membership is contingent inasmuch as group identity emerges out of social differentiation (Young 2011, 7). Thus social group 'salience' in anti-discrimination law only makes sense in the context of an implicit differentiation of one group from some other group comprising those who are not faced

[102] These groups reflect those in the Equality Act 2010

with systemic and persistent discrimination and who accordingly enjoy relative privilege in relation to rights and liberty.

The idea of discrimination as a person-to-person harm makes sense of the everyday behaviour that manifests itself in sexism, racism, misogyny, ridicule, disrespect, insult, shaming, bias, stereotyping and all the other behaviours both transitory and embedded that together make up the experience of discrimination. But this person-to-person harm is part of a larger whole. There is a tendency, supported by the structure of anti-discrimination law, to think of discrimination only in terms of wrongful treatment meted out by one person to another in a particular social or economic context: between co-workers, or employee/employer; between teachers and students/pupils; between police officers and suspects; between public office-holders and public service users. This understanding of discrimination tends to be superimposed on quite specific (often hierarchical) dyadic relations in which a person of higher status tends to discriminate against another with lower status. Organisations and their discriminatory policies are also included in this description. Often that higher 'status' is itself simply an expression of the effect of discrimination seen, for example, in the way that White males will tend to dominate in many social situations. But on the whole, this idea of discrimination as a two-party harm is misleading in its simplicity. It captures (to a degree) the social relational nature of much discrimination, but it does not give sufficient weight to the background 'hum' of discrimination. This is the phenomenology of exclusion that puts limits on liberty, whether self-imposed or more obviously relational. This has an insidious but powerful effect that reflects and reproduces the social hierarchy Bourdieu describes. Anti-discrimination legislation does not (and probably cannot) address this, particularly as it is framed in terms of individual claims. Most instances of (for example) 'casual' racism, sexism and Islamophobia do not provoke a response in terms of law enforcement: many (perhaps most) instances of this type of discrimination are not actionable[103]. If people pat their pockets as if checking for their wallets, or hold on more tightly to their handbags, when they encounter a Black man, this is a hurtful, damaging, and very much *felt* slur, but it is not something that the subject can effectively respond to (particularly as the act may

[103] There is some movement now towards legislation to protect women from sexual harassment, but moves to outlaw misogyny are met with strong resistance. Topping, Alexandra (2022) "UK government backs plan to criminalise sexual harassment in street" The Guardian 9 December 2022 see: <https://www.theguardian.com/world/2022/dec/09/uk-government-backs-plan-to-criminalise-sexual-harassment-in-street?CMP=share_btn_link> accessed 4 January 2023

have been entirely unconscious)[104]. If women are subject to a specifically gendered appraisal based entirely on their appearance, an appraisal that many (including women) may consider to be reliable preliminary evidence of character and competence, there is little the subject can do to question or counter the impression she makes. But this type of (often unconscious) discriminatory behaviour is deeply damaging, just as the perpetuation of gender and racial stereotypes from birth is harmful and discriminatory in its effect. This type of 'everyday discrimination' in all its manifestations is sufficient to maintain differentials in deontic status and keep people down, to keep them in their place (thus differentiating them from those of higher deontic status).

Discrimination is in effect the expression of a relative deficiency in deontic status. This relativity is reflected in anti-discrimination law, which picks out those socially salient groups whose members tend to enjoy lower status relative to the members of dominant groups[105]. Of course, as a remedial measure anti-discrimination rights are important. But they are also expressive of a hierarchy in the enjoyment of liberty. Socially salient groups are offered legal rights to protect their enjoyment of what are liberties for those who do not suffer discrimination. Thus, a right not to be treated less favourably than others on grounds of race, sexual orientation, gender, age, or any of the other protected characteristics under the Equality Act 2010, is a marker of a certain status in a hierarchy at the top of which are those who possess none of the salient characteristics protected by anti-discrimination law and who simply get on with their lives, exercising many liberties as they do so.

For example, while a new father may (or may not) exercise a statutory right to paternity leave following the birth of his child, he will not generally need to assert a right simply to remain in employment: he is at liberty to do so under the terms of his job contract. His status as an 'expectant' father is disregarded by his employer (or may be interpreted as evidence of a renewed and deeper commitment to work, reinforcing his status as a 'bread winner' for his family). By contrast, an expectant and new mother may need to rely on maternity rights not only to protect a right to remain in employment while pregnant and

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[104] Wing Sue, Derald (2010) "Racial Microaggressions in Everyday Life" blog post 5 October 2010 see: <https://www.psychologytoday.com/us/blog/microaggressions-in-everyday-life/201010/racial-microaggressions-in-everyday-life> accessed 29 April 2019

[105] Dominance is relative to the particular socially salient group in question, taking account also of intersectionality.

giving birth, but also to protect her liberty to return to work following the birth of her baby. This reflects a substantial material difference in treatment between mothers and fathers as parents, although some might argue that ultimately their respective liberties/ rights have the same practical outcome: they can both return to work following their child's birth. He can simply exercise a liberty to come into work as per the terms of his employment contract. His position is not precarious in the sense that being a parent has not altered his prospects. She can also rely on her contract of employment and statutory (anti-discrimination) rights. But her position is precarious, and her future is no longer certain. In this way, there is a substantial difference between the two. The outcome is not the same, and the theoretical difference between liberties and rights in this context marks a significant difference in status. If the mother has to actually enforce her anti-discrimination rights-claim, the practical outcome is certainly not the same for her as it is for the father, who simply enjoys a liberty to remain in work. The enforcement of rights is onerous and precarious. It is also time-consuming, costly and emotionally draining. In most successful employment cases the remedy does not guarantee a return to work, because 'reinstatement' is possible but it is rarely ordered as a remedy by tribunals. Monetary compensation is the usual order.

The difference between the exercise of a liberty and the (possibly failed) exercise of an anti-discrimination right is subtle. I suggest that anti-discrimination 'rights' are themselves flags or markers of a denial of deontic status and recognition[106] as an equal participant in both rights and liberties. Those who have a 'right' not to be sacked for being a prospective parent are the beneficiaries of a duty that protects their liberty to choose whether or not to return to work after the birth of their child. But surely (and despite their 'liberty' in this domain being 'protected') they are not better off than those who have no need of such a right, because their simple liberty is sufficient? Those who need 'rights' to protect themselves from discrimination on grounds of their protected characteristics are surely diminished in status compared to those who have no need of such 'rights'. Anti-discrimination law does not lift the burden of discrimination. It marks where some may exercise liberty, and others may not. These liberties—to shop, travel, eat

[106] cf Isiah Berlin (1958) who acknowledges the force of demands for status and recognition in social relations, but identifies these as claims for *equality* rather than an impediment to the exercise of liberty. I argue that those with relatively lower deontic status suffer from a lack of recognition which necessarily affects their access to liberty, whether characterised in terms of freedom *from*, or freedom *to*.

in restaurants for example, or return to work after the birth of a child—may seem trivial, but the effects of cumulative interference are undermining and diminishing. Those who might need to invoke the law to protect their liberty are marked as victims who have suffered at the hands of others who have used *their* liberty to engage in unlawful prejudice and discrimination.

Discrimination is not only a direct interference in liberty, involving the literal denial rights (seen, for example in discriminatory 'unfair' or 'constructive' dismissal from work). It is also an indirect, implicit interference in liberty, an insidious undermining of self-confidence, producing a lack of self-esteem, and psychological harm that limits horizons and warps self-perception. This subtlety and complexity is not always fully appreciated by liberal rights theorists, such as Sophia Moreau (2010), who defends anti-discrimination law as necessary for liberty. I want to consider Moreau here particularly since she has now modified her position (2020).

Moreau (2010) argues that anti-discrimination law is justified because it protects the 'deliberative freedom' of those who suffer discrimination, enabling them to make the same choices about their lives as those who are free from discrimination's harms. The logic of this is that 'freedom' from discrimination enables a claimant to enjoy a full measure of 'deliberative freedom'. This account is in an important sense consonant with my own, with its emphasis on liberty as a pre-requisite for rights enjoyment. But it departs from mine in a critical respect in that Moreau does not place deliberative freedom within a social/jural relation. On her account, deliberative freedom allows the individual to "decide for *herself* what she values and what she wishes to spend her life pursuing" (148) (my emphasis). This is as if to say that the individual, empowered by formal anti-discrimination rights, can successfully pursue a freely chosen path. Of course, Moreau acknowledges constraints on deliberative freedom, saying that costs and resources as well as the needs and expectations of others put limits upon it. However, she claims anti-discrimination law enables deliberative freedom by allowing the individual to make choices about her life without being required to factor in the cost of "normatively extraneous" traits, such as her gender, race, sexuality, and religion (149). This picture is deficient for a number of reasons. These include the narrow scope of anti-discrimination rights (which are operative in only a few domains) and the compensatory rather than

corrective and ameliorative nature of the legal remedies available to successful claimants, who in most cases simply get monetary awards for 'damages'. There is no monetary or other consumable substitute for what Anca Gheaus describes as 'democratic relational goods'—which is to say social relationships, inclusiveness, non-exploitation. These cannot be 'bought', and they are non-fungible. They require a mutual endeavour, a collective commitment and effort for their realisation (Gheaus 2016, 56, 61). Granted this being so, anti-discrimination law protects a claimant's financial loss following discrimination and serves some deterrent function. What it does not do is enable those affected to make choices as if they are free from discrimination and its effects.

However, the principal difficulty with Moreau's argument is her failure to take account of the complexity of the social world. Moreau makes few, if any, concessions to rights and liberty as social/jural relations in her analysis, notwithstanding such relations are implicit in her account of the experience of discrimination (for example, the employer who sacks a pregnant employee, or the bus driver who refuses to recognise a Black woman's bus pass)[107]. Instead she focusses on the individual autonomy of the person who suffers discrimination. In this Moreau is following the political philosophy of those who put individual freedom, and freedom as non-interference, at the heart of liberalism. Moreau does not examine the notion of 'deliberative freedom' as a privilege: she treats it as a 'given' except to the extent that she understands discrimination can take effect as an impediment to its full expression. It is against this background that I argue a conceptual account of rights and liberty needs to describe and analyse the privilege of those who exercise liberty, including deliberative freedom, relatively unimpeded.

Moreau has what might be called a 'blind spot' about the nature of the privilege represented by the systematic exclusion of certain salient social groups from the enjoyment of deliberative freedom. I suggest many accounts of autonomy in liberal theory place too much weight on the idea of 'self rule' while neglecting its relational aspects[108]. Moreau does of course recognise that deliberative freedom as autonomy is not simply self-generated, because she acknowledges the benefit of anti-discrimination law as

[107] Anti-discrimination law typically (but not exclusively) concerns individual rights in contractual relations: employer/ employee; transport operator/passenger; bakery/customer and similar.

[108] Compare for example Michael Garnett (2014) and Steven Weimer (2014).

a means to prevent relevant 'others' from interfering in deliberative freedom, at least in those domains subject to statutory intervention aimed at discriminatory conduct. But I suggest her account of how anti-discrimination law does this (assuming for argument's sake that it does in fact do this) is simplistic if not naive. She argues that anti-discrimination law "prevents" others denying us opportunities and thereby enables deliberative freedom "free" from any consideration of "normatively extraneous traits" as "burdens" (2010, 155). Moreau argues that anti-discrimination law is aimed at "wrongful interference with another person's right to a roughly equal set of deliberative freedoms" (178). This seems to accommodate my argument about discrimination, deontic status and the infringement of liberty. But I suggest this argument is built on two false premises: first, that anti-discrimination law is an effective deterrent against (illegal) discriminatory conduct; secondly, that it offers claimants a remedy that in effect unpicks the legacy of harm suffered in consequence of discrimination. Moreau's argument makes sense only if it can be said that the beneficiaries of anti-discrimination law find they have an expanded psychic space in which they may exercise their deliberative freedom *as if* they lived in a social world free of the threat of discrimination and its consequences. I consider this to be demonstrably not the case. Finally, Moreau defends statutory limits on the scope of anti-discrimination law, confined as it is to rights in specific domains (such as employment and the supply of goods and services (160)). In this she fails to acknowledge the manner in which diminished deontic status blights not just prospects of employment or the peaceful enjoyment of public transport, but the experience of whole lives. Moreau here offers an impoverished view of the social relations we are all bound up in, relations that are complex and multi-faceted and cannot be reduced to a single one-to-one story about (say) the effects of interference in consequence of a particular instance of wrongful discriminatory conduct.

Since 'What is Discrimination?' (2010), Moreau has revised her account of anti-discrimination law and its relation to deliberative freedom. In *Faces of Inequality: A Theory of Wrongful Discrimination* (2020), she offers a new, pluralist theory of what it is to fail to treat others as equals, asking the question 'what is the wrong involved?' in discrimination. She identifies three key elements to that wrong: unfair subordination; infringement of a right to a particular deliberative freedom; and a denial of access to a basic good (2020, 249). I note a certain resonance with my account of what it is to have

full access to rights-enjoyment, and reasons for the failure of universal, equal citizen rights. Moreau (who is focussed not on rights as such, but on wrongful discrimination) says

> "My theory […] enables us to explain and validate many claimants' thoughts about the ways in which they have been wronged, and it offers us a rich and nuanced understanding of what it is to fail to treat someone as the equal of others." (249)

I suggest her emphasis on the validation of claimants' "thoughts about the ways in which they have been wronged" points to the importance of phenomenology in a theory of social/jural relations, while her concern about a failure to treat people as equals is a tacit acknowledgement of the structuring effects of an embedded social hierarchy in the maintenance of differentials in deontic status and the enjoyment of liberty.

7.6 *Conclusion*

In this Chapter I have argued that deontic status tracks a social hierarchy of relative privilege and subordination. This account of privilege in deontic status can be understood in terms of an easeful engagement with the world. Privilege is felt as an undifferentiated and unconscious enjoyment of rights and liberty, while the experience of subordination is one of a denial of rights, a burden of obligation, and an infringement of liberty. Hohfeld's use of privilege as a synonym for liberty in his table of jural relations points towards a way to understand the exercise of liberty within a social hierarchy, in which a 'bloated' liberty for some tends to reproduce and reinforce differentials in deontic status. To think of liberty in terms of privilege allows us to embrace the idea that liberty can be associated with excess and harm. The idea of privilege embraces a certain precarity, something that can be withdrawn or denied. But it also conjures the notion that privilege is deserved, is earned, is awarded on merit. It captures the idea that privilege is a 'good' thing to possess. And it suggests a distribution according to status, desert and rank within a hierarchy. Not all privileges are scarce commodities and subject to rationing, but many are. Scarcity, status, hierarchy, benefit, desert, and even entitlement, are all reasons why privileges (or if you will, liberties) might be jealously defended by those who have learnt to use them to the exclusion of others. They are defended on both ideological and philosophical bases. Some liberal rights theorists see liberty as essential to individual freedom and autonomy,

and therefore in need of protection[109], even at the expense of those who do not share that liberty in equal degree.

It strikes me as ironic that liberal ideology, with its emphasis on rights as necessary for the preservation of individual autonomy and liberty, supports and entrenches the interests of those who have least need of recourse to the protection of 'rights' in their successful engagement with the social world as they exercise their autonomy and liberty. At the same time, that ideology obscures the pernicious effects of a social hierarchy that systematically limits the life-choices of those who are of inferior deontic status. On this account of rights, it is clear that the formal grant of citizen rights by statute and common law, and the imposition of correlative duties, is not sufficient to ensure that the benefits of rights and liberty are distributed according to principles of equality to the citizens of liberal democratic states. Who benefits from rights? In many instances, those with the least need of protection in the exercise of liberty are the substantive beneficiaries of formal citizens' rights in liberal democracies.

[109]Seana Shiffrin sees harm in interference in deliberative freedom but would positively resist measures to restrict the liberty of others — including anti-discrimination law, for example (2005).

Chapter 8
Conclusion

In writing this thesis I have proposed a way to understand how citizens rights work in practice so that we may better understand why they *don't* work. My principal claim is that our theory of rights needs to account for wider social relations of entitlement and obligation as informal counterparts to our formal rights. This is by no means a novel observation in the history of rights in which the formal stands if not in opposition to then at least in tension with the actual material enjoyment of rights. For all my criticism of citizen rights in practice, and my concern about a blinkered focus on personal autonomy and choice in the philosophy of rights, I do not advocate a rejection of rights as a means to achieve political ends. Wendy Brown identifies a paradox in the demand for rights by women and others who seek justice and equality for historically marginalised and rights-impoverished groups in society (Brown, 2002). The paradox lies in the way universal rights speak to a liberal individualism that effaces and ignores gendered, raced, and other 'deviation' from a White masculine heterosexual norm in the social world, while specific identity based rights (as typically found in anti-discrimination statutes) perpetuate subordination and inequality, emphasising and reproducing the differentials in power relations that such rights are supposed to erase (424). I have described how 'rights' are largely irrelevant to those with the requisite deontic status and liberty to enjoy the benefits that citizen rights protect, while those same benefits are effectively denied to those with subordinate status, notwithstanding their formal entitlement to such 'rights'. Brown nevertheless defends rights when she says that the political struggle for rights enables us to articulate what equality and freedom might consist in if the promised benefit of rights was actually exceeded in practice (432)[110].

On that note, and in conclusion, I want say a little more about the importance of status to the enjoyment of liberty. I have described a status hierarchy of relative privilege and entitlement founded upon social practice understood in terms of phenomenology and habitus. Formal rights are superimposed on a social world that is replete with informal

[110] cf Marx 'On the Jewish Question' (1844). Marx sees no benefit in political revolution and the extension of citizen rights to all while the social world is unchanged, leaving "man as he appears uncultivated and unsocial, man in his accidental existence, man as he comes and goes, man as he is corrupted by the whole organisation of society, lost to himself, sold, given over to the domination of inhuman conditions and elements—in a word, man who is no longer a species-being" .

jural relations of entitlement and obligation. Deontic status reflects position in a social status hierarchy and a relative burden of entitlement and obligation. My claim is that a critical jural relation—the liberty/no-right correlation—is enjoyed to a greater or lesser degree by individuals dependent upon their deontic status and social status more generally, and this differential in liberty affects the enjoyment of citizen rights. In the philosophy of rights, liberty is typically understood in terms of freedom in making choices and acting upon them. Thus Will Theory frames its defence of rights in terms of autonomy in action, choice and the exercise of deliberative capacity, while Interest Theory directs its justification for rights towards the individual's interest in autonomy and moral agency. In both, interference with liberty is understood in terms of constraint on action, at least in negative theories of freedom, and all citizens are assumed to be *persons*. But this assumption is undermined by my claims about the reproduction of a status hierarchy, and the concomitant effect this has on differentials in access to liberty. If, as I propose, the benefit of universal equal rights in contemporary liberal democracies is in fact unequal and not universal, then the cause lies not so much in particular person-to-person and institutional constraint, restraint and interference but in an inequality in status founded on position in a social hierarchy and its concomitant burden of informal obligation. If we are concerned about liberty, our focus should be directed away from 'interference' in action and towards questions about status inequality.

I am not entirely alone in taking this stance. Recently, Felicity Green (2022) has distinguished neo-Roman liberty by detaching it from questions about freedom in action and choice. She identifies a loss of independence and diminished status in the harm that follows from the denial of liberty (33). This perspective draws attention towards the benefits of liberty—the question *What is Liberty For?*—and away from a fixation on action and restraint. This is relevant to my concern with liberty's essential involvement in the enjoyment of rights. The benefit of rights lies not in a right-holder's passivity and inaction but in her pro-active embrace of the opportunities and activities that rights protect. From a different angle, Lena Halldenius has identified a deficiency within liberal theory in its attempts to defend rights, which is surprising given its preoccupation with liberty and liberty's relation to the person (2022, 228-232)[111]. Halldenius attributes this

[111] Her subject is human rights but her argument holds for citizen rights.

deficiency to a failure to account for the way the world actually is, a failure dressed up in the clothes of pragmatism and realism, and the need to avoid the danger of 'utopianism'. She points to a particular assumption behind the defence of a theoretical and practical minimalism about the necessary content of rights, the assumption that the beneficiary of rights is "a cognitively and emotionally capable human person, all set to pursue the life they value". A characteristic liberal lack of curiosity about what such a person might value, and what ends she might in practice be able to pursue, draws a veil over the life she actually leads. And critically, this assumption disregards the impact of socio-economic (231 fn 41) and other inequality including, I suggest, the status hierarchy reproduced and maintained through social practice, the phenomenology of space, informal jural relations and differentials in deontic status. An appeal to neo-Roman liberty understood as *substantive* political equality tells us that formally 'equal' rights are not—without more—a sufficient guarantee of access to the benefits promised, nor to the liberty needed for their enjoyment (Skinner 1998, 97 cited by Halldenius 2022, 232). Our theories and accounts of rights and liberty need to reflect a much thicker political and social context.

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