The Logic of Constitutional Rights

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Series Preface

The principal objective of this series is to encourage the publication of books which adopt a theoretical approach to the study of particular areas or aspects of law, or deal with general theories of law in a way which is directed at issues of practical, moral and political concern in specific legal contexts. The general approach is both analytical and critical and relates to the socio-political background of law reform issues.

The series includes studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

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Introduction

The more demonstration becomes particular the more it sinks into an indeterminate manifold, while universal demonstration tends to the simple and determinate. But objects so far as they are an indeterminate manifold are unintelligible, so far as they are determinate, intelligible: they are therefore intelligible rather in so far they are universal than in so far as they are particular.[1]

In 1994 three terminally ill patients from Washington State filed a federal lawsuit. Medication did not fully relieve their suffering, and a state law prohibited physician-assisted suicide. The court found the law unconstitutional, but, in the case of *Washington v. Glucksberg*, the US Supreme Court reversed that decision.[2] All three patients had died by the time the case reached the Supreme Court, but the crucial question remained: at the time of their illnesses, did they have a constitutional right to seek professional help to end their lives? The text of the Constitution contains no such right. Instead, the Court examined the Due Process Clause of the Fourteenth Amendment, which commands that no State shall 'deprive any person of ... liberty ... without due process of law'.[3] The Court had to decide whether the term 'liberty' included the right sought by the patients.[4]

The Court found that the history and traditions of American law did not support a right to commit suicide, or to obtain medical assistance to do so. Writing for the Court, Chief Justice Rehnquist maintained that prohibitions of suicide were centuries old.[5] Penalties had become milder in recent times,[6] but few states had gone so far as to embrace an affirmative authorization of suicide, even in cases of medical extremity.[7] Several Justices joined Rehnquist's opinion, but that is where the consensus ended. Four Justices provided different readings of the case.

Justice O'Connor agreed that there was no sense in which the Due Process Clause could be construed to contain a general right to commit suicide. However, she left open the question whether such a right might arise for the small number of individuals experiencing great suffering and already facing impending death. In her view, the Washington law had not prevented the patients from obtaining some meaningful degree of palliative treatment, even such treatment as might hasten their death. The Court therefore did not have to decide whether constitutional protection was required in that case.[8]

Two other justices agreed that, on the facts, the Court did not have to announce a constitutional right in this instance. But they disagreed with the Chief Justice's view that an essentially historical analysis resolved the matter. For Justice Souter, the question was whether such a law amounted to an 'arbitrary imposition' or 'purposeless restraint'. If it did, then a lack of supporting precedent or tradition for physician-assisted suicide posed no obstacle to finding a violation of the Due Process Clause.[9] For Justice Stevens, the question was whether the patients had

been harmed in their 'personal dignity and autonomy'. Such a harm would count as a constitutional violation, regardless of tradition or precedent.[10] Justice Breyer agreed with Rehnquist that an historical inquiry was appropriate. However, he felt that the analysis should not be limited to the narrow question of whether history yielded a 'right to commit suicide'. The question was whether American legal history and tradition supported a 'right to die with dignity'. It might be impossible to define that concept precisely, but 'at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined'.[11]

Choosing among the Justices' opinions is like choosing among religions. Each is plausible on its own assumptions, but there are no criteria for deciding which assumptions are correct. The Constitution does not tell us, and the kinds of theories that might help us choose the best opinion ('the Constitution must be interpreted according to the intentions of the founding fathers', 'the Constitution must be viewed as a living instrument', 'the Constitution must be viewed as an instrument of representative democracy') are as controversial as the opinions themselves.

That fragmentation of the Supreme Court mirrors the fragmentation of American constitutional theory. Laurence Tribe's standard treatise *American Constitutional Law* adopts seven models of constitutional law, bearing such names as 'the model of settled expectations', 'the model of governmental regularity', 'the model of preferred rights', or 'the model of structural justice'.[12] Tribe has admittedly wondered whether that number could be reduced:[13] whether a penetrating analysis would reveal two of the models to be one—which, on still further analysis, would reveal itself to be united with a third, and so on. Through the work's second and third editions, however, Tribe has retained his seven models:[14] 'American constitutional law simply doesn't look, feel, or work like a readily unified or genuinely unifiable field'.[15] Not all scholars would adopt Tribe's seven models—some might add one here, subtract one there, rename this one, rewrite that one. Yet most would agree with him that, absent one grand theory, we can pinpoint 'certain basic regularities in constitutional argument'.[16] Tribe notes that, in a work dedicated to the whole of constitutional law, he cannot achieve the degree of detail that could be expected of a work devoted only to one aspect of the Constitution.[17] He leaves open the possibility that any one of the seven models might fragment further.

A continuum seems to emerge. At one extreme, we can postulate a fully unified theory of constitutional law. Such a theory might be called 'the Constitution as a framework for liberty' or 'the Constitution as a tool of democracy'. Tribe's remarks rightly suggest that such a theory, if possible at all, would be too general to be informative. At best, it would unite vastly different issues in constitutional law in only superficial or trivial ways. At the other extreme, we can postulate sheer particularism: detailed information about any given case, but which points to no broader links among cases or throughout the whole of constitutional law. Tribe's seven theories emerge somewhere along that continuum: general enough to promote a broader understanding of the Constitution, particular enough to avoid sheer platitudes. But no point on the spectrum is ideal. Any move towards unity runs a risk of omitting

or simplifying important details. Any move towards specificity runs the risk of tearing a dispute or a theme away from its doctrinal, institutional, historical or socio-political context.

Comparable predicaments abound in legal theory. Wesley Hohfeld's system of 'fundamental legal conceptions' explains concepts such as 'right', 'liberty', 'duty' and 'immunity'.[18] Under Hohfeld's system, the meanings of those concepts remain constant despite the infinite variety of factual, procedural or institutional circumstances of actual cases. Certain simplifying assumptions must be made, such that an identical concept of, say, 'right' or 'liberty' may be found to be common to otherwise very different sets of facts. Those assumptions are acceptable when nothing more than that shared concept of 'right' or 'liberty' is required, but prevents the analysis from playing any role when certain factual particulars are at issue. If a dispute about a delivery of Belgian truffles is resolved differently from one about Perugian sun-dried tomatoes—the difference turning on the microbiology of perishable foods—Hohfeld will have no light to shed. Nor can Hohfeld reveal much about the policy implications of choosing, say, between a one-month deadline and a three-month deadline for filing court documents. Those issues are just not the kinds that Hohfeld seeks to address. It is by suspending those details that he achieves a unified schema, just as 2 + 2 = 4 remains constant, regardless of whether we are counting cucumbers or bananas. Further down the spectrum, we could conduct a deep empirical study of contracts involving, respectively, Belgian truffles and Perugian sun-dried tomatoes; but it might well eclipse the more general kind of analysis, like Hohfeld's, that allows us to see uniformity across cases.[19]

This book proposes an analysis of constitutional rights lying towards the unity end of the scale. It is a unified theory insofar as it shows how all arguments about constitutional rights can be understood in terms of a discrete number of elements. It draws on techniques of logical analysis, but presupposes no prior training in logic. (For those with such training, certain technical points are discussed in the endnotes.[20]) The theory lies 'towards', and not 'at', the unity end, as it is not a unified theory of all of American constitutional law. First, this book is only about part of the Constitution—those individual rights falling under the Bill of Rights[21] and the Fourteenth Amendment: Do terminally ill patients have a right to die? Do women have a right to abortion? Is the death penalty cruel and unusual? Second, it examines only the substantive elements of such disputes. It does not examine questions about, say, federalism or separation of powers (or such procedural issues such as *res judicata*, choice of forum or burden shifting).

Of course, that limited corpus has generated a vast case law. One might hesitate to suggest that any systematic, formal structure can underlie it. Holmes's pronouncement that 'a page of history is worth a volume of logic'[22] has echoed through American legal theory like Beethoven's knock of destiny. The disadvantage of formal analysis is that, as with Hohfeld, certain simplifying assumptions must sidestep a variety of institutional, procedural, doctrinal and theoretical issues. The advantage is that the model can then identify common elements across cases appearing to be very different. At first glance, controversial

cases give the impression that constitutional law is constantly driven by new conflicts, and that lawyers and scholars are constantly, 'creatively', imagining new arguments about them. Nothing in this book will contradict that impression. That surface level of constitutional argument is real. But it is only one level. At a deeper level, something different can be observed. A set of fixed concepts is at work, structuring and constraining the kinds of arguments that can be made. Any substantive argument in a case about a constitutional right is always just one instance of some particular combination of those concepts.

What are those background concepts? John Stuart Mill came closest to identifying them with his famous harm principle, as set forth in *On Liberty*: 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.[23] Mill identified harm and consent as the decisive elements in questions of individual rights and liberties.[24] (A contemporary version, modified to include a concept of paternalism, was advanced by H.L.A. Hart,[25] in rebuttal to Sir Patrick Devlin's insistence on a firmer limit to liberal values.[26]) Few scholars today agree that Mill had the last word on civil rights and liberties. He is never entirely clear in defining his concepts of harm and consent,[27] and controversy on the meanings of those terms is arguably as old as law itself. Who is to say what counts as 'harm'? Does psychological injury count? Or sheer offense? And what about consent? When is consent validly given, and by whom?[28] Insofar as Mill clarifies his concepts of harm and consent, he sometimes reaches conclusions that would run contrary to liberal beliefs today.[29] Even on those points where Mill's liberalism is unambiguous and up-to-date, it would be implausible to argue that the highly individualist values of liberalism are the only ones embraced in American law. Justice Scalia has claimed that 'there is no basis for thinking that our society has ever shared that ... "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal—much less for thinking that it was written into the Constitution'.[30]

In this book, the question will not be whether Mill's views on any given controversy were right or wrong. The aim will not be to rummage through cases to see whether the harm principle applies. In fact, this book is not about Mill at all. I will adopt his concepts of harm and concept, but will take them in a different direction. My hypothesis will be that some fixed, formal concept of harm combines with some fixed, formal concept of consent—pitting individuals either against each other, or against society as a whole—in every dispute about a constitutional right, despite ongoing substantive disagreement on what counts as 'harm' or 'consent' in particular cases. The aim will be to see how purely formal concepts of harm and consent structure arguments in constitutional disputes, regardless of the fact that harm and consent can never be conclusively defined in substantive terms. The formal concepts of harm and consent will be treated just as we treated variables like x and y when we studied algebra. We learned how we could treat such variables as empty shells, shuffling them all around, regardless of their ultimate values, as long as we obeyed certain rules. My entirely hollow concepts of harm and consent will reveal a constant structure underlying arguments about constitutional rights, a kind of Chomskyan deep structure of constitutional argument. The purpose of this book

is only to pinpoint that structure. It can help to clarify relative strengths and weaknesses of arguments, but does not provide the 'right answer', or even the preferable outcome, of any dispute. It proposes no 'neutral' principles—no algorithm that would provide the legitimate resolution of a controversial case.[31] Its results are descriptive, not prescriptive.

The method proposed in this book has been developed with several aims in mind. One is to achieve a fair level of formal precision without requiring any knowledge of logic or formal analysis on the reader's part. Another is to design a model specifically geared to arguments about individual rights and liberties, avoiding discussions about formal modeling that have no immediate relevance to constitutional law. In view of those aims, I must take a moment to address a few words to those scholars who are familiar with formal logic. Compared to some of the complex problems that formal logicians have attempted to tackle (problems of modality, reference failure, or the status of conditional statements), logicians may find the kinds of arguments that are analyzed in this book straightforward, and may wonder why I do not adhere to the standard notation forms of symbolic logic (except in the endnotes for Chapter 1, where they work well enough). The answer is that there is no way it can be done for a more general readership of constitutional scholars, political scientists, or moral and political philosophers. Any attempt to summarize the basics of symbolic logic in a few dozen pages (apart from being as shoddy as such summaries always are) would make the mechanics of the analysis hopelessly cumbersome, and keep it so bogged down in questions of logic and language as to eclipse the aim of developing a method specifically tailored to constitutional argument. Standard notation forms are designed largely to facilitate the testing of the validity of deductions from premises to conclusions. That is not an aim of this book. This book seeks to keep the familiar issues of constitutional law in the foreground. To achieve that aim, several departures are made from methods of standard symbolic logic, some of which are noted in the text.[32]

The first full exposition of the technique was set forth in *The Logic of Liberal Rights*.[33] That book examined more of the technical points of concern to logicians. However, I knew that some of those points would not interest a more general readership. My aim in the present book is to provide a simplified version of the theory. For both books, the word 'logic' applies in a limited sense. Again, we will not be asking how or whether conclusions follow from their premises. (The notation forms would have to be fully revised—in the direction of greater complexity—for that to be done, and, in my view, little would be gained in terms of insight into constitutional law.) Rather, the aim of the book will be to ascertain a fixed set of background concepts without which arguments in individual rights disputes would be unthinkable, and any one of which can always be ascertained for any argument in a given case.

The model is an account of argument about civil rights and liberties generally, and can be applied to any number of jurisdictions—in principle, to any regime promulgating and applying civil rights and liberties, however well or ill it does so.[34] A useful feature of the model is its ability to apply indifferently to all such regimes.[35] Standard American constitutional scholarship is generally unable to do

that, anchored as it is in concepts unique to its own history and practices. Concepts like 'tiers of judicial scrutiny', or 'substantive due process', or 'vagueness and overbreadth', all fundamental to American constitutional law, are difficult to transfer accurately to other systems. Of course, for present purposes, the case law of the US Supreme Court will keep us busy enough without our having to look elsewhere. We will examine a comparatively small number of cases, which will serve as examples for a larger body of US constitutional case law.

The limitation of the analysis to the more well-known amendments of the Constitution will come as no surprise. The issues examined will be those widely known, even to readers not specialized in constitutional law. Only one omission requires explanation. No mention will be made of equal protection law. Discrimination raises questions not only about whether a right is enjoyed at all, but also about whether it is enjoyed equally by different legal subjects. In *The Logic of Equality*,[36] I explained how that feature entails its own formal structures. Those structures are compatible with the ones examined in this book, but are distinct enough to require separate treatment. As that book analyzes some of the landmark cases in equal protection jurisprudence, they are not examined here. As to the Fourteenth Amendment, then, only cases relevant to the Due Process clause will receive detailed attention. That limitation does not preclude examination of discrimination arising in other contexts. For example, the death penalty is examined with reference to the Eighth Amendment prohibition of cruel and unusual punishments. We will see, however, that the Supreme Court has had to consider whether evidence of racially discriminatory administration of the death penalty should be treated as, itself, evidence that the punishment is cruel or unusual.

In view of the focus on concepts of harm and consent, some readers may wonder whether the model applies to other areas of law in which those concepts play a central role, such as criminal, personal injury, property or contract law, or whether theories or doctrines from those areas would provide a means for testing the model. My stance on that question will be neutral. I believe that the concepts of harm and consent proposed here might indeed apply to other areas of law, but not without close attention to the different kinds of issues that arise. For example, the concept of harm adopted in this book will be limited to two kinds:

(1) Harm alleged to arise from the *exercise of* an asserted constitutional right (e.g. harm alleged to be caused to oneself through euthanasia; or to a foetus through abortion; or to society's moral values through homosexuality or hate speech). That concept of harm will be called *right-based* harm.

(2) Harm alleged to arise from a *restriction* on an asserted constitutional right (e.g. to a death row inmate through execution; or to a property owner through a restriction on land use). That concept of harm will be called *restriction-based* harm.

I will argue that those are the only two kinds of harms relevant to arguments about whether an asserted right is protected by the Constitution, or whether a

restriction on the exercise of an asserted right should be held to be constitutional. Harms arising in criminal law, personal injury law, or other areas, are not generally construed as arising from the exercise of, or from a restriction upon, asserted constitutional rights. In some cases that will not matter, and we will see that a few examples drawn from criminal and tort law turn out to be helpful. Nevertheless, questions about the degree to which the model as a whole can be adopted beyond the framework of constitutional rights would lead the present analysis too far afield, and, therefore, will not be considered.

Chapter 1 clarifies some of the basic terms that will be used in the book. It need not be read first, and, for some readers, may make more sense if it is read at a later stage. For readers seeking only a general feel for the model, it can perhaps be skipped entirely. Chapter 2 begins the analysis by introducing the *agents* of constitutional argument: the persons or entities who populate legal argument in constitutional cases. They are divided into classes: *parties*, who make constitutional arguments; and *actors*, about whose interests constitutional arguments are made. Those classes are then further subdivided. Chapter 3 examines the concept of harm. Despite interminable controversy about the meaning of the word 'harm', I argue that we can pinpoint formal concepts of harm without which constitutional arguments could not be made. Two *Harm Axioms* are introduced to show how arguments in constitutional disputes presuppose some concept of harm. Chapter 4 introduces the concept of consent. That concept, too, has no fixed or certain substantive content. However, I argue that precisely one formal concept of consent combines with each concept of harm. In Chapter 5, the formal concepts of harm and consent are combined to generate a complete set of *background theories* underlying arguments about constitutional rights. Those theories are described with reference to familiar terms such as 'liberal', 'democratic', or 'paternalist', and the concepts of harm and consent, as developed in the earlier chapters, are used to give those terms precise meanings.

Some readers will have only limited interest in formal analysis, and I have introduced many of the key concepts before Chapter 5. Of course, I am not keen on advising readers to break off the reading before Chapter 5. Only there do I develop the complete set of background theories underlying arguments about constitutional rights. Only there do I show how any substantive argument about a constitutional right can be seen as a version of one of the background theories. Only there is the analysis sufficiently advanced to allow examination of a greater number and variety of cases than in the preceding chapters. Nevertheless, the core concepts of harm and consent proposed in Chapters 3 and 4 do provide the foundations of the model, and, I hope, will prove of some interest even to those not inclined to follow the development of the model through to its completion.

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Notes

1 Aristotle 1941a (86a5-7): 149-50.
2 Washington v. Glucksberg, 521 U.S. 702 (1997).
3 U.S. CONST. amend. XIV, §1.
4 The words 'without due process of law' suggest that government *may* deprive citizens of their liberty, as long as they receive due process of law. However, in recent decades, the Supreme Court has been willing to find that certain individual choices on matters of deeply personal or private concern require greater protection. In 1965, the Court decided that the Constitution protects the right of married couples to use contraception, as part of a broader privacy right, despite the fact that the black letter of the Constitution contains no such right. Griswold v. Connecticut, 381 U.S. 479 (1965). Various Justices sitting in that case identified possible constitutional foundations for the privacy right. At the time, only Justice Harlan found the privacy right rooted in the liberty component of the Due Process Clause. *Id.* at 500 (Harlan, J., concurring). In subsequent judgments, the Court has increasingly accepted Harlan's view. See, e.g. Lawrence v. Texas, 123 S. Ct. 2472, 2476-77 (2003) (reviewing the case law since *Griswold*). In several cases applying the term 'liberty' to individual interests beyond those expressly protected by the Constitution, the Court has nevertheless taken a cautious approach. For example, it has at times required evidence that those interests were 'deeply rooted in [American] history and tradition'. Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion). Cf., e.g. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 269-79 (1990). Note that similar questions about the meaning of 'liberty' can arise with respect to the federal government, under the Due Process Clause of the Fifth Amendment.
5 521 U.S. at 711.
6 *Id.* at 713.
7 *Id.* at 717.
8 *Id.* at 736 (O'Connor, J., concurring).
9 *Id.* at 752 (Souter, J., concurring in the judgment) (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
10 *Id.* at 738 (Stevens, J., concurring in the judgment) (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
11 *Id.* at 790 (Breyer, J., concurring in the judgment).
12 Tribe 2000: 3, 6.
13 Tribe 2000: 3, 5-6.
14 See generally Tribe 2000, 1988, 1978. At the time of completing the present book, the second volume of Tribe's third edition has not yet appeared. However, in a private communication, Professor Tribe has confirmed that the second volume will retain the seven models. Cf. Tribe 2000: 6.
15 Tribe 2000: 3.
16 Tribe 2000: 6.
17 Tribe 2000: 1, 2.
18 See Hohfeld 1946. For a comprehensive introduction, including a new edition of Hohfeld's original text, along with an examination of Hohfeldian concepts and terminology, and a bibliography of representative studies, see Simmonds 2001: xxviii-xxix.
19 The tension between universalism and particularism is not new, nor is it distinct to legal theory. It was well known to the ancient Greeks, and arises still in disciplines as different as psychology, linguistics, aesthetics, anthropology, history or political science. Aristotle begins one of his treatises on biology placing that dilemma at the core of scholarly

concern. He confirms that it has no easy resolution, and that it reaches well beyond the problems of natural science. (In the following passage, for 'man', 'lion', and 'ox', we can substitute, *mutatis mutandis*, three given areas of constitutional law, such as 'freedom of speech', 'cruel and unusual treatment', and 'privacy'; or indeed three specific cases, such as 'Moore v. East Cleveland', 'Cruzan v. Director, Missouri Dept. of Health', and 'Planned Parenthood v. Casey'.)

> [Should we] begin by discussing each separate species—man, lion, ox and the like—taking each kind in hand independently of the rest, or ought we rather to lay down the attributes which they have in common in virtue of some common element of their nature? For genera that are quite distinct present many identical phenomena, sleep, for instance, respiration, growth, decay, death, and other similar affections and conditions ... [I]f we deal with each species independently of the rest, we shall frequently be obliged to repeat the same statements over and over again; for horse and dog and man present every one of the phenomena just enumerated. A discussion therefore of the attributes of each such species separately would necessarily involve frequent repetitions as to characters, themselves identical but recurring in animals specifically distinct. [...] We must, then, have some clear understanding as to the manner in which our investigation is to be conducted; whether ... we are first to deal with the common or generic characters, and afterwards to take into consideration special peculiarities; or whether we are to start straight off with the particular species. For as yet no definite rule has been laid down in this matter. Aristotle 1984 (639a13-639b8): 994-95 (substituting 'species' for 'substance' in the first sentence, following Aristotle 1941b (639a13): 643).

20 Cf. this chapter, text accompanying note 33.

21 Although the Bill of Rights consists of the first ten amendments, this study focuses on cases arising under the First, Fifth and Eighth Amendments.

22 New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

23 Mill 1974: 68.

24 Whether or to what extent Mill fathered the harm principle is no easy question. By identifying the concepts of harm and consent as central to the concept of liberty, he certainly elicited the strong link between those concepts and concepts of individual rights and liberties. Nevertheless, echoes of the harm principle resound throughout history. It is difficult to escape the impression that notions of individual freedom, however different they may have been from ours, have commonly led to similar intuitions about the role played by harm and consent. The principle is already detectable, as a social ideal, if not as a rigid norm, in Pericles' funeral oration: 'far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbor for doing what he likes'. Thucydides 1982 (II.37): 108. Plato suggests that some such principle thrives among his Athenian contemporaries. He no doubt has the (somewhat exaggerated) image of democratic Athens in mind when, in the *Republic* viii, 557b, he has Socrates ask about democracies, 'aren't [the people] free? And isn't the city full of freedom and freedom of speech? And doesn't everyone in it have the license to do what he wants? [...] And where people have this license, it's clear that each of them will arrange his own life in whatever manner pleases him.' Plato 1997: 1168. Cf. Heinze 2005. For an enormous secondary literature on concepts of liberty in ancient Greece, see, e.g. the materials gathered or cited in Robinson 2004.

John Locke takes a step in the direction of the harm principle in finding that some degree of personal autonomy is guaranteed through natural rights in property and liberty: 'the end of law is not to abolish or restrain but to preserve and enlarge freedom ... liberty [is for a man] to dispose and order as he [chooses] his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own'. Locke 1947 (vi.57): 148. Cf. Locke 1947 (v.27-34, viii.104): 134-37, 173. Cf. also Locke 1983. However, he undertakes no detailed inquiry into that balance between individual will and 'the allowance of those laws' which distinguishes Mill's approach. On that point, it could be said that Mill picks up where Locke leaves off (although Mill by no means accepts the whole of Locke's theory, e.g. Locke's grounding of liberty in natural law).

A more familiar formulation of the harm principle appears in article 4 of the French *Déclaration des droits de l'homme et du citoyen* of 1789: 'La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui. Ainsi, l'exercise des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres memberes de la société la jouissance de ces mêmes droits ...' ['Liberty consists in being able to do anything that does not harm others. Thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of those same rights ...'] In view of subsequent French republican (some might say Rousseauvian) legislative and judicial practices, however, it is debatable whether that passage can be said to have acquired in France the distinctly liberal, individualist ethos with which Mill's view has long been associated. Kant offers a foundation for liberalism by deriving principles of freedom from principles of duty. Kant 1908-13. Yet some would challenge the appropriateness of such a foundation. Thus, whatever the harm principle's origins may be, Mill's merit is to have distinguished it as central to a concept of liberty that characterize much of the continuing jurisprudence and theory of individual rights and liberties.

25 Hart 1963.

26 Devlin 1959. Cf. this book, Section 4.5.

27 For example, he writes that 'acts which ... if done publicly, are a violation of good manners, and com[e] thus within the category of offences against others, may rightfully be prohibited. Of this kind are offences against decency ...' However, his definitions of 'good manners', 'offences', and 'decency' are more hinted at than systematically examined. Mill 1974: 168-69, 175-76.

28 See, e.g. Heinze 1998.

29 Today, all Western legal systems, and most moderate liberals, agree with Mill's view, cited in this chapter, n. 27, that individual freedoms may be limited in the interest of public 'decency'. It is questionable, however, whether contemporary lists of acts qualifying as 'decent' would coincide on all points with Mill's, even if his views on certain moral issues, such as the status and conduct of women, were progressive in his day. Nor would his reference to 'good manners' meet with easy approval today. Mill also writes that 'if, either from idleness or from any other avoidable cause, a man fails to perform his legal duties to others, as for instance to support his children, it is no tyranny to force him to fulfil that obligation, by compulsory labour, if no other means are available'. Mill 1974: 167-68. Today, that view is associated not with liberals, but with those who advocate limits to liberal policies. The revival of American chain gangs notwithstanding, contemporary Western legal systems, in civil as well as criminal contexts, have generally sought alternatives to coerced labor as a legal remedy (in part

because monetary relief is easier to obtain in today's more widespread capitalist, wage-based economies).

30 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 574 (1991) (Scalia, J., concurring).

31 A well-known attempt along such lines was proposed in Wechsler 1959. For critical discussion, see, e.g. Tribe 2000: 208 n. 4; Tribe 1988: 1478; Deutsch 1968; Pollak 1959.

32 In view of those departures, some may wonder why a formal system should be used at all. Why not use a semi-formal method like Hohfeld's? My corpus, limited to arguments in certain kinds of constitutional cases, is narrower than Hohfeld's. It aims to pinpoint a greater number of common elements than a Hohfeldian-type analysis would allow. Those shared elements become unwieldy if not expressed concisely. For example, by the time we reach Section 4.7, the structure will have been sufficiently developed to yield an analysis of the patients' argument in *Glucksberg* which is written: A: Ip~γrCv. In standard English, the aggregation of terms which that formula is translating, even though each term will have been defined, is cumbersome: 'The claimant asserts that the personal actor's volitional consent renders irrelevant any right-based harm'. The formal scheme also facilitates immediate comparison with the corresponding opposing arguments, e.g. the state's claim, which will take the form Z: IpHr~C~v, but which would yield an equally cumbersome English translation. In a classic exposition, Carnap (1958: 2) provides a similar explanation for the formalization of mathematics,

> [An] advantage of using artificial symbols in place of words lies in the brevity and perspicuity of the symbolic formulas. Frequently, a sentence that requires many lines in a word-language (and whose perspicuity is therefore slight) can be represented symbolically in a line or less. Brevity and perspicuity facilitate manipulation and comparison and inference to an extraordinary degree. [...] Had the mathematician been confined to words and denied the use of numerals and other special symbols, the development of mathematics to its present high level would have been not merely more difficult, but psychologically impossible. To appreciate this point, one need only attempt to translate into the word-language e.g. so elementary a formula as '(x + y)3 = x3 + 3x2y + 3xy2 + y3' ('The third power of the sum of two arbitrary numbers equals the sum of the following summands: ...').

33 Heinze 2003a. An earlier version, Heinze 1999a, is a very preliminary forerunner, some points of which have been modified.

34 Heinze 2003a: 26-27.

35 On differences among jurisdictions concerning the status of such elements as judicial review, *stare decisis*, non-contentious (e.g. advisory) jurisdiction, rendering of a *ratio decidendi* (*jugement motivé*), or alternative dispute resolution, see Heinze 2003a: 21-22.

36 Heinze 2003b.