

PRINCIPLES FOR A META-DISOURSE OF LIBERAL RIGHTS: THE EXAMPLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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INTRODUCTION

The word "right," when "taken in an *abstract* sense, means justice, ethical correctness, or consonance with the rules of law or the principles of morals."¹ When "taken in the *concrete* sense, [it denotes] a power, privilege, faculty, or demand, inherent in one person and incident upon another."² MacIntyre speaks of rights "which are alleged to belong to human beings as such, and which are cited as a reason for holding that people ought not to be interfered with in their pursuit of life, liberty and happiness."³ Yet Hohfeld proposes an analysis in which "the term 'right' will be used solely in that very limited sense according to which it is the correlative of duty."⁴ Indeed, for Posner, any broader concept of rights is

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1. BLACK'S LAW DICTIONARY 1323 (6th ed. 1990)

2. *Id.* at 1324.

3. ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69 (2d ed. 1985).

4. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 72 (1966).

"primitive."⁵ Nevertheless, Minow captures a vision of rights which "muster people's hopes and articulate their continuing efforts to persuade."⁶ One could find many more citations. Yet the point is clear. No understanding of rights is thinkable in isolation from a broader theory of law.

Why theorize about rights at all? Why not just ask what *the law itself* says about them? In fact, it says very little. Or rather, it says so many things, in so many contexts, that it shuns any unified or self-evident concept. Even the more specific field of liberal rights⁷ reveals not a jurisprudence of rights *as such*, but simply a jurisprudence of this or that particular right — a jurisprudence of free expression, criminal procedure, due process, religious liberty or discrimination. Once the term "rights" has been stamped upon these disparate interests, their unity is more easily assumed than examined.

We thus face a dilemma. On the one hand, we can accept black-letter doctrine as the only reliable statement about rights. That approach, however, reduces the concept of rights to an empty shell. It provides conceptual unity only at the broadest, and commensurately trivial, level of abstraction: rights are whatever the law says they are. On the other hand, rights can be subsumed under a more substantively unified theory, but only insofar as some — invariably controversial — position is taken on the nature of law itself (such as "law is a servant of justice," "law is a by-product of political institutions," or "law is an instrument of economics").

Is there another approach? Is it possible to take Ockham's razor to rights discourse — to account only for those concepts which are necessary to the sheer intelligibility of rights discourse? Are there rules that govern the conditions for the possibility of rights discourse? Do we "instinctively" follow such rules without even knowing what they are, just as people follow rules of syntax or logic without ever having studied them in any systematic way?

It will be argued that liberal rights discourse has a structure that unites and circumscribes rights jurisprudence, precisely dictating what rights jurisprudence can and cannot assert, and that such a structure can be

5. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 331-33 (1990).

6. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867 (1987).

7. While traditional rights instruments such as the United States Bill of Rights limit individual rights to civil and political interests, subsequent thought, particularly in the international human rights movement, has included concepts of social, economic, cultural and collective rights. See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* chs. 5, 14, 16 (1996). This study, however, will examine only liberal rights, meaning the civil rights and liberties now common in constitutional democracies and in international and regional rights regimes. The question whether the model proposed here, or some comparable model, would apply to other kinds of rights, is too broad to be summarily affirmed or denied, and must instead be deferred for future analysis.

elaborated through a formal, symbolic language.⁸ That language will be called a *meta-discourse*⁹ of liberal rights. The meta-discursive model proposed here will serve to develop the following theses:

1. All arguments in the adjudication of liberal rights are instances of fixed combinations of variables.¹⁰ These combinations can be expressed as symbolic formulas. There are fourteen kinds of arguments — *meta-arguments* — that can be made in the adjudication of liberal rights. (General formulas representing the fourteen meta-arguments appear in Part 3.3, Table 2.) Any one formula can be adopted to an infinite variety of fact patterns. The fourteen meta-arguments thus represent not total determinacy, but only the limits of determinacy in liberal rights discourse.
2. All rights disputes are nothing but disputes about which formula is correct. Disputes about which formula is correct are nothing but disputes about the values to be ascribed to the constituent variables. Those values are always indeterminate; but the variables and formulas to which they are ascribed are fixed, and, in that sense only, are determinate.¹¹
3. As the fourteen meta-arguments represent the conditions for the very coherence of liberal rights discourse, they apply to any system of civil rights — domestic, regional, or international.¹²

8. For an analysis of symbolic as compared with natural language, see WILLARD VAN ORMAN QUINE, *ELEMENTARY LOGIC* 52-53 (1965).

9. Compare Carnap's concept of *metalanguage*: "In the investigation of languages, either historical natural ones or artificial ones, the language which is the object of study is called the *object language*. . . . The language we use in speaking *about* the object language is called the *metalanguage*." RUDOLF CARNAP, *INTRODUCTION TO SYMBOLIC LOGIC AND ITS APPLICATIONS* 78 (William H. Meyer & John Wilkinson trans., Dover Publications 1958).

10. See also Eric Heinze, *A Meta-Discourse of Constitutional Rights* (unpublished manuscript, on file with author); Eric Heinze, *A Meta-Discourse of Discrimination Law* (unpublished manuscript, on file with author).

11. In Wittgenstein's words, "[d]as Wesentliche am Satz ist . . . das, was allen Sätzen, welche den gleichen Sinn ausdrücken können, gemeinsam ist." Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* 3.341, in 1 WERKAUSGABE 7, 24 (1984). "That which is essential to a sentence is . . . that which is common to all those sentences which can express the same meaning." (translation by author).

12. Although the concept of civil and political rights, inherent within all individuals as inalienable legal claims against the State, is largely Western European in origin, it has increasingly provided a primary component of international and regional human rights instruments, of national constitutions, and of foreign policy. See STEINER & ALSTON, *supra* note 7, chs. 2, 3, 7, 10, 12. See also Eric Heinze, *Beyond Paradoxes: Right and Wrong*

Although some of the notation to be used in this analysis is drawn from standard symbolic logic, no knowledge of formal logic is assumed. All relevant logical concepts and symbols will be explained. Those used are rudimentary and based upon familiar, intuitive processes.

This analysis does not purport to bring us any closer to solving rights disputes. It takes no position on the merit or universality of rights discourse, as opposed to other means of articulating human needs and aspirations.¹³ It contains not a scintilla of substantive insight on moral, philosophical, sociological, or policy-based rights debates. It seeks only to understand how those debates can become rights discourse in the first place. After all, not all moral, philosophical, sociological, or policy debates are debates about rights. The statement "*abortions not performed by qualified professionals are harmful to women*" is not, without more, a legal one. What, then, is required to turn such statements into statements about the adjudication of rights? The aim of this study is not to resolve controversies surrounding rights jurisprudence, but only to clarify them by understanding them as products of a regular and predictable discursive structure.¹⁴ Moreover, having banished such standard concepts as "liberty" or "reasonableness" to the land of variable contingencies, we will nevertheless see towards the end of this paper that a formal analysis allows us to re-generate natural-language¹⁵ concepts. Such concepts, if hardly accounting for the full variety of debate proper to rights adjudication, nevertheless, to the extent of the determinacy of rights discourse, can be used with precision. Thus, the analysis will conclude by proposing formal concepts of liberalism, paternalism, communitarianism, and State sovereignty.

The corpus to be examined here will be the case law of the European Convention on Human Rights.¹⁶ Its jurisprudence is the most extensive among international and regional human rights systems, providing one of the

Approaches to the Universality of Human Rights Law, 12 NETH. Q. HUM. RTS. 369 (1994); LUDGER KÜHNHARDT, *DIE UNIVERSALITÄT DER MENSCHENRECHTE* (1987).

13. See STEINER & ALSTON, *supra* note 7, ch. 4; Heinze, *supra* note 12; KÜHNHARDT, *supra* note 12.

14. Compare Carnap's depiction of formal logic: "Such a system is not a theory (*i.e.* a system of assertions about objects), but a *language* (*i.e.* a system of signs and of rules for their use)." CARNAP, *supra* note 9, at 1.

15. The term *natural language* as used here simply denotes languages, such as English, colloquially spoken or written, as opposed to *artificial languages*, such as formal logic, mathematics, or computer languages, developed for limited scholarly or technical purposes. See JOHN LYONS, *NATURAL LANGUAGE AND UNIVERSAL GRAMMAR* 1-3, 50-52 (1991).

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 45 AM. J. INT'L L. Supp. 24 (1951) [hereinafter *European Convention on Human Rights*].

leading bodies of case law on civil rights and liberties.¹⁷ The model proposed here is structured on the basis of arguments attributed to parties in dispute. These are drawn only from European Court or European Commission opinions,¹⁸ and not from oral or written pleadings.¹⁹ The assumption is that an opinion issued by the European Court or Commission, as a condition for its coherence, must be assumed to arbitrate between *some* two opposing positions, even if such positions are different from those of the parties' original submissions and even if the opinion does not articulate the positions it ascribes to the parties in great detail. A broader corpus embracing written or oral pleadings, decisions of domestic courts, or *travaux préparatoires* would simply provide further instances for applying the model — and may offer a worthwhile basis for future analysis — but in no way bears upon the structure of the meta-discourse as set forth here. Similarly, the fact that the parties or judges may have failed to raise arguments that might have been made in a given case is irrelevant, as the proposed model envisages possible, as well as actual, arguments.

The hypothesis is that this meta-discourse applies to any system of liberal rights. Even in legal systems that make less use of a "reasoned" ("*motivé*") style of jurisprudence, it cannot be assumed that such jurisprudence is arbitrary (or, at least, any more arbitrary than adjudication in the common-law world), but only that any requisite reasoning was done at other, presumably legislative, executive, or administrative levels, and is then accepted and incorporated by a judicial body.

Part 1 considers the failure of standard concepts to provide a discursive unity of rights jurisprudence. Part 2 proposes the components of a meta-discourse. Part 3 examines how those components combine to generate legal arguments.

1. STANDARD APPROACHES

Courts must generalize about rights. Rights jurisprudence must appear orderly rather than random, principled rather than *ad hoc*. Some degree of unity is required.

17. For an overview of current international and regional human rights practice, see STEINER & ALSTON, *supra* note 7, chs. 6-10.

18. On Court and Commission practice generally, see D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* chs. 22-24 (1995). The institutional changes now in force under protocol 11 of the Convention will entail the replacement of the Commission's functions by a restructured Court. See *id.* ch. 26. These changes do not affect the meta-discursive model.

19. Accordingly, all citations to the European Convention on Human Rights cases refer to the Series A reporters. For records of the submissions made by the parties in each case, the corresponding Series B reporters may be consulted.

Consider some examples. In *Handyside v. United Kingdom*, the European Court upholds a government ban on a children's textbook containing explicit discussions of human sexuality.²⁰ In *Dudgeon v. United Kingdom*, the Court finds a Northern Irish prohibition on private, adult, consensual homosexual conduct to be in violation of the Convention's privacy right.²¹ In *Mellacher v. Austria*, the Court upholds rent control legislation reducing proceeds to owners of rented property.²² In *Tomasi v. France*,²³ the Court upholds an individual's claim of unlawful detention,²⁴ deprivation of a judicial hearing within a reasonable time,²⁵ and infliction of

20. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976). The claim was brought under article 10, which reads in part:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas . . .

(2) The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention on Human Rights art. 10.

The United Kingdom prevailed under the "protection of . . . morals" clause. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 21, 28 (1976).

21. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981). Article 8(1) states: "[E]veryone has the right to respect for his private and family life . . ." European Convention on Human Rights art. 8(1). Article 8(2) sets forth a limitations provision similar to that of article 10(2). Compare European Convention on Human Rights art. 8(2), with European Convention on Human Rights art. 10(2). These limitations include a "protection of health or morals" clause identical to that invoked in *Handyside*. See European Convention on Human Rights art. 8(2).

22. See *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) (1989). Article 1, Protocol 1, reads in part, "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 9 E.T.S. 41.

23. *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) (1992).

24. Article 5 states: "Everyone has the right to liberty and security of person. . . . Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or release pending trial." European Convention on Human Rights art. 5.

25. Article 6(1) states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time . . ." *Id.* art. 6(1).

torture or inhuman or degrading treatment.²⁶ In *McCann v. United Kingdom*, the Court finds a police shooting of individuals suspected of terrorist activity to have violated the Convention.²⁷

Handyside and *Dudgeon* differ insofar as *Handyside* concerns the right of free expression while *Dudgeon* concerns the privacy right. They are related, however, as they both raise questions of public morals. The Court in *Dudgeon* carefully reconciles its view of public morals to that adopted in *Handyside*.²⁸ *Mellacher*, *Tomasi*, and *McCann*, while not presenting "public morals" questions in the conventional sense, are nevertheless equally concerned with public welfare. How conceptually related, then, are these five cases? Are they guided by concepts that would unify all of the Convention jurisprudence, or indeed the jurisprudence of all international, regional, or domestic liberal rights regimes?

We will begin by considering two standard sets of unifying concepts: Part 1.1 examines standard "political" concepts. Part 1.2 examines standard "judicial" concepts. In both cases, we will see that standard concepts in liberal rights adjudication prove to be too ambiguous to provide a general language of rights. In Part 1.3, it is suggested that such a language can be found at a more basic level.

1.1 Discursive Unity through Standard "Political" Concepts

Concepts of liberty, community, dignity, democracy, autonomy, individual welfare, or public interest have long guided rights discourse. Each purports to have something to say about rights as a whole — about speech as well as privacy, due process as well as religious freedom. Can any of these concepts provide a cohesive account of *Handyside*, *Dudgeon*, *Mellacher*, *Tomasi*, and *McCann*?

"Liberty" seems like a good candidate. *Handyside* and *Mellacher*, it might be said, stand for the proposition that principles of individual liberty are not absolute. *Dudgeon*, *Tomasi*, and *McCann*, on the other hand,

26. Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* art. 3.

27. See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995). Article 2 reads in part:

Everyone's right to life shall be protected by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary — (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained

European Convention on Human Rights art. 2.

28. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21-22 (1981).

demonstrate that principles of individual liberty must nevertheless override certain countervailing State interests. The concept of liberty would thus appear to provide a general discourse of liberal rights, able to characterize five very different disputes.

Yet the concept of liberty could just as easily have explained the opposite results in each case. Had each case been decided differently,²⁹ we would simply say that it is *Dudgeon*, *Tomasi*, and *McCann* which stand for the proposition that principles of individual liberty are not absolute, while *Handyside* and *Mellacher* demonstrate that principles of individual liberty must nevertheless override certain State interests. By explaining every possible outcome, the liberty concept explains none. Far from explaining the results of individual cases, it is only explained by them: "liberty" is only what the cases say it is. It explains liberal rights not "synthetically," but "analytically"; it does not provide conceptually distinct information about liberal rights, but is merely part of their definition.³⁰ It at first raises the hope of unifying liberal rights discourse by extrapolating, in some meaningful way, from specific cases to a general principle. Yet, it does just the opposite. Any attempt to clarify the general notion of liberty merely leads us back to the facts and reasoning of particular cases.

Even if we accept "liberty" as a unifying concept in these cases, further indeterminacy arises. If *Handyside* and *Mellacher* stand for the proposition that individual liberty must sometimes cede to countervailing interests, and if *Dudgeon*, *Tomasi*, and *McCann* demonstrate that individual liberty must sometimes override countervailing interests, then what are those countervailing interests? One might call them "democratic consensus" or

29. As with most controversial cases, and many uncontroversial ones, opposite results in all five of these cases are by no means unthinkable. The impugned publication in *Handyside* was legal in a number of other member States. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 8, 27 (1976). In *Dudgeon*, the majority vote in favor of the applicant reversed earlier positions taken by the Commission. It was only rather recent changes of attitudes among European States that, in the Court's view, warranted a revised stance. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981). See also ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 98-99 (1995). The Court in *McCann* was split by ten votes to nine. See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 65 (1995) (Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Freeland, Baka and Jambrek, JJ., dissenting). The holding in *Mellacher* — hardly revolutionary, from the perspective of the contemporary, Western European welfare State — nevertheless produced five dissenting opinions. See *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) at 32 (1989) (Cremona, Bindschedler-Robert, Gölcüklü, Bernhardt and Spielmann, JJ., dissenting). Even the brutal treatment found in *Tomasi* did not survive Strasbourg scrutiny with full unanimity. See *Tomasi v. France*, 241 Eur. Ct. H. R. (ser. A.) at 62 (1992) (Mr. Soyer, dissenting).

30. Indeed, the article 10 right adjudicated in *Handyside* is freedom of expression, merely the Germanic form of the Latinate "liberty." Thus, the equally official French version of the Convention provides in article 10 for *liberté d'expression*. See European Convention on Human Rights art. 10.

"community interests." Yet, if that is the case, then "liberty" is no longer a unifying concept. Conceptual unity instead derives from some combination of liberty and democracy or liberty and community. In addition, if the *Handyside* Court is correct to note that the State's interests lie not merely with broad democratic consensus or community values, but also with protecting specific, vulnerable individuals who might be adversely affected by reading the publication,³¹ then the concept of state paternalism must be injected.³²

Of course, there is no reason why a general discourse must consist of only one concept. It may consist of a combination of concepts. But which combination? Each specific fact scenario — a restriction on expression, a restriction on privacy, a restriction on property, a restriction on the right to life, a restriction on detention procedures or practices — will require its own balance of concepts. The more we try to distill general principles from specific factual scenarios, the more those principles dissolve back into factual scenarios. Far from providing a general language of rights, combinations of standard, relevant terms simply provide different ways of restating specific legal issues and fact patterns.

These standard concepts, moreover, are irresistibly prescriptive. It is difficult to trust a concept purporting to provide a neutral account of rights jurisprudence when that same concept is used to advocate or to challenge rights. If Mr. Dudgeon asserts "liberty requires privacy," is this merely a restatement of applicable doctrine, or is it rather an expression of his own views? How would we know the difference? When the Court, in *Dudgeon*, attributes to a democratic society the "two hallmarks" of "tolerance and broadmindedness,"³³ or, in *Mellacher*, claims that "it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way[,]"³⁴ are these observations descriptive or prescriptive? Is the distinction even meaningful? Purportedly neutral descriptions of rights discourse all too easily blend with partisan discourse, and partisan discourse all too easily serves political ends.³⁵

31. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 14-17 (1976).

32. See Eric Heinze, *Victimless Crimes*, in 4 *ENCYCLOPEDIA OF APPLIED ETHICS* 464-65, 467-68 (1998).

33. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21 (1981). Cf. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 29 (1976).

34. *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) at 28 (1989).

35. There is little need to belabor this point, which, like the analytical point made in *infra* Part 1.2, has become so familiar from critical legal perspectives as to require little elaboration.

1.2 *Discursive Unity through Standard "Judicial" Concepts*

Courts might purport to avoid such "political" concepts through recourse to distinctly "judicial" concepts. While periodically referring to liberty, community, dignity, democracy, autonomy, individual welfare, or public interest, the Court raises no pretense of subsuming the entirety of its jurisprudence under any one, or any combination, of these concepts. Instead, it more commonly employs concepts of "reasonableness," "proportionality," or a "margin of appreciation"³⁶ — concepts which, again, purport to characterize rights as such, transcending the confines of any particular right. These concepts, however, are equally indeterminate, and their apolitical nature is questionable.

The most highly elaborated of the three concepts is the margin of appreciation doctrine. According to this doctrine, some balance between individual rights and State interests is commonly required. It cannot be expected that States with different histories, cultures, and political or legal institutions will always strike these balances in the same way.³⁷ "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge"³⁸ to assess local interests. Yet, far from providing a consistent, unified rights discourse, this doctrine is thoroughly chaotic. It is ill-defined, applied only with reference to a half dozen ancillary doctrines. These ancillary doctrines are equally ill-defined as to their scope and their hierarchical relationships to one another. They stand with each other not in an orderly queue — which the Court often appears to construct by moving from step to step as if checking off entries on a shopping list — but in a vicious circle.

The Court indicates that the margin of appreciation is not "unlimited." It "goes hand in hand with a European supervision. Such supervision concerns both the aim of the [government] measure challenged and its 'necessity[.]'"³⁹ We suddenly have not one concept, but four: (1) the margin of appreciation, which is constrained by (2) judicial supervision, as guided by (3) the aim of government action, as well as (4) the necessity of that action. Recall the circularity inherent in this fourth concept: in cases arising under articles 8 through 11, the whole point of the margin of appreciation doctrine is to interpret the requirement that government restrictions on rights

36. See, e.g., HARRIS ET AL., *supra* note 18, at 5-19, 289-301.

37. See *id.* at 12-15, 290-301. See also J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* ch. 7 (2d ed. 1993).

38. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

39. *Id.* at 23. By "European supervision," the Court simply means judicial scrutiny under the Convention.

must be “*necessary* in a democratic society.”⁴⁰ The margin of appreciation doctrine is then applied to interpret a necessity requirement, yet a necessity requirement is devised to interpret the margin of appreciation doctrine.

But there is more. How do we assess the “necessity” of government action? “[A] restriction on a Convention right cannot be regarded as ‘necessary in a democratic society’ . . . unless, amongst other things it is proportionate to the legitimate aim pursued.”⁴¹ What other things? Now we have two additional concepts: “proportionality,” which the Court often applies regardless of whether a margin of appreciation is at issue,⁴² and “legitimacy.” According to which standards, however, is government action “proportionate” or “legitimate”? *Dudgeon* cites a seventh doctrine — the “evolving European consensus”⁴³ — in this case, favoring the legality of private, adult, consensual homosexual relations. Yet, there was also a European consensus favoring the legality of the impugned book in *Handyside*. In *Dudgeon*, the doctrines of proportionality or legitimacy accord with the doctrine of European consensus.⁴⁴ In *Handyside*, the doctrines of proportionality or legitimacy override the doctrine of European consensus.⁴⁵

Why the conflicting results? When the judges can draw upon six ancillary doctrines, with no clear rules dictating those doctrines’ meanings, scope, or hierarchy *inter se*, it matters not a whit what the judges’ rationale is for reaching a decision, as one or another of these ancillary doctrines will justify any outcome.⁴⁶ Like “political” concepts, these “judicial” concepts,

40. European Convention on Human Rights art. 10(2) (emphasis added). Cf. HARRIS ET AL., *supra* note 18, at 290-301.

41. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21-22 (1981) (citations omitted).

42. See HARRIS ET AL., *supra* note 18, at 11-12.

43. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981). Cf. HARRIS ET AL., *supra* note 18, at 7-11, 294-96.

44. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981).

45. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 27-28 (1976).

46. It is worthwhile to consider two recent books devoted entirely to the margin of appreciation doctrine, HOWARD CHARLES YOROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (International Studies in Human Rights Series No. 28, 1996), and ELIAS KASTANAS, *UNITÉ ET DIVERSITÉ: NOTIONS AUTONOMES ET MARGE D’APPRÉCIATION DES ETATS DANS LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L’HOMME* (1996). The books are of interest not so much because of what the authors observe, but rather in what they fail to observe. At the very least, one would expect either that the authors would demonstrate that the doctrine is meaningless; or, if they believe the doctrine to be meaningful, that they would provide some sense of what it means — some synthesis, extrapolating from specific cases to a more general understanding. Yet they do just the opposite. The further they progress, the further they move away from any meaningful synthesis, drowning in a sea of sheer case summaries. Any conceptual synthesis remains at the broadest, and commensurately trivial, levels of abstraction. Both authors suggest that the doctrine reflects tensions between the European Convention’s

which would purport to lead us from the chaos of divergent interests and fact settings to the unity of a coherent rights discourse, in fact do the opposite. The margin of appreciation doctrine amounts to nothing more than its application in any particular case. In any given case, it justifies a result in favor of State interests just as plausibly as it justifies a result in favor of individual rights. If we change the outcome in each case, and substitute the foregoing "liberty" analysis with the margin of appreciation doctrine, we are left with identical results: *Dudgeon* then stands for the proposition that the State enjoys a margin of appreciation in determining public interest, while *Handyside* or *Mellacher* stand for the proposition that the margin of appreciation is nevertheless subject to "European supervision" on the basis of legitimacy of the State action, its proportionality to the stated aim, and so forth.⁴⁷

A compression of the margin of appreciation and its ancillary doctrines into one sentence would result in something resembling the following:

The State enjoys a margin of appreciation to place a restriction on the exercise of an individual right, but subject to European supervision, in light of that restriction's necessity, and of the legitimacy of its aim, and of the proportionality of the restriction to that aim, with regard to the practice of other Convention States.

Yet these ancillary concepts of supervision, necessity, legitimacy, proportionality, and State practice are merely tests of reasonableness. The judges simply apply them to the facts of a case in order to produce a result that commonly would be regarded as reasonable. Every European Convention case that has ever been decided on the basis of the margin of

"unity and diversity," or between European integration and subsidiarity, or between judicial activism and restraint. Yet these tensions are equally present in cases that do not invoke the margin of appreciation doctrine. They follow from the sheer existence of a regional system of liberal rights. The authors state no *specific* way in which those tensions illuminate, or are illuminated by, the margin of appreciation doctrine. Naturally, such tensions resonate most clearly in controversial cases. This is not, however, because these cases employ the margin of appreciation doctrine, but simply because they are controversial and would reflect the same tensions regardless of the judicial reasoning employed. Far from identifying any specific, non-trivial principles contained in the margin of appreciation doctrine, these works default to the tautological point that the doctrine reduces to the limitless normative and factual situations to which it can be applied. The authors fail to understand that they are not dealing with a *doctrine*, in any significant sense, at all, but only with an empty shell. The margin of appreciation doctrine accounts for everything because it means nothing. It tells us nothing about the European Convention and everything about judicial hoodwinking.

47. Although the analyses in *Tomasi* and *McCann* do not rely upon the margin of appreciation doctrine, it would be impossible to demonstrate that opinions doing so would have reached different results or would have been based on substantively different grounds.

appreciation and its arsenal of ancillary concepts could have been decided with a run-of-the-mill "reasonableness" doctrine (or "legitimacy" doctrine, or "fairness" doctrine, or "appropriateness" doctrine) without the slightest loss of difference either to the final result or to the substantive reasoning. In place of the foregoing formulation, the European Court could just as easily say the following:

The State may place reasonable restrictions on the exercise of individual rights.

It could then proceed to examine the same factual evidence, reaching the same conclusions on conceptually identical grounds. Were the Court to substitute a straightforward reasonableness inquiry for the margin of appreciation inquiry, no doubt many of the factors considered would be identical. The Court surely would examine, among other things, the aims of a State action, that action's relationships to those aims, and the practices of other State parties. Thus, one can view the entire margin of appreciation doctrine not as an alternative to a straightforward reasonableness doctrine, but rather as its very articulation. If this is the case, however, then it should be frankly acknowledged that the half-a-dozen ancillary doctrines are nothing more than components of an ordinary reasonableness inquiry, with all the attendant indeterminacy.

If the Court's conceptual arsenal largely, or entirely, reduces to a discourse of reasonableness, then, strictly speaking, it tells us nothing at all. The requirement that a balance between individual rights and State restrictions must be reasonable is not "synthetically" true, but "analytically" true. It is true by definition. What else would it mean for a liberal rights jurisprudence to balance conflicting interests, if not that the balance must be "reasonable?" Moreover, even the ostensible neutrality of the standard "judicial" terms, as compared with "political" terms, does not exempt them from confusion with a partisan discourse. When the Court in *Handyside*, *Dudgeon*, or *Mellacher* asserts that a State restriction must be reasonable, legitimate, appropriate, or proportionate to a necessary aim, are these assertions descriptive or prescriptive? How would one know? And, if and when they are prescriptive, how can we know that they are, at the same time, not "political?"

1.3 *Discursive Unity and Conceptual Determinacy*

Standard "political" and "judicial" concepts, then, are indeterminate. Nevertheless, rights discourse cannot be wholly indeterminate without entailing absurdities. Consider the following utterance: *If tax deductions are allowed for out-of-pocket expenses, then government censorship of pornographic material is permissible.* The question is not whether this is a

correct statement of law, but rather whether it is coherent as rights discourse at all. If rights discourse is entirely indeterminate, then there is no reason why this utterance should be less coherent than others.

Of course, we immediately recognize this utterance as incoherent. We immediately sense the conflation of tax discourse and censorship discourse as no more coherent than, say, a conflation of physics discourse and censorship discourse: *If the mass of a decelerating particle is greater than that of a stationary particle, then government censorship of pornographic material is permissible.* We immediately distinguish certain utterances which are not rights discourse from others which are rights discourse. But how do we do this? By instinct? By habit? Do we intuitively place such utterances outside the bounds of coherent rights discourse just as we place the utterance, *Où est ma chatte?*, outside the bounds of coherent English, or the utterance, *if a cat is an animal, then it must be a Cheshire cat*, outside the bounds of coherent logical deductions?

We need not search as far as tax law or physics to concoct incoherent rights discourse. Consider the following proposition:

In a democratic society, the people, through their elected representatives, may legitimately restrict the individual exercise of a right, even if they agree that the exercise of that right causes no harm.

Such propositions have long provoked well-known debates: What are the limits of individual rights? How do they balance against the wishes of the majority? The question here, however, is not whether this proposition is valid or invalid, but rather whether it is even coherent, as an assertion about rights, and, if so, what makes it so.

That proposition is in fact incoherent. It only appears coherent, if at all, because we read it as meaning something very different, namely:

In a democratic society, the people, through their elected representatives, may legitimately restrict the individual exercise of a right, by agreeing that the exercise of that right causes harm.

The distinction between the two propositions would appear to lie in the old problem of defining "harm." Must harm be material? If not, what non-material effects are harms?⁴⁸ It would seem hasty to conclude that the second version of this proposition is "real," while the first is incoherent. It would seem that, whether one adopts the first proposition or the second depends on

48. See Heinze, *supra* note 32, *passim*.

one's definition of "harm." If one's definition is material, then the first proposition would appear entirely coherent, indeed superior to the second (its validity as a statement of substantive law being a separate issue).

If one's definition of harm is material, assuming agreement on the meaning of "material," then on what grounds are the people, in the first proposition, declining to allow individuals to exercise a right? Because they fear its effects on public morals? But why would people fear those effects, if not because they believed them to be *harmful* to public morals? And to admit that those effects are harmful to public morals is to admit a concept of non-material harm, thus contradicting the premise that the first proposition is meaningful if our definition of harm is material.⁴⁹

Perhaps the people find the individual exercise of the right immoral "in itself," *regardless* of its effects on public morals. But what makes an act immoral "in itself"? Does the act degrade human dignity? What is "degradation" if not a kind of harm? Does it violate God's law? What is an act in "violation" of a law if it is not an act that in some sense harms the purposes or values of that code? To call something "immoral" is to assert that it harms the purposes or values of morality.

Or perhaps the people "just don't like" the act, *regardless* of its morality or immorality. But to "just not like" a thing means to not like its existence or effects. Additionally, not to like its existence or effects is to feel that a state of affairs in which it exists or exercises its effects obstructs — harms — the preservation or advent of a state of affairs in which it does not exist or exercise its effects.

At this point, one might object that, as long as we are satisfied that we "understand each other" when speaking about rights, it cannot really matter that we may not always say precisely what we mean. But *what* do we understand when we understand each other? Is there a determinacy that structures even our use of highly indeterminate concepts?

Legal adjudication requires coherent use of language at some level, even when it generates contradictions. It is not pure chaos — pure indeterminacy, sheer meaninglessness — that generates contradictions, but rather some kind of order at some level which allows that modicum of meaning which is necessary to the very determination that a contradiction has arisen. No set of utterances can be *both* mutually contradictory *and* meaningless. There is contradiction only where there is meaning, and there is meaning only where there is some level of determinacy. Legal discourse,

49. In *Handyside* or *Dudgeon*, assuming the people's, or the majority's, wish to proscribe the impugned activity in order to preserve public morals, such a wish is asserted not *regardless* of whether the activity is in fact harmful to public morals, but *because* it is believed to be harmful to public morals. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 11-13, 14-18 (1976); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 29-31 (1981) (Zekia, J., dissenting); *id.* at 39-47 (Walsh, J., partially dissenting).

like language itself, is neither perfectly chaotic nor perfectly ordered, neither perfectly determinate nor indeterminate.

Consider the analogy to logic or linguistics. No logician asserts that all meaningful utterances are logical. The statement, "the sun is rising," is, in abstraction, neither logical nor illogical. Depending on the context in which it is uttered, it may be false; it may not be amenable to verification; it may indeed be meaningless. But it can be meaningful regardless of whether it issues from a train of reasoning that is logical. The study of logic does not reveal logical structure in all meaningful utterances, nor can it render all meaningful utterances logical. It merely seeks the conditions that must be fulfilled *if* an utterance is to be logical.⁵⁰ Similarly, the linguist does not maintain that all utterances are, or can be made, syntactical. Linguistics merely seeks the conditions that must be fulfilled *if* an utterance is to be syntactical.⁵¹ Logic and linguistics can study whatever determinacy there is within their respective corpora without assuming those corpora to be perfectly determinate. Logic does not assume all thought, nor does linguistics assume all language, to be susceptible to immutable rules. They do not render human thought or language more logical or syntactical, but only propose rules which define what it means for thought or language to be logical or syntactical — *i.e.*, to be determinate.

The analogy to logic is particularly apt. Traditional, formal logic, like mathematics, proposes a system of tautologies, or what is sometimes referred to as "trivial truths": observations which are true not because they provide substantive information about the world, but simply because they are different ways of stating that which is true by definition. In mathematics, it might be said that the equation " $2 + 2 = 4$ " is only tautologically, or trivially, true, insofar as " $2 + 2$ " and " 4 " are simply two ways of stating the same thing, which, indeed could be stated in countless other ways — " $3 + 1$ ", " $10 - 6$," " $4 + 0 + 0 + 0$ " — without ever telling us anything more about the world than we know if we understand the meaning of " 4 ." Addition, subtraction, and other operations do not provide substantively new information about numbers. They simply provide so many illustrations of what we mean when we *call* something a number. Similarly, in logic, the conclusion which results from the deduction: "*If all judges are confused, and if Holmes is a judge, then Holmes is confused*" is "*Holmes is confused*." However, that conclusion is no more informative than were the two premises. Given the two premises "*judges are confused*" and "*Holmes is a judge*," the conclusion that "*Holmes is confused*" is merely a restatement of what is already necessarily meant by them. In this deduction, logic, like

50. See, e.g., WILFRID HODGES, LOGIC 13-41 (1977).

51. For a classic statement, see FERDINAND DE SAUSSURE, COURS DE LINGUISTIQUE GÉNÉRALE 97-192 (Tullio de Mauro ed., 1979).

mathematics, generates not a heretofore unknown truth, but simply a more economical, more convenient, statement of a proposition that is already conceded to be true.⁵²

Thus, the purpose of the present analysis is, above all, to say nothing new. Why bother? There is trivia, and there is trivia. A proposition that is trivial in the strict sense, meaning that it states only a tautology, is not necessarily trivial in the colloquial sense of being without interest or utility. New insights into mathematics or logic, however tautological, appear every day. In an age of judicial opinions running into the hundreds of pages (and treatises running into the thousands), there is nothing trivial in wondering whether there is some way of saying it all a bit more concisely, or whether law might benefit from a few tautologies, serving to organize ostensibly unrelated doctrines and themes. It may be true that a page of experience, like a page of history, is worth a volume of logic.⁵³ However, if volumes of experience can be summarized in a page of logic, then the two may not be at odds.

However indeterminate rights discourse may be, it must possess at least enough determinacy to be identifiable and functional as rights discourse. That which can be stated with certainty about rights discourse is determinate; that which remains subject to variation is indeterminate. The object of a meta-discourse is not to eliminate the standard "political" or "juridical" concepts. If, as suggested, these concepts are ("analytically") part of the very meaning of liberal rights, then they cannot be eliminated. Their uses and limits can, however, be clarified. The limits of determinacy define the limits of indeterminacy.

2. ELEMENTS OF THE META-DISOURSE

We will first examine three constitutive elements of rights discourse: *actors*, *harm*, and *consent*. Part 2.1 inquires into the *actors* envisaged by rights discourse: Who is entitled to exercise rights, and in whose name may rights validly be restricted? Part 2.2 suggests that any abridgment of rights necessarily proceeds on the basis of some notion of *harm* asserted to be caused by the individual exercise of, or by State interference with, Convention rights. Part 2.3 examines the element of *consent* given or withheld by those actors to incur those harms. Of course, any formal or symbolic language can be developed only through the existing terms of a natural language. Thus, these three terms derive, themselves,

52. For a classic exposition of the tautological character of mathematics or deductive logic, see ALFRED JULES AYER, *LANGUAGE, TRUTH, AND LOGIC* 74-77 (1952).

53. Justice Holmes once said: "[A] page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

from natural language — “harm” and “consent,” in particular, are notoriously “loaded” terms. The conversion of these elemental terms into components of a purely formal language requires that they be reconstituted to encompass any definition that can be given to them within any possible rights dispute.

2.1 *Actors (t)*

Innumerable actors have an interest in the adjudication of Convention rights. At first, it would appear that the actors relevant to the Convention are dictated by the Convention’s bipolar standing requirements and are thus limited to: (1) individuals alleged to be victims of a violation and (2) States Parties to the Convention.⁵⁴ As in other areas of law, however, the resolution of cases between two sides of a dispute can affect a broader range of actors.

Brief examination of any Convention case makes the point. While the Court in *Handyside* expressly adjudicates only one publisher’s rights and one State’s powers, the outcome concerns not only the actual applicant, but also other similarly situated publishers and the media generally — not only in Britain, but also in other States Parties to the European Convention. In addition, children, not merely as an undifferentiated mass but also as individuals from different backgrounds and of different characters, have an interest in the outcome of the case, as do parents, educators, or religious or community leaders. Far from being a simple dispute between two discrete parties, *Handyside*, like *Dudgeon*, becomes the locus of a broad social debate about sexuality and morals, affecting actors at many levels of society.

The roster of actors potentially affected by the adjudication of the entire gamut of liberal rights is indeed limitless, encompassing families, neighborhoods, ethnic groups, linguistic groups, political groups, economic groups, or any number of social or public interest groups. *Mellacher* concerns all property owners and all persons in need of inexpensive housing. *McCann* concerns all persons suspected of unlawful activity, particularly in circumstances of urgency. *Tomasi* concerns the rights of all detained persons and the powers of all law-enforcement officials.

At the same time, while any given case may affect a broad number of actors, the Commission and Court are not called upon to adjudicate the interests of non-parties. While the Court’s judgment in *Handyside* makes general reference to the interests of children, parents, or educators, the

54. See European Convention on Human Rights arts. 25(1), 48, *amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, 155 E.T.S. 1. Cf. HARRIS ET AL., *supra* note 18, chs. 22-26. In the case of State-initiated complaints, it is, of course, individual interests that are at issue. See *id.* at 585-88.

precise identities of these actors, and their convergent or divergent interests, are left largely undefined. Are all children, parents, or educators similarly situated? Does social or ethnic background count? The Court does not give explanation on these subjects. Similarly, the interests of religious communities or of the media generally are barely mentioned. *Dudgeon*, *Mellacher*, *McCann*, and *Tomasi* are equally vague with regard to the wider range of affected actors.

Substantively, then, the identities and interests of relevant actors in Convention cases are multifarious, but indeterminate: some affected actors receive greater attention, others receive little or no attention. *Formally*, rights discourse under the Convention "resolves" this substantive indeterminacy by pitching the interests of all actors at two generalized and opposed levels of abstraction. All relevant interests are reduced either "downwards" to the interests of individuals or "upwards" to the collective interests of society as a whole.⁵⁵ There is no intermediary level.⁵⁶ In *Handyside*, the applicant becomes a paradigmatic individual actor, asserting personal interests against the State as a whole. Formally, any interests of other publishers, however divergent or convergent with those of the applicant, become entirely assimilated to his. The moral interests of children, or the interests of parents or educators or religious authorities in children's moral welfare, become assimilated either to the applicant's interests in publishing the work or to the State's interest in suppressing it.

The actors formally recognized in liberal rights discourse are, then, on the one hand, specific individuals and, on the other hand, the State. The former will be denoted here by the upper-case Roman "variable" I ("individual actors"). The latter will be denoted with a symbol commonly used in symbolic logic called a tilde (~) (read "not")⁵⁷ preceding, and representing the opposite value of, the relevant variable, hence ~I (the "non-individual" actor, *i.e.*, the collectivity, or society as a whole, as represented by the State).⁵⁸ Where it is useful to speak of relevant actors

55. The reduction of intermediary group interests either "downwards" to individual interests, or "upwards" to State interests is, again, specific to the more traditional, liberal rights regime embodied by the Convention. An attempt to take account of minority groups as such can be found in the International Covenant on Civil and Political Rights, art. 27, Dec., 16, 1966, 999 U.N.T.S. 171 (entered into force, Mar. 23, 1976). However, article 27 is limited in its wording to "persons belonging" to those groups. See *id.* Debate thus remains as to whether, or to what degree, article 27 departs from the liberal, individualist model. Subsequent developments have not fully resolved this question. See Eric Heinze, *The Construction and Contingency of the Minority Concept*, in MINORITY AND GROUP RIGHTS IN THE NEW MILLENNIUM 25 (Bill Bowring & Deirdre Fottrell eds., forthcoming 1999).

56. For further analysis of this point, see *infra* Part 2.1.2.

57. See QUINE, *supra* note 8, at 11-13.

58. The term "non-individual" is thus to be understood as "collective." It is not to be understood as "no one," which would yield an absurdity.

generally, without specifying them either as individual (I) or as the State ($\sim I$), the lower-case, Greek variable ι (iota) will be used. A similar scheme will be followed later in the analysis, as other elements are introduced. Upper-case Roman variables will be called "first-degree variables." Lower-case Greek variables used to represent more than one possible first-degree variable (*i.e.*, in this case, I or $\sim I$) will be called "second-degree variables." In order to represent the set of possible values of a given variable, the " \subset " symbol will be used. Thus the *postulate* (Ps) that I and $\sim I$ are possible values of ι can be written:

$$\text{Ps.1} \quad \iota \subset I, \sim I$$

2.1.1 *Individual Actors*

Having drawn an initial distinction between individual and collective actors, we must further distinguish between two different kinds of individual actors (*see* Figure 1). Despite the polarity between the individual asserting a right and the State, liberal rights discourse recognizes another kind of individual actor. It recognizes any individual, for example, "Y," who is affected when another individual, for example, "X," exercises a right. In *Handyside*, the respondent government asserts not only a generalized interest in the morals of society, and particularly of children, as a whole ($\sim I$), but also an interest in the welfare of any individual children (I) upon whom a reading of the book might have a specific emotional or psychological effect.⁵⁹ Both interests can freely be conceded to be speculative (the whole point of the prohibition is to prevent the alleged harm from occurring in the first place) and somewhat overlapping.⁶⁰ Substantively, there is not necessarily a bright line between them. Formally, however, they remain distinct. Rights discourse always allows a legal argument to distinguish between them. Liberal rights discourse thus envisages two types of individual actors:

1. The first type is *any individual actor, X, seeking to exercise a right*. We will say that X is affected by the exercise of a right with *respect to X's "own person."* Assertions of interests with respect to one's "own person" will be denoted by means of the

59. Reference to the rights of others as limits to the exercise of individual rights is common in liberal rights instruments, indeed implied by the very idea of liberal rights. In *Handyside*, this principle is directly drawn from art. 10(2). *See* discussion *supra* note 20. *Cf.* European Convention on Human Rights arts. 8(2), 9(2), 11(2). *See also id.* art. 17.

60. Often "it is somewhat artificial . . . to draw a rigid distinction between 'protection of the rights and freedoms of others' and 'protection of morals.' The latter may imply safeguarding the moral ethos or moral standards of a society" *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

superscript, lower-case Roman *marker* "p" as I^p .⁶¹ In *Handyside*, the applicant's interest in free publication of his ideas is an assertion of rights with respect to his "own person" (I^p). It is *his* freedom of expression that he seeks. The same applies to the applicants' assertions of privacy rights in *Dudgeon*, property rights in *Mellacher*, rights governing detention and treatment in *Tomasi*, or the right to life in *McCann*.

2. The second type comprises *any individual, Y, other than the individual seeking to exercise a right, X, but who is affected by that individual's (X's) exercise of that right*. Assertions regarding the effects of the exercise of individual rights upon other individuals — so to speak, not upon one's "own person," but on "the person of another" — can be denoted with the marker " $\sim p$ " ($I^{\sim p}$). If, in *Handyside*, the British government had not only made an argument about public morals generally, but had also demonstrated a specific, causal relationship between some child's reading the book and some adverse effect upon that child, such an argument would be an $I^{\sim p}$ argument. By extension, even the more speculative assertion that there is a *risk* that the book *might* have such an effect, with or without empirical corroboration,⁶² is still an $I^{\sim p}$ argument. In *Dudgeon*, the State adduces harm not only to public morals as a whole ($\sim I$), but also to minors or to other "vulnerable members of society" who might be specifically harmed if homosexual activity were to be legalized.⁶³ The harm alleged by the State to be caused by the individual applicant's exercise of his property rights ($I^{\sim p}$) in *Mellacher* can be characterized both as a harm to certain, specific, lower income persons ($I^{\sim p}$) in need of housing and as a harm to society as a whole ($\sim I$) linked to broader social problems associated with homelessness or inadequate housing.⁶⁴ $\sim I$ and $I^{\sim p}$ interests are both strongly present in *Handyside*, *Dudgeon*, and *Mellacher* more as two different expressions of a common concern than as utterly distinct concerns. An individual

61. As used in this analysis, the difference between a "marker" and a "variable" is that a marker is only meaningful when attached to a variable, and thus, a marker never stands alone.

62. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 15-18 (1976).

63. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

64. See *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) at 21-23, 26-30 (1989).

is denied the right to shout "Fire!" falsely in a crowded theater⁶⁵ not only on the basis of harm to the specific persons (I^{-P}) present in the theater, who might, additionally, bring civil actions for physical or psychological injuries caused in the ensuing panic, or for the value of the tickets of the ruined performance, but also on the basis of harm to society as a whole ($\sim I$), which has an interest in preventing fortuitously dangerous or disruptive acts *regardless* of whether harm to specific individuals results.

I^P and I^{-P} , then, represent two possible values of I :

Ps.2 $I \subset I^P, I^{-P}$

Wherever I is left unmarked, it signifies either I^P or I^{-P} . Ps.1 can thus be restated more accurately, to denote the set of all actors formally recognised in liberal rights discourse, by means of a *theorem* (Th) derived from Postulates Ps.1 and Ps.2:

Th.1 $\iota \subset I^P, I^{-P}, \sim I$

The relationships among ι variables are illustrated in Figure 1.

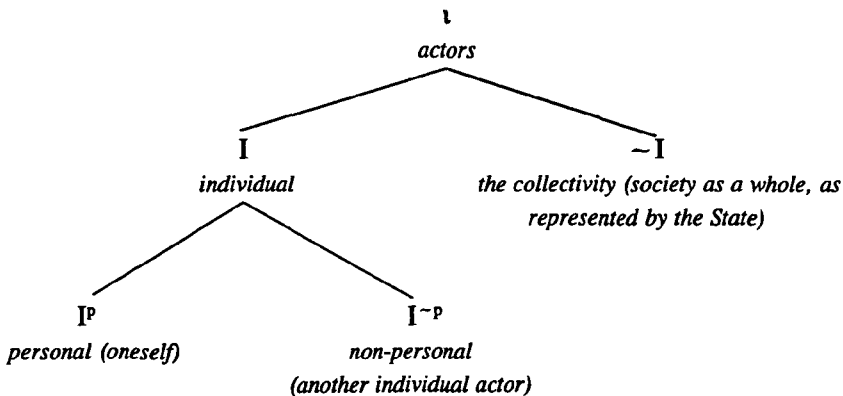


Figure 1

In the case of *Laskey v. United Kingdom*,⁶⁶ the Court finds that British laws prohibiting adult, sexual sado-masochistic acts do not violate the article 8(1) right to privacy. The sexual acts in question raise three possible issues:

65. The example, of course, is from Justice Holmes in *Schenk v. United States*, 249 U.S. 47, 52 (1919).

66. *Laskey v. United Kingdom*, 1997 Eur. Ct. H.R. (ser. A) at 120.

1. the rights of individuals to have inflicted upon themselves — to submit their “own persons” to — blows administered by others (I^p);
2. the rights of individuals to inflict blows upon other individuals — to submit other persons, not their own person — to such blows (I^{-p}); and
3. the authority of the State to determine that such acts adversely affect not only the specific individuals participating in such acts, but also the moral climate of society as a whole ($\sim I$).

Perspectives (1) and (2) represent two formally distinct characterizations of a substantively identical act. The law governing liberal rights does not assume that rights governing one's action upon one's own person are necessarily identical to rights governing the same action upon another, even with the consent of the latter. A State permitting suicide but prohibiting assisted suicide allows one to submit one's own person (I^p) to a homicidal act but prohibits the submission of another person (I^{-p}) to such an act, regardless of the consent of the latter.⁶⁷ Similarly, the *Laskey* judgment has no conclusive bearing on one's right to inflict blows upon oneself in purely solitary acts of sexual pleasure.

A dispute about whether an entity is a relevant actor is thus a dispute about whether its interests are attributable to some value of $\mathbf{1}$. In *Brüggemann v. Germany*, the State defends a restriction on abortion as a protection of the fetus as an individual actor (I^{-p}) from the applicant's exercise of the privacy right (I^p).⁶⁸ The applicant disputes the existence of any relevant I^{-p} interest by disputing the existence of a relevant I^{-p} actor.⁶⁹

Note also that, in liberal rights discourse, the State always enjoys a *prima facie* presumption of representing the interests of the collectivity ($\sim I$) through its democratic political processes. Arguments to the contrary may indeed be introduced — in *Dudgeon*, the European Court considers data suggesting that the blanket prohibition of homosexual acts no longer represents the actual viewpoints of the majority.⁷⁰ In the first instance, however, collective interests are not ascertained by independent opinion surveys or empirical data. State policy is *ipso facto* presumed to represent

67. It should be noted that the European Court has not yet issued a final ruling on euthanasia.

68. See *Brüggemann v. Germany*, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 107 (1977).

69. See *id.* at 111. See also *infra* Part 2.2.6.

70. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 12 (1981).

the collective will or the will of the majority.⁷¹ Thus where the State does not restrict itself to arguments about specific, individual harm (I^p), but also adduces some general State policy ($\sim I$), it purports to be representing the interests of society as a whole.

2.1.2 *Intermediary Actors*

The interests of all actors relevant to European Convention jurisprudence, then, are pitched either at the lowest level of abstraction, as purely individual interests (I^p , $I^{\sim p}$), or at the highest level of abstraction, as interests of society as a whole ($\sim I$). Intermediary actors, such as familial, ethnic, religious, social, or economic groups, are recognized only to the extent that their interests can be formulated either as individual interests or as interests of society as a whole.

Rights of families, for example, are formulated, for some purposes, in terms of the rights and interests of individual family members (I^p , $I^{\sim p}$), and, for other purposes, as general public interests ($\sim I$). In a number of cases from the United Kingdom involving procedures of child welfare authorities governing the placement of children in foster care and subsequent adoption, the Court finds that denial to the natural parents of sufficient opportunities to be heard in the course of such procedures constitutes a violation of the parents' individual right (I^p) to a fair and public hearing under article 6(1).⁷² In *Handyside*, parents' interests in their children's welfare are asserted by the State not only as individual interests ($I^{\sim p}$) against the applicant's exercise of rights of expression (I^p), but also as interests of society as a whole ($\sim I$). In *Kjeldsen v. Denmark*, the Court affirms the State's power to require compulsory sex education for students in State schools,⁷³ despite the claims of some objecting parents of a violation of the Protocol 1, article 2⁷⁴ requirement that education must conform to parents' religious and

71. Such is presumably the meaning of the margin of appreciation doctrine. *See also* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 9 E.T.S. 41 (providing that States parties will "hold free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature").

72. *See, e.g.*, *O v. United Kingdom*, 120 Eur. Ct. H.R. (ser. A) at 4 (1986); *H v. United Kingdom*, 120 Eur. Ct. H.R. (ser. A) at 45 (1987); *W v. United Kingdom*, 121 Eur. Ct. H.R. (ser. A) at 4 (1986); *B v. United Kingdom*, 121 Eur. Ct. H.R. (ser. A) at 61 (1987); *R v. United Kingdom*, 121 Eur. Ct. H.R. (ser. A) at 105 (1987).

73. *See Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) (1976).

74. Article 2 of Protocol 1 states: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, 9 E.T.S. 41

philosophical convictions.⁷⁵ The State thus asserts a collective interest ($\sim I$) in social enlightenment on such social issues as reproduction, birth control, or sexually-transmitted disease,⁷⁶ as well as the individual (I^p) interests of children who, by missing this part of their education, would be adversely affected by the parents' exercise of their rights (I^p).

Similarly, the interests of racial, ethnic, religious, or linguistic minority groups may be formulated, for some purposes, as individual rights against discrimination by, or attributable to, the State, but, for other purposes, as affirmative State interests. The *Belgian Linguistic case*⁷⁷ concerns the rights of a French-speaking minority in predominantly Flemish-speaking regions of Belgium. The French speakers bring complaints of individual discrimination (I^p) against the State, complaining of the State's failure to provide French speakers with education in their own language. Minority interests are thus advocated as aggregations of individual (I^p) interests.⁷⁸ In *Jersild v. Denmark*,⁷⁹ on the other hand, the State's censorship of a television program containing racist material derives from its assertion of a collective interest ($\sim I$) in the dignity of racial minorities, as well as the related interest in preventing offense to any specific members of such minorities ($I^{\sim p}$).

2.1.3 Attribution

While liberal rights discourse recognizes three kinds of actors, the interests of those actors are only asserted, in the context of adjudication, by the two disputing parties. As the analysis progresses, such assertions will include other kinds of variables conjoined to the three τ variables. It will be useful to indicate in succinct form who is asserting what about whom. Applicants bringing a claim against a State, or on whose behalf a claim is brought, will be denoted with the variable "A". A can represent any entity bringing a claim under the Convention's standing requirements,⁸⁰ such as one individual, several individuals, a group, a corporation, or some other organization, or, in the case of an inter-State complaint, the applicant State. Respondent States will be denoted by the variable "Z". Where reference

75. To the extent that article 2 of Protocol 1 imposes a positive obligation on States, its character as a social or cultural right represents a break from the more classically liberal character of the original Convention. See HARRIS ET AL., *supra* note 18, at 540-44. As suggested in the *Kjeldsen* or *Belgian Linguistic* cases, however, the conformity clause has been adjudicated in largely the same terms as those of traditional liberal rights, and thus presents no particular problems in terms of positive obligations. See *id.* at 544-47.

76. See *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 10-16 (1976).

77. Case "Relating to Certain Aspects of the Laws on the Uses of Languages in Education in Belgium," 6 Eur. Ct. H.R. (ser. A) (1968).

78. But see discussion *supra* note 55.

79. *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994).

80. See sources cited *supra* note 54.

need simply be made to some party without specification as to whether that party is the applicant (A) or the respondent (Z), the letter π (pi) will be used (not to be confused with the occasional use of π as denoting "plaintiff"):

Ps.3 $\pi \subset A, Z$

The term *position* will be understood as *any combination of variables adduced by or attributed to an applicant (A) in support of, or a respondent (Z) in opposition to, a liberal rights claim*. An applicant's position will be called an A position. A respondent's position will be called a Z position. A π position is either an A position or a Z position. Every π position will be denoted by a colon (:) following the variable representing the party to which the position is attributed:

π :...

A positions and Z positions will thus be written, respectively:

A:...

Z:...

2.2 Harm (η)

The assertion by A that a right has been violated is always opposed by Z's assertion of a countervailing State interest. It will be argued in this section that, in liberal rights discourse, a dispute between A's right and Z's countervailing interest is always a dispute about some *harm* caused either (1) through A's exercise of the right or (2) through Z's interference with the right.

Like the set of possible actors, the set of possible harms in rights discourse is substantively indeterminate. It is potentially infinite in number and quality. Disagreements about what qualifies as harm, whether it is present in a given case, how it is to be ascertained, or who is competent to do so, arise in many areas of law. Some would recognize only material injury; others would add emotional, moral, or symbolic injury. "Battles of the experts" are often disputes about whether, or what kind of, harm is present in a case. In liberal rights discourse, some notion of harm can be invoked to denote numbers of hours spent in solitary confinement, quality of food or health care available to persons in detention, or losses incurred through restrictions on private property; it can denote degrees of prurience of erotic materials, degrees of news-worthiness or vitriol in hate speech, or

degrees of “immorality” in works of art.⁸¹ This substantive indeterminacy, however, is by no means unintelligibility. Every day, courts do in fact decide, regardless of whether they use the term “harm” or some other term, that treatment of criminal suspects, conditions of incarceration, incursion upon private property, or works of journalistic or artistic expression, do or do not reach a sufficiently harmful level to warrant a finding that State action has or has not violated an individual right.

2.2.1 *Two Harm Postulates* (HP₁, HP₂)

The formal concept of harm assumed in every substantive dispute can be stated in the form of two *harm postulates* (HP₁, HP₂), which will be explored piece by piece as the analysis progresses. HP₁, in particular, may at first appear odd, for, in its first provision, HP₁(1), it attributes to individual rights seekers the argument that the exercise of their rights causes harm — just the opposite of the argument that applicants appear to make in conventional discourse. But note the use of the conjunctive *and*.

First Harm Postulate (HP₁): In the adjudication of liberal rights, any claim by an individual that a right has been violated is asserted in one of two ways:

1. *Either* the individual claims that:
 - a. some harm is *caused by that individual* in the exercise of that right; *and*
 - b. such harm is caused to that individual, or to some other individual, or to society generally; *and*
 - c. the harm is *either*
 - i. *insufficient* to justify State interference with that right; *or*
 - ii. *irrelevant* to the question of whether State interference with the right is justified.
2. *Or* the individual claims that:
 - a. some harm is *caused by the State* to the individual asserting the right; *and*
 - b. such harm is *sufficient* to warrant a finding that State interference with the right is unjustified.

Second Harm Postulate (HP₂): In the adjudication of liberal rights, any assertion by an individual that a right has been violated is opposed by the State in one of two ways:

81. See Heinze, *supra* note 32, at 463, 465-66, 474-75.

1. *Either* the State claims that:
 - a. some harm is *caused by that individual* in the exercise of that right; *and*
 - b. such harm is caused to that individual, or to some other individual, or to society generally; *and*,
 - c. the harm is *sufficient* to justify State interference with that right.
2. *Or* the State claims that:
 - a. some harm is *caused by the State* to the individual asserting the right; *and*
 - b. such harm is *either*
 - i. *insufficient* to warrant a finding that State interference with the right is unjustified, *or*
 - ii. *irrelevant* to the question of whether State interference with the right is justified.

2.2.2 *Sufficient and Insufficient Harm*

A concept of "sufficient harm" appears in HP₁(2)(b) and HP₂(1)(c). A concept of "insufficient harm" appears in HP₁(1)(c)(i) and HP₂(2)(b)(i). An assertion of *sufficient* harm will also be referred to, interchangeably, as *unacceptable* harm. An assertion of *insufficient* harm, will also be referred to, interchangeably, as *acceptable* harm. (Later we will be translating these terms into symbolic variables. A formal system is easier to use if its symbolic variables can be translated back into familiar, colloquial language. These alternative but synonymous terms are introduced in order to allow selection of the more congenial term in a given instance.) Regardless of the terms that lawyers or judges may happen to use, rights discourse is never concerned with whether there is *harm* or *no harm*. It is concerned only with whether there is *sufficient harm* or *insufficient harm* to justify a finding of a violation. The mere term "harm" says too little, as it leaves this question undefined. The term "no harm" says too much, for as long as there is insufficient harm to warrant a finding of a violation, it is unnecessary to determine whether there is "not enough harm" or "absolutely no harm." An assertion of "no harm" is not so much incoherent, as it is, so to speak, "hyper-coherent," overstating that which is strictly required to generate a coherent position. An assertion of "no harm" may certainly be adduced in argument but is only relevant insofar as it signifies insufficient harm.

The applicant in *Handyside* argues that any harm caused by him (HP₁(1)(a)), either to individual children who may read the book or to society generally (HP₁(1)(b)), is insufficient to justify State interference with

his rights of free expression (HP₁(1)(c)(i)).⁸² The State rebuts that any harm caused by the applicant (HP₂(1)(a)) to children or to society generally (HP₂(1)(b)) is sufficient to justify State interference with the right (HP₂(1)(c)).⁸³ The applicant in *Dudgeon* argues that any harm caused by his homosexual acts (HP₁(1)(a)) to himself, to other individuals, or to society generally (HP₁(1)(b)) is insufficient to justify State interference (HP₁(1)(c)(i)).⁸⁴ The State rebuts that any harm caused (HP₂(1)(a)) to himself, to other individuals, or to society generally (HP₂(1)(b)) is sufficient to justify State interference (HP₂(1)(c)).⁸⁵ The applicants in *Laskey* argue that any harm caused through their acts of sexual sado-masochism (HP₁(1)(a)) to themselves, to other individuals, or to society generally (HP₁(1)(b)) is insufficient to justify State interference (HP₁(1)(c)(i)).⁸⁶ The State rebuts that any harm caused by the applicants (HP₂(1)(a)) to themselves, to other individuals, or to society generally (HP₂(1)(b)) through the practice of those acts is sufficient to justify State interference (HP₂(1)(c)).⁸⁷ The State in *Brügge mann* asserts that abortion entails a harm caused by the woman (HP₂(1)(a)) to a living being (HP₂(1)(b)), which is sufficient to justify State interference (HP₂(1)(c)).⁸⁸ The applicants rebut that any harm caused by them (HP₁(1)(a)) to such a being (HP₁(1)(b)) is insufficient to justify State interference (HP₁(1)(c)(i)): *a fortiori* as, for the applicants, there is no such being, hence no harm, but which simply means insufficient harm to justify State interference with the right — which is all that the Commission can meaningfully decide.⁸⁹ The applicants in *McCann*⁹⁰ and *Tomasi*⁹¹ argue that State officials have caused harm (HP₁(2)(a)) at a level sufficient to warrant a finding that such action was unjustified (HP₁(2)(b)). The State in each case argues that any harm caused by those officials (HP₂(2)(a)) is insufficient to warrant such a finding (HP₂(2)(b)(i)).⁹²

Rights discourse is always bi-polar. Arguments serve either to support

82. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 14, 24-25 (1976).

83. See *id.* at 13-18, 24-28.

84. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 23-25 (1981).

85. See *id.* at 19-20. See also *id.* at 29-31 (Zekia, J., dissenting); *id.* at 39-47 (Walsh, J., partially dissenting).

86. See *Laskey v. United Kingdom*, 1997 Eur. Ct. H.R. (ser. A) at 124, 127-28, 131-32. See also *id.* at 138 (excerpts from the Opinion of the Commission); *id.* at 147-48 (Mr. Loucaides, dissenting).

87. See *id.* at 126-27, 128-29, 132-34.

88. See *Brügge mann v. Germany*, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 107 (1977).

89. See *id.* at 110-12. See also *id.* at 118-20 (Mr. Fawcett, dissenting).

90. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 51-54 (1995).

91. *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) at 34-35, 40-44 (1992).

92. See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 54-56 (1995); *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) at 35-38, 41-43 (1992).

or to defeat the claim that a right has been violated. A harm may thus be asserted to be insufficient merely in the sense that it is less harmful than the alternative. Aside from debates about harm to another living being, additional arguments in the abortion debate may include assertions by the State of harm (HP₂(1)(a)) caused by women to themselves (HP₂(1)(b)), and that such harm is sufficient to justify State interference (HP₂(1)(c)).⁹³ In rebuttal, pro-choice advocates may assert that if the only two available alternatives are either access or non-access to legal abortion, then the former is less harmful than the latter, as any harms caused to women by legal abortions are less than those which can be caused through illicit means;⁹⁴ thus any harm caused by women (HP₁(1)(a)) to themselves (HP₁(1)(b)) is, by comparison, insufficient to justify State interference (HP₁(1)(c)(i)). The State in *Mellacher* argues that the harm that would be caused by the applicants (HP₂(1)(a)) to low-income persons in need of rent control or to society as a whole as a result of social problems caused by inadequate housing (HP₂(1)(b)) is sufficient to justify State interference (HP₂(1)(c)).⁹⁵ The applicants' rebuttal that undue harm is caused to them through reduction in value of their property is *ipso facto* an assertion that the harm caused by exercise of their property rights (HP₁(1)(a)) to other individuals, or to society generally (HP₁(1)(b)), is, if only by comparison with the alternative, insufficient to justify the State action (HP₁(1)(c)(i)).⁹⁶ The State in *Kjeldsen* asserts that any harm caused (HP₂(1)(a)) to the children or to society generally (HP₂(1)(b)) through inadequate sexual education is sufficient to justify State interference (HP₂(1)(c)).⁹⁷ For the applicants, exemption of their children is not merely a lesser harm but an unqualified good, as they see sex education as a positive evil. They thus argue that any harm caused (HP₁(1)(a)) to their children or to society generally (HP₁(1)(b)) by seeking to exempt their children from compulsory sex education is, by comparison, insufficient to justify State interference (HP₁(1)(c)(i)).⁹⁸

Some claims challenge not active State interference, but rather the omission of the State to undertake an affirmative duty. Hence a doctrine of "positive obligations," in contrast to traditional concepts of liberal rights as sheer "negative" rights.⁹⁹ The assertion by the State of an undue financial or administrative burden is nothing but a claim of unacceptable harm: cost

93. See *Brüggemann v. Germany*, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 112-13, 116-18 (1977).

94. See *id.* at 111.

95. See *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) at 21-23, 27-30 (1989).

96. See *id.* at 9-13, 27-29.

97. See *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A.) at 10-16 (1976).

98. See *id.* at 24-28.

99. See HARRIS ET AL., *supra* note 18, at 19-22, 284-85; MERRILLS, *supra* note 37, at 102-06.

to the State is harm to the State. The cost to society, hence to the State, even if substantively small, is asserted by the State to be too great to be required for purposes of respecting the right. In *Rees v. United Kingdom*¹⁰⁰ and *Cossey v. United Kingdom*,¹⁰¹ the State successfully defeats the applicant transsexuals' individual assertions of a right to obtain full recognition of their new civil status.¹⁰² The State argues that the requisite administrative changes would create an unacceptable burden, hence unacceptable cost. Three dissenting judges in *Rees*,¹⁰³ in an opinion reiterated in *Cossey*,¹⁰⁴ reject this reasoning, finding that some of the measures requested would not unduly burden the government. In this case, State interference takes the form not of active intervention, but rather of omission to grant full recognition of the change in civil status. For the State, cost is nothing but a harm caused (HP₂(1)(a)) to society (HP₂(1)(b)) of a level sufficient to justify State interference with the asserted privacy right (HP₂(1)(c)).¹⁰⁵ For the applicants, any harm caused (HP₁(1)(a)) by imposing that cost upon society (HP₁(1)(b)) is insufficient to justify State interference with that right (HP₁(1)(c)(i)).¹⁰⁶

The cases on transsexualism illustrate the substantive malleability of the concept of harm. The question whether the burden on the State is too great is examined not in the abstract, but in light of the corresponding interference with the countervailing individual right. Part of the Court's reasoning in *Rees* and *Cossey* is that British practice in recording civil status does not take the form of comprehensive, unified national identity registration schemes as found in other European countries. While not allowing changes to all documents, British practice does allow changes to some.¹⁰⁷ The cost to the State of making the residual changes sought by the applicant is accepted by the Court as being too great, given that the applicant's change of civil status already enjoys partial recognition. In *B. v. France*,¹⁰⁸ the fact that the French system allows no partial changes to identify documents thus *diminishes* the government's claim of excessive administrative burden by increasing the gravity of the individual applicant's predicament, even though

100. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986).

101. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990).

102. The Court's transsexualism cases have been decided principally with reference to article 8 of The European Convention on Human Rights.

103. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 21 (1986) (Bindschedler-Robert, Russo and Gersing, JJ., dissenting).

104. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 20 (1990) (Bindschedler-Robert and Russo, JJ., partly dissenting).

105. *See Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 17 (1986).

106. *See Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 15-16 (1990).

107. *See Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 10, 16 (1986); *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 9 (1990).

108. *B. v. France*, 232 Eur. Ct. H.R. (ser. A) at 17 (1992).

a total change to the French system might well be more costly than a partial change to the British system. The Court thus chooses $HP_1(2)$ over $HP_2(1)$.

The different result in *B. v. France* might instead be explained not in terms of the subtlety, or ambiguity, of the Court's concept of harm, but simply in terms of a reversal in the Court's attitude towards the phenomenon of transsexualism,¹⁰⁹ particularly in light of what it suddenly claims to accept as new scientific evidence about the nature of transsexualism.¹¹⁰ A meta-discursive model, however, need neither confirm nor deny such a suggestion. Every case may be decided for reasons other than those stated. The conditions for the *coherence* of a legal argument are indifferent to judges' political, psychological, or other motivations for accepting or rejecting it. More important, in terms of a meta-discursive model, is the fact that the dissenting judges in *B. v. France* must face the fact that, by itself, the cost argument of *Rees* and *Cossey* no longer persuades the majority of the Court. They now attempt to bolster the "society generally" component of $HP_2(1)(b)$ with arguments based on the "that individual" and "some other individual" components. Some attribute to the State the authority to determine that sex-change operations might cause unacceptable harm to the individuals seeking them.¹¹¹ Even arguments based on harm to others are adduced: Judge Pinheiro Farinha suggests that a child born out of wedlock and subsequently initiating paternity proceedings might suffer harm from the shock of learning of the change of sex of the natural father.¹¹² In a more recent case directly concerned with the rights of transsexuals to adopt children, and thus with the affects of that situation upon the children, the Court broadly accepts State assertions of sufficient harm to such children.¹¹³

2.2.3 Irrelevant Harm

A concept of "irrelevant harm" appears in $HP_1(1)(c)(ii)$ and $HP_2(2)(b)(ii)$. Some arguments neither affirm nor deny the existence, character, or level of harm. Rather, they assert that any inquiry into harm is irrelevant to the proper disposition of the dispute. They assert that the case must be resolved a certain way *regardless* of the existence, character,

109. See, e.g., HEINZE, *supra* note 29, at 99-103; G. Cohen-Jonathan, *Respect de la Vie Privée et Familiale*, 5 JURIS CLASSEUR: TRAITÉ DE DROIT EUROPÉEN 6521, 6523, 6525 (1992).

110. See *B. v. France*, 232 Eur. Ct. H.R. (ser. A) at 48-49 (1992). This growing change in attitude is already evident in *Cossey*, which, in contrast to *Rees*, produces a sharply split Court, inspiring virulent dissenting opinions.

111. See *id.* at 59 (Matscher, Pinheiro Farinha, Pettiti, Valticos, Loizou and Morenilla, JJ., dissenting).

112. See *id.* at 61-62 (Pinheiro Farinha, J., dissenting). Cf. *id.* at 70 (Morenilla, J., dissenting).

113. See *X, Y & Z v. United Kingdom*, 1997 Eur. Ct. H.R. (ser. A) at 619.

or level of harm caused. In *Laskey*, an alternative to the applicants' $HP_1(1)(c)(i)$ argument is an argument of the form $HP_1(1)(c)(ii)$. Their $HP_1(1)(c)(i)$ argument is, after all, not without difficulties, as the selfsame acts inflicted upon non-consenting persons are easily characterized, in European jurisdictions as elsewhere, as sufficiently harmful to constitute criminal or tortious batteries.¹¹⁴ It can be difficult to argue that the sheer act of consent transforms the physical characteristics of the acts. As an alternative argument, the applicants assert that as long as the participants have given valid consent, any harm caused ($HP_1(1)(a)$) to themselves, to other individuals, or to society generally ($HP_1(1)(b)$) is irrelevant to the question of whether State interference is justified ($HP_1(1)(c)(ii)$).¹¹⁵ The State rebuttal, by definition, remains the same: the assertion that any harm caused by the applicants is sufficient to justify State interference ($HP_2(1)(c)$) is *ipso facto* an assertion that such harm is relevant.

As in *Laskey*, all assertions of irrelevant harm depend upon assertions of consent. For the sake of completeness, we will take note of them throughout the remainder of this discussion of harm, but will analyze them in greater detail in Part 2.3.

2.2.4 Substantive Causation, Formal Causation and Formally Dispositive Harm

The Harm Postulates indicate that assertions about harm refer not only to the sufficiency or relevance of harm, but also to its cause. $HP_1(1)$ and $HP_2(1)$ correspond to *individually-caused* harm, while $HP_1(2)$ and $HP_2(2)$ correspond to *state-caused* harm. The concept of causation is by no means straightforward. The Coase Theorem¹¹⁶ challenges conventional assumptions about rights by reversing the link between rights and harms. It compares a regime in which harm is caused wherever a right is infringed, with a regime in which a right is infringed only where harm is caused. In the latter, infringement of a right constitutes not a sufficient cause but rather a necessary cause for a finding of harm. If rights are not presupposed by, but rather themselves presuppose, the question as to whether harm has occurred, then harm must be determined with reference to something other than rights. And, if there is disagreement about what that referent should be, then the questions whether harm has occurred and who has harmed whom remain indeterminate.

Claims based on individually-caused harm ($(HP_1(1), HP_2(1))$) as in

114. See, e.g., SIR JOHN SMITH & BRIAN HOGAN, *CRIMINAL LAW* 416-18 (8th ed. 1996); CLERK & LINDSELL ON TORTS 959-64 (R. W. M. Dias et al. eds., 16th ed. 1989) (showing examples in the United Kingdom).

115. See sources cited *supra* note 86.

116. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

Handyside, *Dudgeon*, *Mellacher*, *Brüggemann*, *Laskey*, *Kjeldsen*, or the transsexualism cases involve applicants asserting insufficient harm to themselves, to others, or to society in general in the exercise of their rights. Yet under a Coase rationale, these cases could just as plausibly be cast under $HP_1(2)$ and $HP_2(2)$ as complaints of unacceptable harm caused to the applicants by the State authorities in arresting, prosecuting, or fining the applicants, censoring their works, searching, seizing or devaluing their property, or otherwise regulating their conduct. Similarly, *McCann* and *Tomasi* are expressed under $((HP_1(2), HP_2(2)))$ as cases of harm caused to the applicant by the State. But are the suspected terrorists in *McCann* themselves partly the cause of their killings by State officials? Can *Tomasi* just as plausibly be understood as a reaction by State officials to any harm alleged to have been caused by the applicant either through the criminal acts that led to their imprisonment or through their conduct in prison? In short: Is it the applicants, in all of these cases, who, in exercising their asserted rights, cause harm to themselves, to other individuals, or to society as a whole? Or is it, rather, the State that causes harm to the applicants by interfering with those asserted rights?

Substantively, the concept of causation is indeterminate. It is never self-evident or purely empirical, but rather presupposes some prior allocation of rights and duties. An analysis of rights discourse, however, seeks only to identify the formal concept of causation specifically presupposed by rights arguments. The substantive plausibility of that concept is no doubt an important question, but it is a distinct one, raised only by the outside observer looking in at rights discourse and never by the terms of rights discourse itself. *Formally*, the concept of causation remains entirely intact, as a condition for the coherence of rights discourse. Economic and policy-based analyses seek to understand what law is "really" doing by examining its substantive effects, regardless of what it says it is doing in terms of conventional rights and duties. Law's version of what it says it is doing is not thereby rendered irrelevant, as it must continue to deploy a discourse specific to its task of case-by-case dispute resolution. The relationship between conventional legal discourse on the one hand, and policy-based discourse on the other, is not so much a matter of replacing the former with the latter as it is a matter of translation back and forth between the two sets of discourses. Conventional legal discourse thus retains quasi-autonomy, and an understanding of what law can say is an understanding of what it cannot say.

The applicants' $HP_1(1)$ positions in *Handyside*, *Dudgeon*, *Mellacher*, *Brüggemann*, *Laskey*, *Kjeldsen*, or the transsexualism cases certainly include or presuppose claims of unacceptable harm inflicted by the State's unduly intrusive or harsh conduct. However, for the specific purpose of adjudicating liberal rights, the question whether unacceptable harm has been inflicted by the State in these cases simply begs the question as to whether

the applicants' own activities caused sufficient harm to justify the conduct of the State authorities. The dispositive question in these cases is whether it is the applicants' acts that caused sufficient or insufficient harm to justify interference with their Convention rights. For purposes of rights adjudication, it is the applicants' acts that provide the decisive cause of any relevant harm. The legitimacy — sufficiency or insufficiency — of any subsequent State-caused harm only begs the question as to the sufficiency or insufficiency of the prior individually-caused harm. Even in *Mellacher*, the question whether the State unacceptably harms the individual property owner only begs the question as to whether the individual property owner, in exercising the property right, harms the countervailing public interest. In these cases, then, the *formally dispositive harm* is individually-caused. We will simply use the term *individually-caused harm*, its formal character being assumed.

In *McCann* and *Tomasi*, the $HP_2(2)$ position presupposes the possibility of claims of unacceptable harm attributable to the applicant through a legitimate suspicion of the applicant's commission of criminal acts. The commission of criminal acts, or the suspicion thereof, does factor into the question of the sufficiency or insufficiency of State-caused harm, but it is formally distinct. If a State official kills X in order to protect Y from X's murder attempt, then any harm caused by X may be relevant to X's *murder attempt*, a formally distinct issue arising under substantive criminal law, but it is not relevant to X's *right to life*. Y is not affected by X's exercise of the right to *life*, but only by X's formally distinct act of attempted murder. For the sole purpose of adjudicating X's right to life, any question as to whether the State-caused harm was sufficient or insufficient with respect to Y is meaningful only to answer the question as to whether that harm was sufficient or insufficient with respect to X. X's attempted murder is treated the same as any other factor, such as how fast X was running, whether X was alone or accompanied, whether X was previously known by the State officials as a dangerous person, and the like. If a claim is brought on behalf of X that killing X was unnecessary under the circumstances, then the State's contrary assertion that the killing was indeed necessary to protect Y simply factors the attempted murder of Y into the assessment of the State-caused harm. The *formally dispositive harm* in such cases is State-caused. We will simply use the term *State-caused harm*, its formal character being assumed.

Although cases can be imagined which would involve both kinds of formally dispositive harms, the two can readily be distinguished. If, for example, the police in *Handyside*, *Dudgeon* or *Laskey* had arrested the applicants using excessive force, then the formally dispositive harm for an article 3 claim would be the harm caused to the applicants by the State agents, while the dispositive harm for the article 8 or 10 claims would be that caused by the applicants to themselves, each other, or society as a whole in practicing sado-masochism. Dispositive harms, however substantively

related in a given factual setting, always remain formally distinct.

It should not be assumed that a given Convention article can only involve one kind of harm. The question of an article 3 violation in *Tomasi* depends on the sufficiency of State-caused harm, but in *Ahmed v. Austria*¹¹⁷ it depends upon the sufficiency of an individually-caused harm. *Ahmed* concerns a State decision to return a Somalian refugee, who had been convicted of attempted robbery in Austria, to Somalia. The applicant complains of an article 3 violation, claiming that he faces a risk of torture or inhuman or degrading treatment if he returns to Somalia. Unlike *Tomasi*, however, any question of harm caused by the Austrian State in this case, by exposing the applicant to that risk, only begs the question of possible harms caused by the applicant by remaining in Austria. In this case, the Court finds that the risk of recidivism posed by the applicant is not sufficiently harmful to justify interference with the applicant's article 3 right by exposing the applicant to such danger.

2.2.5 Symbolic Translation of the Harm Postulates

Assertions of sufficient, or unacceptable, harm will be denoted by the variable H . Assertions of insufficient, or acceptable, harm will be denoted by the variable $\sim H$. Thus, the variables H and $\sim H$ must not be read as "harm" and "no harm." They must be read, respectively, as "sufficient harm" or "unacceptable harm" (H), and "insufficient harm" or "acceptable harm" ($\sim H$). Where it is useful to speak of harm generally, without specifying it either as sufficient (H) or insufficient ($\sim H$), the second-degree variable φ (phi) will be used:

$$\text{Ps.4} \quad \varphi \subset H, \sim H$$

Assertions that inquiry into harm is irrelevant can be denoted by negating φ , hence the second-degree variable ($\sim \varphi$). Where it is useful merely to indicate the issue of relevance of harm, without indicating whether the issue of harm is asserted to be relevant (φ) or irrelevant ($\sim \varphi$), a "third-degree variable" η (eta) will be used. A third-degree variable is a symbol representing more than one second-degree variable:

$$\text{Ps.5} \quad \eta \subset \varphi, \sim \varphi$$

Accordingly,

$$\text{Th.2} \quad \eta \subset H, \sim H, \sim \varphi$$

117. *Ahmed v. Austria*, 24 Eur. H.R. Rep. 278 (1996).

The relationships among η variables are illustrated in Figure 2.

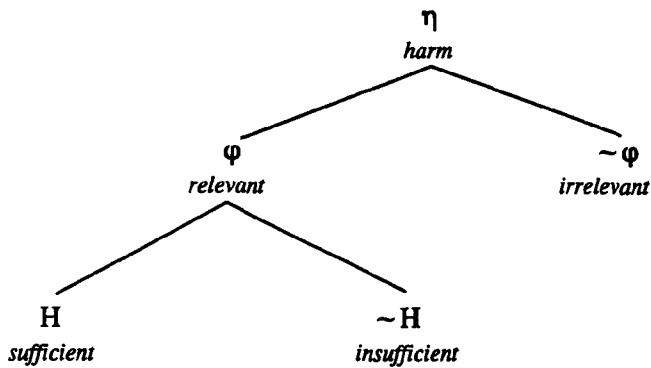


Figure 2

All arguments — that is, all π positions — in liberal rights adjudication attribute some η to some ι . All π positions thus assume what we will call a *general form* (GF):

$$\text{GF.1} \quad \pi: \iota\eta$$

Thus, the assertion by a State ($\pi = Z$) of sufficient harm ($\eta = H$) to another individual ($\iota = I^{-p}$) in the exercise of a right would take the following form (where *formulas* are used only to illustrate an argument arising in a specific case, the simple notation “F” will be used):

$$\text{F.1} \quad Z: I^{-p}H$$

One possible rebuttal to F.1 would be an assertion by an applicant ($\pi = A$) of insufficient harm ($\eta = \sim H$) to another individual ($\iota = I^{-p}$) in the exercise of a right, which would take the form:

$$\text{F.2} \quad A: I^{-p}\sim H$$

Another rebuttal could take the form of an assertion that consent by that individual to incur the harm renders irrelevant any inquiry into its acceptably or unacceptably harmful character ($\eta = \sim\phi$):

$$\text{F.3} \quad A: I^{-p}\sim\phi$$

HP₁(1) and HP₂(1) govern individually-caused harm and can be denoted by use of the lower-case Roman marker “i” affixed to the relevant

η variable:

Th.3 $\eta^i \subset \varphi^i, \sim \varphi^i$ (cf. Ps.5)

GF.1 allows a more precise formulation of Th.3:

Th.4 $1\eta^i \subset 1\varphi^i, 1\sim\varphi^i$

HP₁(2) and HP₂(2) govern harms asserted to be *caused by the State* in the exercise of a right and can be denoted by use of the marker “ \sim ” affixed to the relevant η variable:

Th.5 $\eta^{-i} \subset \varphi^{-i}, \sim\varphi^{-i}$ (cf. Ps.5)

GF.1 allows a more precise formulation of Th.5:

Th.6 $1\eta^{-i} \subset 1\varphi^{-i}, 1\sim\varphi^{-i}$

Having thus translated all of components of the two Harm Postulates into symbolic form,¹¹⁸ we can begin to examine their various features.

118. The two Harm Postulates can thus be restated with the aid of symbolic variables corresponding to each component:

First Harm Postulate (HP₁): In the adjudication of liberal rights, any claim by an individual ($\pi = A$) that a right has been violated is asserted in one of two ways

1. *Either* the individual (A) claims that:
 - a. some harm is *caused by that individual* (η^i) in the exercise of that right; *and*
 - b. such harm is caused to that individual ($1^i\eta^i$), or to some other individual ($1^p\eta^i$), or to society generally ($\sim 1\eta^i$); *and*
 - c. the harm is *either*
 - i. *insufficient* ($\eta^i = \sim H^i$) to justify State interference with that right; *or*
 - ii. *irrelevant* ($\eta^i = \sim \varphi^i$) to the question of whether State interference with the right is justified.
2. *Or* the individual (A) claims that:
 - a. some harm is *caused by the State* to the individual asserting the right ($1^p\eta^{-i}$); *and*
 - b. such harm is *sufficient* ($\eta^{-i} = H^{-i}$) to warrant a finding that State interference with the right is unjustified.

Second Harm Postulate (HP₂): In the adjudication of liberal rights, any assertion by an individual that a right has been violated is opposed by the State ($\pi = Z$) in one of two ways:

1. *Either* the State (Z) claims that:
 - a. some harm is *caused by that individual* (η^i) in the exercise of that right; *and*
 - b. such harm is caused to that individual ($1^p\eta^i$), or to some other individual ($1^p\eta^i$), or to society generally ($\sim 1\eta^i$); *and*
 - c. the harm is *sufficient* ($\eta = H^i$) to justify State interference with that right.
2. *Or* the State (Z) claims that:

2.2.6 Individually-Caused Harm ($\pi: \imath\eta^i$)

HP₁(1) and HP₂(1) thus encompass π positions taking the form $\pi: \imath\eta^i$. As assertions that harm is irrelevant ($\eta = \sim\varphi$) are only meaningful in conjunction with assertions about the variable of *consent*, positions taking the form $\pi: \imath\sim\varphi^i$ will be examined in Part 2.3. For now, we will simply examine π positions taking the form $\pi: \imath\varphi^i$. Ps.4 defines the scope of $\pi: \imath\varphi^i$ positions:

Th.7 $\imath\varphi^i \subset \imath H^i, \imath \sim H^i$

Note that where variables are grouped together, the tilde (\sim) negates not the entire combination of variables, but only the variable directly following it. For example, in the combination $\sim IH$, the tilde negates only I and not the entire combination IH.

Under HP₁(1), the A positions in *Handyside*, *Dudgeon*, *Mellacher*, *Laskey*, *Brüggemann*, *Kjeldsen*, or the transsexualism cases take one of the following forms:

- a. *Either* A claims that A's exercise of those rights would cause no unacceptable harm ($\sim H^i$) to A, as an individual seeking to exercise those rights (I^p):

F.4 A: $I^p \sim H^i$

- b. *Or* A claims that A's exercise of those rights would cause no unacceptable harm ($\sim H^i$) to other individuals ($I^{\sim p}$):

F.5 A: $I^{\sim p} \sim H^i$

- c. *Or* A claims that A's exercise of those rights would cause no unacceptable harm ($\sim H^i$) to society generally ($\sim I$):

- a. some harm is *caused by the State* to the individual asserting the right ($I^p\eta^{\sim i}$);
and
b. such harm is *either*
i. *insufficient* ($\eta^{\sim i} = \sim H^{\sim i}$) to warrant a finding that State interference with the right is unjustified, *or*
ii. *irrelevant* ($\eta^{\sim i} = \sim\varphi^{\sim i}$) to the question of whether State interference with the right is justified.

F.6 A: $\sim I \sim H^i$

The corresponding Z position to each of these A positions ($HP_2(1)$), is, respectively:

a. *Either* Z claims that A's exercise of those rights would cause unacceptable harm (H^i) to A as an individual seeking to exercise those rights (I^p):

F.7 Z: $I^p H^i$

b. *Or* Z claims that A's exercise of those rights would cause unacceptable harm (H^i) to some other individual or individuals ($I \sim^p$):

F.8 Z: $I \sim^p H^i$

c. *Or* Z claims that A's exercise of those rights would cause unacceptable harm (H^i) to society generally ($\sim I$):

F.9 Z: $\sim I H^i$

Arguments taking the form π : $i\varphi^i$ encompass the following: harms asserted to be caused by individuals to themselves ($I^p \varphi^i$, hence $I^p H^i$ or $I^p \sim H^i$); harms asserted to be caused by individuals to other individuals ($I \sim^p \varphi^i$, hence $I \sim^p H^i$ or $I \sim^p \sim H^i$); and harms asserted to be caused by individuals to society generally ($\sim I \varphi^i$, hence $\sim I H^i$ or $\sim I \sim H^i$). Hence,

Th.8 $i\varphi^i \subset I^p H^i, I^p \sim H^i, I \sim^p H^i, I \sim^p \sim H^i, \sim I H^i, \sim I \sim H^i$

In *Handyside* and *Kjeldsen*, Z asserts unacceptable harm to individual children (Z: $I \sim^p H^i$, F.8) and to society (Z: $\sim I H^i$, F.9). In symbolic logic, a combination of two propositions is commonly called a "conjunction." It is represented by a dot (\cdot), which can simply be read as "and".¹¹⁹

F.10 Z: $I \sim^p H^i \cdot \sim I H^i$

A rebuts with an assertion of insufficient harm to other individuals (A: $I \sim^p \sim H^i$, F.5) and to society as a whole (A: $\sim I \sim H^i$, F.6):

F.11 A: $I \sim^p \sim H^i \cdot \sim I \sim H^i$

119. See VIRGINIA KLENK, UNDERSTANDING SYMBOLIC LOGIC 52-53 (1983).

In *Laskey*, the applicants assert insufficient harm to themselves (A: $I^p \sim H^i$, F.4), to other individuals (A: $I^{-p} \sim H^i$, F.5), and to society as a whole (A: $\sim I \sim H^i$, F.6):

F.12 A: $I^p \sim H^i \cdot I^{-p} \sim H^i \cdot \sim I \sim H^i$

The State claims the contrary:

F.13 Z: $I^p H^i \cdot I^{-p} H^i \cdot \sim I H^i$

The most dramatic example of substantive indeterminacy arises in the case of abortion. Where other liberal rights are concerned, the question is simply whether harm is being caused and, if so, to whom. In the case of abortion, the first question simply begs the second. There can only be a harm if there is a whom; there can only be a \varnothing if there is an ι ; and, again, the question whether there is an ι is a question whether there is an I^{-p} . In *Brüggemann*, Z responds in the affirmative (Z: $I^{-p} H^i$, F.8).¹²⁰ For A, there is no life to protect, thus no harm to any other person, thus no unacceptable harm to any other person, in the exercise of the right (A: $I^{-p} \sim H^i$, F.5). Other positions also arise in the abortion debate. Z may adduce moral or paternalist arguments: prohibition of abortion deters harm to public morals (Z: $\sim I H^i$, F.9) or protects women from making a wrong choice for themselves (Z: $I^p H^i$, F.7).¹²¹ A positions in rebuttal deny any unacceptable harm to public morals (A: $\sim I \sim H^i$, F.6) or to women seeking abortions (A: $I^p \sim H^i$, F.4).¹²²

In *Otto-Preminger-Institut v. Austria*, government authorities had censored a film, *Das Liebeskonzil*, disparaging of Roman Catholicism. They deemed the film unacceptably harmful — harm, here, asserted to be sheer moral or psychological offense — to society generally through the promotion of intolerance or “hate speech”¹²³ (Z: $\sim I H^i$, F.9) and to any individuals who might take personal offense¹²⁴ (Z: $I^{-p} H^i$, F.8) (hence F.10). The applicants argue that there is insufficient harm either to other individuals (A: $I^{-p} \sim H^i$, F.5) or to society as a whole (A: $\sim I \sim H^i$, F.6) to justify interference with their freedom of expression (hence F.11).¹²⁵ The Court accepts the State’s

120. See *Brüggemann v. Germany*, App. No. 6959/75, 10 Eur. Comm’n H.R. Dec. & Rep. at 100, 107 (1977).

121. See *supra* note 93 and accompanying text.

122. See *supra* note 94 and accompanying text.

123. See *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 20-21 (1994).

124. See *id.* at 34-36 (opinion of the Commission) (Messrs. Ermacora, Weitzel and Loucaides, partly dissenting).

125. See *id.* at 23-25 (Palm, Pekkanen and Makarczyk, JJ., dissenting). See also *id.* at 31 (opinion of the Commission).

position. Yet in *Jersild*, decided just four days later, the Court finds Denmark's ban on the television emission *Søndagsavisen* to be in violation of the Convention.¹²⁶ Arguments similar to those in *Otto-Preminger* are made on each side (F.10, F.11).¹²⁷ As in *Handyside* or *Dudgeon*, rights discourse in *Otto-Preminger* and *Jersild* presuppose potential distinctions between harm to others ($\pi: I^{-p}\phi^i$) and harm to society as a whole ($\pi: \sim I\phi^i$) without rigorously distinguishing the two.

Otto-Preminger and *Jersild* further illustrate the substantive indeterminacy of the concepts of harm that inform liberal rights discourse. Conventional casuistry would distinguish the cases by noting that the *Søndagsavisen* emission involves an attempt at the neutral and objective exposition of ideas of public concern (hence insufficient harm to I^{-p} or $\sim I$ actors to justify interference with the right of expression, F.11),¹²⁸ while *Das Liebeskonzil* deliberately debases religion (hence sufficient harm to I^{-p} or $\sim I$ actors to justify interference with the right, F.10).¹²⁹ Yet, as the dissenting opinions in each case argue, plausible contrary arguments can be made in both cases: *Das Liebeskonzil* can be seen as a work of iconoclastic social commentary, which had been shown only to a small, self-selecting audience within the context of an art house cinema and thus cannot be deemed unacceptably harmful to others (hence insufficient I^{-p} or $\sim I$ harm, F.11);¹³⁰ or the *Søndagsavisen* program had failed to provide sufficiently critical context, thus conveying the racist utterances with undue prurience, amounting to racist expression (hence sufficient I^{-p} or $\sim I$ harm, F.10).¹³¹ Substantive disagreement about harm in these cases, far from undermining, only underscores the formal determinacy of the harm concept: either case requires ascription of *some* H^i or $\sim H^i$ value to ϕ^i (Th.7). Rights discourse is, so to speak, indifferent to the choice made, *i.e.*, to the comparative strengths of F.10 and F.11. It cares not about truth, but about intelligibility. It requires only that the argument take *some* value of the general formula $\pi: \eta$ in order to be coherent as rights discourse. Rights discourse remains coherent even if the substantive results in *Otto-Preminger* and *Jersild* are reversed.

126. See *supra* text accompanying note 79.

127. For $Z: I^{-p}H^i$ arguments, see, e.g., *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 29-30 (1994) (Ryssdal, Bernhardt, Spielmann and Loizou, JJ., dissenting); *id.* at 31 (Gölcüklü, Russo and Valticos, JJ., dissenting). See also *id.* at 40-42 (Mr. Gaukur Jörundsson, Sir Basil Hall and Mr. Geus, dissenting) (noting, in addition to a link to racial discrimination generally, the possibility of individual offense to members of racial minorities); *id.* at 44-45 (Mrs. Liddy, dissenting).

128. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 21-26 (1994).

129. See *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 20-21 (1994).

130. See *id.* at 23-25 (Palm, Pekkanen and Makarczyk, JJ., dissenting). See also *id.* at 31 (opinion of the Commission).

131. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 21-26 (1994).

In theory, all assertions about harm can be understood as assertions about cost. In practice, this would produce controversial results. In *Otto-Preminger* or *Jersild*, it would be unusual, although by no means incoherent, to argue that any unacceptable harm caused by hate speech can be rendered acceptable by making payments to persons adversely affected. The less provocative hypothesis is that, *to the extent* that harms can be understood in monetary terms, assertions about harm are assertions about cost. Assertions of sufficient and insufficient harm then become assertions about whether the harmed actors are willing, or can be expected, to absorb the costs inflicted upon them by the act in question.

The foregoing discussion of cases falling under $HP_1(1)$ and $HP_2(1)$ shows that, for every position of the form $\pi: \imath\varphi^i$, any dispute is about the value of φ^i . For A's exercise of a right, A asserts insufficient harm ($A: \imath \sim H^i$), while Z asserts sufficient harm ($Z: \imath H^i$). Even *Brüggemann* inquires into the \imath status of the fetus not in abstraction, but for the sole purpose of determining whether there is any harm to an $I^{\sim p}$ actor; it asks whether there is a "whom" solely to determine whether there is sufficient harm. Concepts of liberty, democracy, reasonableness, or the margin of appreciation, to the extent that they are meaningful, are simply means of attributing — ultimately indeterminate — values to $\imath\varphi^i$. They are neither more nor less persuasive, *a priori*, than other natural-language concepts that might be used.

2.2.7 State-Caused Harm ($\pi: \imath\eta^{\sim i}$)

$HP_1(2)$ and $HP_2(2)$ thus encompass π positions taking the form $\pi: \imath\eta^{\sim i}$. Here too, as assertions of the irrelevance of harm ($\eta = \sim\varphi$) require examination of consent, we will limit ourselves in this section to positions of the form $\pi: \imath\varphi^{\sim i}$. Ps.4 defines the scope of $\pi: \imath\varphi^{\sim i}$ positions:

$$\text{Th.9} \quad \imath\varphi^{\sim i} \subset \imath H^{\sim i}, \imath \sim H^{\sim i}$$

Acts involving, for example, maltreatment of individuals by State agents, as in *McCann* or *Tomasi*, are challenged by A claiming that the harm is unacceptable, *i.e.*, sufficient to constitute a violation of the right:

$$\text{F.14} \quad A: I^p H^{\sim i}$$

Z rebuts that any harm caused by the State to A is insufficient to constitute violation of the corresponding right:

$$\text{F.15} \quad Z: I^p \sim H^{\sim i}$$

The scope of $\pi: \imath\varphi^{\sim i}$ positions is narrower than that of $\pi: \imath\varphi^i$ positions. In

the former, the only possible value of ι is I^P :

Th.10 $\iota\varphi^{-i} \subset I^P\varphi^{-i}$

The reasons are straightforward. First, there is no argument of the form $\pi: \sim I\varphi^{-i}$. Within liberal rights discourse, there is no concept of harm caused by the State to itself. Certainly, arguments are imaginable which would assert that harms caused by the State can affect society as a whole ($\sim I\varphi^{-i}$): "The society which debases individuals (I^PH^{-i}) also debases itself ($\sim IH^{-i}$).¹³² Judges might even take note of such an argument, either on their own initiative or because an applicant had raised it, as part of the very philosophy of human rights.¹³² Nevertheless, any principle of State self-debasement can provide only a background philosophy to support an I^PH^{-i} claim. There are no principles in liberal rights discourse which would provide for the disposition of a case on the basis of harms caused by society to itself.

Second, there is no argument of the form $\pi: I^{-P}\varphi^{-i}$. For any harm caused by the State to other individuals, if relevant at all, serves only to bolster a position of the form $A: I^PH^{-i}$. Never is harm caused to others by the State relevant as a distinct matter. If it is others' rights that are at issue in a dispute concerning State-caused harm, then such claims are coherent only as distinct claims of the form $A: I^PH^{-i}$ and not as I^{-P} claims within someone else's lawsuit. Where the dispositive harm is State-caused, it can only be understood to affect the person asserting a right (I^P) against infliction of that harm. Again, if a State official kills X in order to protect Y from X's murder attempt, then Y is indeed affected by X's *murder attempt*, but

132. For example, Judge Makarczyk's views on derogations under article 15 of the European Convention in *Brannigan v. United Kingdom* are stated as follows:

A derogation made by any State affects not only the position of that State, but also the integrity of the Convention system of protection as a whole. It is relevant for other member States — old and new — and even for States aspiring to become Parties which are in the process of adapting their legal systems to the standards of the Convention. For the new Contracting Parties, the fact of being admitted, often after long periods of preparation and negotiation, means not only the acceptance of Convention obligations, but also recognition by the community of European States of their equal standing as regards the democratic system and the rule of law. In other words, what is considered by the old democracies as a natural state of affairs, is seen as a privilege by the newcomers which is not to be disposed of lightly.

Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) at 29, 74 (1992) (Makarczyk, J., dissenting). See also *infra* Part 3.4 (discussing derogations under article 15 of the European Convention).

not by X's *right to life*. If a claim is brought on behalf of X that killing X was unnecessary under the circumstances (A: $\mathcal{P}\mathcal{H}^{-i}$), then the State's contrary assertion that the killing was indeed necessary to protect Y simply factors the attempted murder of Y into the value it ascribes to φ^{-i} ($\sim \mathcal{H}^{-i}$, hence Z: $\mathcal{P} \sim \mathcal{H}^{-i}$, hence an assertion of insufficient harm caused by the State in light of the urgency of the circumstances). There is no distinct $\mathcal{I}^{-\mathcal{P}}$ interest with respect to any individual's exercise ($\mathcal{I}^{\mathcal{P}}$) of the right to life.

The formula $\pi: \mathcal{I}\varphi^{-i}$ thus always reduces to $\pi: \mathcal{I}\varphi^{-i}$ (i.e., for all $\pi: \mathcal{I}\varphi^{-i}$, $\mathcal{I} = \mathcal{I}^{\mathcal{P}}$). The combination $\mathcal{I}\mathcal{H}^{-i}$ denotes an A position claiming that harm caused by the State to A is unacceptable:

F.16 A: $\mathcal{P}\mathcal{H}^{-i}$ (cf. F.14)

$\mathcal{I} \sim \mathcal{H}^{-i}$ denotes a Z position claiming that harm caused by the State to A is acceptable:

F.17 Z: $\mathcal{P} \sim \mathcal{H}^{-i}$ (cf. F.15)

Hence,

Th.11 $\mathcal{I}\varphi^{-i} \subset \mathcal{I}\mathcal{H}^{-i}, \mathcal{I} \sim \mathcal{H}^{-i}$

In *Tomasi*, the Court finds a violation of articles 3 and 5(3). In *Tyrer v. United Kingdom*,¹³³ the Court finds that corporal punishment administered for juvenile criminal wrongdoing violates article 3. In *Costello-Roberts v. United Kingdom*,¹³⁴ the Court rejects a claim of article 3 violation brought on behalf of a school child subjected to a beating by a school headmaster. Dissenting opinions in *Tyrer*¹³⁵ and *Costello-Roberts*¹³⁶ again underscore the substantive indeterminacy of the concept of harm. The Court and the dissenters alike stress that the question of an article 3 violation is one of degree, their disagreements largely concerning the question whether a sufficient threshold of physiological or psychological harm has been reached. Those believing such a threshold to have been reached consider there to be sufficient individual harm (A: $\mathcal{P}\mathcal{H}^{-i}$, F.14) to warrant a finding of a violation. Those not believing the threshold to have been reached consider there to be insufficient individual harm (Z: $\mathcal{P} \sim \mathcal{H}^{-i}$, F.15) to warrant such

133. 26 Eur. Ct. H.R. (ser. A) (1978).

134. 247 Eur. Ct. H.R. (ser. A) at 47 (1993).

135. The notoriously provocative Z: $\mathcal{P} \sim \mathcal{H}^{-i}$ arguments of Judge Sir Gerald Fitzmaurice appear in *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 22 (1978) (Sir Gerald Fitzmaurice, J., dissenting).

136. *Costello-Roberts v. United Kingdom*, 247 Eur. Ct. H.R. (ser. A) at 47, 64 (1993) (Ryssdal, Thór Vilhjálmsson, Matscher and Wildhaber, JJ., partly dissenting).

a finding. In each case, then, the dispute is about the value of φ^{-i} as attributed to I^p .

An assertion about the existence or level of harm cannot be made in abstraction. It depends upon the terms of the right to which it is applied. Individuals killed by State agents suffer, in an abstract sense, the ultimate harm. However, this does not mean that the harm will perforce be treated as unacceptable under the terms of the right. Article 2, paragraph 2 enumerates specific circumstances under which deprivation of life by State officials is justified.¹³⁷ In *McCann*, the Court rejects, only by the thinnest possible margin, the State's contention that the fatal shooting of individuals suspected of terrorist activity was necessary under the circumstances — that the level of harm inflicted was acceptable ($Z: I^p \sim H^{-i}$).¹³⁸ The State can often argue in such cases that it is in fact the individual's conduct that caused sufficient harm to warrant a harsh response by official agents. Again, any such individually-caused harm, if substantively crucial under a Coase rationale, is not formally dispositive. That individually-caused harm is simply factored into the determination as to the level (acceptable or unacceptable) of harm caused by the State.

Having distinguished between individually-caused and State-caused harm, it will nevertheless be economical, at times, to characterize them jointly:

$$\text{Th.12} \quad H \subset H^i, H^{-i}$$

2.2.8 *Synthesis of π : η Values*

Having thus narrowed the scope of possible combinations of ι and η , we can now formulate the set of possible values for π : η . Figure 3 displays all values of GF.1.

137. See sources cited *supra* note 27. Cf. HARRIS ET AL., *supra* note 18, at 40-41, 48-54. Note, however, measures for abolition of the death penalty under protocol 6 of the Convention. See *id.* at 45, 564. See also Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, 114 E.T.S. 1.

138. See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 65 (1995) (Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek, JJ., dissenting).



Figure 3: Possible Values of $\pi: \mathfrak{v}$ (GF.1)

2.3 Consent (κ)

Wherever there is otherwise, say, sufficient individually-caused harm ($\imath H^i$) to justify State interference with a right, or sufficient State-caused harm ($\imath^i H$) to constitute the violation of a right, the question arises whether the harmed actors give or withhold valid consent to incur the harm so as to render State interference unjustified, notwithstanding such harm.¹³⁹ The presence of valid consent can be denoted as "C"; the absence of valid consent, as " $\sim C$ ". The terms "valid" or "invalid" must always accompany any construction of the variables C and $\sim C$, as a mere assertion that consent is given begs the question as to its validity. Moreover, like the assertion of "no harm," an assertion of "no consent" is meaningful only as an assertion of invalid consent. If consent is invalid, then the question whether it is in fact given, but is invalid, or is not in fact given at all, becomes irrelevant. "No consent," like "no harm," is not meaningless so much as it is "hyper-meaningful," overstating that which is strictly required to generate coherent rights discourse.

Where it is useful to speak of consent generally, without specifying it either as valid (C) or invalid ($\sim C$), the second-degree variable λ (lambda) will be used:

$$\text{Ps.6} \quad \lambda = C, \sim C$$

Some arguments assert that consent is irrelevant. An assertion of the irrelevance of consent can be represented by negating λ , hence $\sim \lambda$. The third-degree variable κ (kappa) will thus be used to represent assertions as to the relevance of consent:

$$\text{Ps.7} \quad \kappa = \lambda, \sim \lambda$$

Hence,

$$\text{Th.13} \quad \kappa = C, \sim C, \sim \lambda$$

Like \imath and η , the set of substantive values attributable to κ is subject to controversy and indeterminacy, not only in rights discourse but also in other areas of law. Can an experienced entrepreneur validly consent to conclude an unconscionable contract? Can a woman validly consent to be beaten by her husband?¹⁴⁰ Nevertheless, courts do in fact respond to these

139. See Heinze, *supra* note 32, at 471-72.

140. See *infra* text accompanying notes 144-47.

questions. Rights arguments always assume some sufficiently determinate value of κ . The relationships among κ variables are illustrated in Figure 4:

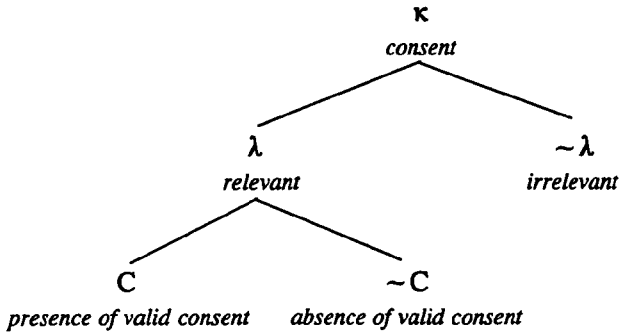


Figure 4

2.3.1 Three Consent Postulates (CP_1 , CP_2 , CP_3)

The variables ι , η , and κ represent the three core components of liberal rights arguments. The general π position in GF.1 can thus be restated more precisely:

GF.2 $\pi: \iota\eta\kappa$

Before examining distinct questions raised by different kinds of actors (ι), we can first make some general observations about consent variables (κ) by considering them in combination with harm variables (η).

First Consent Postulate (CP_1). An assertion of invalid consent ($\sim C$) is always an assertion of sufficient harm (H). For all $\pi: \iota\eta\kappa$, if $\kappa = \sim C$, then $\eta = H$:

Ps.8 $\iota\eta\sim C = \iota H\sim C$

In some cases, this postulate follows as a matter of definition, namely, where harm is itself defined by consent. For example, in European jurisdictions, as in others, a conventional legal distinction between lawful sexual intercourse and rape depends on the presence or absence of valid consent.¹⁴¹ An assertion of invalid consent is thus *ipso facto* an assertion of sufficient harm. Even where harm is not defined solely by consent, this postulate

141. See SMITH & HOGAN, *supra* note 114, at 469 (giving an example in the United Kingdom).

holds. In *Dudgeon*, the State asserts collective non-consent on the basis of sufficient harm that might be caused to public morality through the legality of homosexual acts ($Z: \sim IH^i \sim C$). That argument does not assume that the sufficient harm follows from the collective non-consent, but rather that the collective non-consent follows from the sufficient harm, presumably from the intrinsic evil of homosexuality.¹⁴²

Second Consent Postulate (CP_2). An assertion of valid consent (C) is always an assertion of irrelevant harm ($\sim \varphi$). For all $\pi: \imath \eta \kappa$, if $\kappa = C$, then $\eta = \sim \varphi$:

$$\text{Ps.9} \quad \imath \eta C = \imath \sim \varphi C$$

It might at first appear to follow from CP_1 that an assertion of valid consent (C) necessarily implies an assertion of insufficient harm ($\sim H$). That deduction, however, would be incorrect. An assertion that consent is validly given is an assertion that the law must necessarily permit the consenting party to incur the harm. And if the law necessarily permits the consenting party to incur the harm, then it does so regardless of the sufficient or insufficient character of that harm. Thus, an assertion of *valid* individual consent to terminate one's life, or to engage in sexual intercourse — be it heterosexual or, as in *Dudgeon*, homosexual — is itself an assertion that there can be no meaningful inquiry into the sufficiency of harm.

Third Consent Postulate (CP_3). An assertion of insufficient harm ($\sim H$) is always an assertion of irrelevant consent ($\sim \lambda$). For all $\pi: \imath \eta \kappa$, if $\eta = \sim H$, then $\kappa = \sim \lambda$:

$$\text{Ps.10} \quad \imath \sim H \kappa = \imath \sim H \sim \lambda$$

It might equally appear to follow from CP_1 that an assertion of insufficient harm ($\sim H$) necessarily implies an assertion of valid consent (C). Yet that deduction would also be incorrect. If there is insufficient harm, then there is nothing to which one consents. If something is insufficiently harmful, then its legal consequences are identical regardless of whether consent is given. Consent given to something which, through its insufficiently harmful character, requires no consent, is not meaningful consent. The applicants' assertions that the publication in *Handyside*, or the homosexual acts in *Dudgeon*, are insufficiently harmful to society as a whole means that such acts are insufficiently harmful not *because* others give consent, as many do

142. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 29-31 (1981) (Zekia, J., dissenting); *id.* at 39-47 (Walsh, J., partially dissenting).

not, but rather regardless of whether others give consent.

2.3.2 *Collective Consent to Individually-Caused Harm* ($\pi: \sim I\eta^i\kappa$)

The State enjoys a presumption of collective non-consent to what it determines to be unacceptable, individually-caused harm ($Z: \sim IH^i \sim C$, cf. Ps.10). In *Handyside*, *Jersild*, or *Otto-Preminger*, for example, State censorship is presumed in the first instance to represent the interests of society as a whole. Any presumption of public non-consent to the individual exercise of a right is a presumption that the public deem such exercise to be harmful. If we recall the two propositions that were compared in Part 1.3, we see that the first takes the form $Z: \sim I \sim H^i \sim C$, which is not strictly coherent under CP_1 and CP_3 . An assertion that the public withhold consent to incur a harm means that such consent is withheld not regardless of whether it is unacceptably harmful, but rather because it is deemed unacceptably harmful, $Z: \sim IH^i \sim C$.

Prima facie, the position $Z: \sim IH^i \sim C$ can serve to justify any restriction of individual rights, even if such restriction is submitted, as an empirical matter, to enjoy little popular support (*i.e.*, even if the empirically accurate characterization, presumably adduced by A, would be $A: \sim I \sim \phi^i C$, cf. Ps.9). The law in *Dudgeon* prohibiting private, consensual, adult, homosexual acts for purposes of maintaining public morals ($Z: \sim IH^i \sim C$), is presumed, in the first instance, to reflect the popular will. Only in the face of that presumption does A introduce an empirical claim to the contrary. In addition to such empirical claims, the applicant must make a more principled claim, namely, that any harm caused to society is insufficient to justify interference with the right *despite* society's non-consent to incur that harm.¹⁴³ There being insufficient harm, society's non-consent is irrelevant ($A: \sim I \sim H^i \sim \lambda$, cf. Ps.10).

2.3.3 *Individual Non-Consent: Volitional and Non-Volitional* ($\pi: IH \sim C$)

The Z position in *Jersild* and *Otto-Preminger* is that A's actions are sufficiently harmful not only to society in general, which is presumed to withhold consent to incur the harms of the alleged hate speech caused by A's journalistic or artistic works ($Z: \sim IH^i \sim C$, cf. Ps.8), but also to individual members of the concerned victim groups, who, are also presumed to withhold consent to incur such harm ($Z: I \sim^p H^i \sim C$, cf. Ps.8). What, however, is the nature of individual non-consent in the $I \sim^p$ argument? Does it consist of an empirical submission that such individuals *do not*, in fact, consent to incur the offense? Or does it consist, rather, of a government

143. See *infra* Part 3.2.3.

determination that such individuals, as a matter of law, *cannot* validly consent to such harms, even if some of them would in fact do so? Certainly, on the Voltairian maxim, some members of racial or religious groups may be willing to subordinate any personal offense to what they consider to be the higher value of free speech. By nevertheless exercising censorship, the State in each case determines that such individuals *cannot* validly consent to incur such harms, as a matter of law, even if their personal choices are otherwise.

The distinction between consent in fact and in law is not unique to the discourse of liberal rights. In many areas of the law, non-consent may be recognized only in fact for some persons or circumstances, but decreed in law for other persons or circumstances. In European jurisdictions, as in others, non-consent in fact to conclude contractual agreements is recognized for adults, while non-consent is presumed in law for children.¹⁴⁴ Non-consent to conclude fraudulent, coercive, or unconscionable contracts is presumed in law even for adults.¹⁴⁵ Similarly, non-consent in fact of the victim is, by definition, a requisite element of such crimes as larceny or rape,¹⁴⁶ while some persons are presumed in law to be unable to give valid consent.¹⁴⁷

Formally, then, once a harm is asserted to be sufficient (unacceptable), there are two different kinds of individual non-consent to incur it: *volitional non-consent*, indicated here by suffixing a marker "w" to the variable $\sim C$ (hence, $\sim C^w$), meaning that an individual does not in fact consent to incur the harm ($\pi: IH \sim C^w$), and *non-volitional non-consent* ($\sim C^{-w}$), meaning that, as a matter of law, the individual cannot validly consent to incur the harm ($\pi: IH \sim C^{-w}$). The distinction between volition (w) and non-volition ($\sim w$) is unnecessary in cases of individual consent; valid individual consent to incur an individually-caused harm is by definition volitional. Only individual non-consent raises the question as to whether it is volitional (non-consent "in fact") or non-volitional (non-consent "in law"). There is, then, no meaningful assertion of the form $\pi: IHC^{-w}$. All meaningful assertions of the form $\pi: I\eta C$ necessarily presuppose the form $\pi: I\eta C^w$, and thus need not be written as such. In addition, the distinction between volitional non-consent ($\sim C^w$) and non-volitional non-consent ($\sim C^{-w}$) applies only to arguments concerning individual actors ($\iota = I$). The *prima facie* presumption of collective non-consent in Z positions of the form $Z: \sim IH^i \sim C$ is only coherent insofar as it is assumed to be volitional. There is, then, no meaningful assertion of the form $\pi: \sim IH \sim C^{-w}$. All assertions

144. See, e.g., LAURENCE KOFFMAN & ELIZABETH MACDONALD, *THE LAW OF CONTRACT* 347 (2d ed. 1995) (explaining consent within the United Kingdom).

145. See *id.* at 77-86.

146. See SMITH & HOGAN, *supra* note 114, at 469.

147. See *id.* at 471.

of the form $\pi: \sim IH \sim C$ necessarily presuppose the form $\pi: \sim IH \sim C^w$, and thus need not be written as such.

2.3.4 Individual Consent to Individually-Caused Harm ($\pi: I\eta^i\kappa$)

In *Jersild* and *Otto-Preminger*, Z's assertion of unacceptable harm to other individuals correlates not to an empirical survey about those actors' actual consent or non-consent, but to an assertion of State prerogative to determine as a matter of law that they cannot validly consent to incur such harm (Z: $I^{-p}H^i \sim C^{-w}$, cf. Ps.8). A rebuts by asserting insufficient harm to other individuals. The consequence of that assertion, however, is that those individuals' consent or non-consent is rendered irrelevant ($\sim \lambda$), hence A: $I^{-p} \sim H^i \sim \lambda$ (cf. Ps.10). In *Brüggemann*, Z's assertion that the fetus is an affected individual (I^{-p}) entails an assertion of non-voluntary invalid consent by that actor to incur an unacceptable harm (Z: $I^{-p}H^i \sim C^{-w}$). A's claim that there is no unacceptable harm to another individual means that there is nothing to which one can consent, thereby negating the element of consent ($\sim \lambda$), hence, A: $I^{-p} \sim H^i \sim \lambda$ (cf. Ps.10).

Had Z's position in *Laskey* adduced evidence of individuals who had not consented to incur the harms in question, it could then have alleged failure of valid consent in fact (Z: $I^{-p}H^i \sim C^w$), without having to adduce non-valid consent in law (Z: $I^{-p}H^i \sim C^{-w}$). That argument would have been so evident as to have A's case summarily dismissed: If Z can argue Z: $I^{-p}H^i \sim C^w$ with no challenge on the facts (*i.e.*, no assertion that there was valid individual consent), then the case simply involves a run-of-the-mill battery.¹⁴⁸ Once A asserts valid consent to incur any harm inflicted, the only remaining State rebuttal on point is that such consent is non-volitionally invalid:

F.18 Z: $IH^i \sim C^{-w}$ (cf. Ps.8)

A's argument on this point might at first seem to take the form A: IH^iC . However, an assertion of valid consent to incur a harm is by definition an assertion that the sufficiency or insufficiency of the harm is irrelevant (CP_2). If valid consent can be given to incur harm qualifying as sufficient, then it can *a fortiori* be given to incur a harm qualifying as insufficient. It is only non-consent that raises a question as to the sufficiency of harm. A's position, then, is:

F.19 A: $I \sim \phi^iC$ (cf. Ps.9)

148. See *id.* at 114.

The F.19 position that it makes no difference what individuals do as long as they validly consent, remains strongly libertarian regardless of how cogently linked it is to questions of being or identity. Moreover, this position can still be difficult to adduce in societies that profess paternalist principles — all societies, to a greater or lesser degree.¹⁴⁹ An alternative rebuttal to F.18, then, asserts insufficient harm ($A: I \sim H^i$) (cf. F.11), hence nothing to which one can consent. Such a position renders consent irrelevant:

F.20 $A: I \sim H^i \sim \lambda$ (cf. Ps.10)

Yet, the A position in *Laskey* — unlike that in *Handyside*, *Otto-Preminger*, or *Jersild* — cannot easily maintain that the sado-masochistic acts in question are harmless regardless of consent. Thus, the dispute in *Laskey* is not really about the presence or degree of harm (φ) at all. It is about the relevance of harm (η), as neither side disputes sufficient harm as to individuals not giving valid consent (F.18, F.19). Thus, *Laskey* is not about harm at all. It is about consent. Had the dissenting Commissioners understood this, they might have sent a more persuasive opinion to the Court.

One argument adduced by Z in *Dudgeon* concerns the prevention of unacceptable harm to minors or to other “vulnerable members of society”¹⁵⁰ ($Z: I^{-p}H^i \sim C^w$). A, in no way disputing this proposition as to homosexual or heterosexual sex, responds that the case concerns only individuals giving valid consent. It would perhaps seem that, for A, the giving of valid consent renders any harm insufficient, $A: I^{-p} \sim H^iC$. However, this is not a coherent position. A's position is not that the individual participants in the act consent to incur the act's insufficient harm, but that their consent to proceed with the act renders inquiry into any such harm irrelevant ($A: I^{-p} \sim \varphi^iC$, cf. Ps.9).

While non-volitional non-consent ($\sim C^w$) to incur individually-caused harm (H^i) can be attributed to both I actors ($IH \sim C^w \subset I^p H^i \sim C^w$, $I^{-p}H^i \sim C^w$), volitional non-consent ($\sim C^w$) to incur such harms can be attributed only to I^{-p} actors ($IH^i \sim C^w \subset I^{-p}H^i \sim C^w$). One never argues that one does not validly consent to incur a harm caused by oneself in the exercise of an individual right ($A: I^pH^i \sim C^w$). Volitional non-consent to incur an individually caused harm is attributable only to another individual ($Z: I^{-p}H^i \sim C^w$). Hence,

Ps.11 $IH \sim C^w \subset I^{-p}H^i \sim C^w, IH \sim C^w$

In conjunction with Ps.2, Ps.11 yields a correlative theorem:

149. See Heinze, *supra* note 32, at 468.

150. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 20 (1981). See also *supra* text accompanying note 63.

Th.14 $IH \sim C^w \subset I \sim PH^i \sim C^w, PH \sim C^w, I \sim PH \sim C^w$

The relationships among κ variables in Figure 4 can thus be revised as set forth in Figure 5:

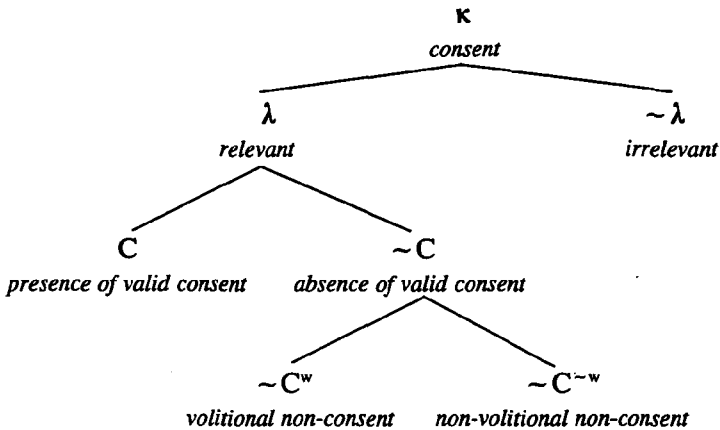


Figure 5

2.3.5 Individual Consent to State-Caused Harm ($\pi: I^p \eta^i \sim \kappa$)

The very fact of bringing a case assumes A's assertion of lack of valid consent to incur State-caused harm ($A: I^p H^i \sim C$). Yet individual non-consent to State-caused harm also raises a question as to its volitional or non-volitional character. In *Tyrer*, the applicant had actually withdrawn his complaint before it reached the Court. Although the Court does not state the reasons for the complaint's withdrawal, it is useful, for argument's sake, to speculate that a change of heart might have prompted the applicant to reconsider his views on the beating, and thus, so to speak, to have given retroactive consent to incur the State-caused harm. Z might then assert the validity of such consent in order to assert non-violation of the Convention. And, if such consent is valid, the precise character of the harm is irrelevant:

F.21 $Z: I^p \sim \varphi^i C$ (cf. Ps.9)

The Commission nevertheless decided to proceed to the Court as a matter of principle.¹⁵¹ Persons might indeed give consent to forgo rights against torture or inhuman or degrading treatment, rights to a fair trial, rights of expression or privacy, or other rights in the belief that they may thereby

151. See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 12-14 (1978).

procure some favor from the State, such as suspension or reduction of a prison sentence. Suspects might consent to sign confessions or to forgo legal counsel; to submit to castration, sterilization, or medical experimentation; or to be electronically tagged.¹⁵² In *Tyrer*, however, the significance of the Commission's action, and of the Court's decision, is that any such act of volitional consent can be asserted to be non-volitionally invalid:

F.22 A: $I^p H^{-i} \sim C^{-w}$ (cf. Ps.8)

In cases concerning individually-caused harms, Z: $I H^i \sim C^{-w}$ positions attribute to the State the *prerogative* of treating individual consent as invalid. The A: $I^p H^{-i} \sim C^{-w}$ position attributes to the State the *obligation* to treat individual consent as invalid.¹⁵³

Where the Z position cannot argue, or cannot argue solely, that A consented to incur a State-caused harm, its only remaining option is to argue that no unacceptable harm has been inflicted, thus rendering irrelevant the question of individual consent:

F.23 Z: $I^p \sim H^{-i} \sim \lambda$ (cf. Ps.10)

Where there is no question of non-volitionally invalid consent, then A's position always assumes that A resists the State action *in fact*, i.e., withholds volitionally valid consent:

F.24 A: $I^p H^{-i} \sim C^w$ (cf. Ps.8)

If A gives volitionally valid consent, for example by accepting incarceration, then there is no dispute. In the many cases, like *McCann*, *Tomasi*, or *Costello-Roberts*, where there is no question of individual consent to incur the State-caused harm, and thus no question of the validity of such consent, the volitional withholding of valid consent is presupposed by merely bringing the claim.

2.3.6 *Synthesis of π : $\eta\kappa$ Values*

Having considered the κ values correlative to each π position, we can now formulate the set of possible values for π : $\eta\kappa$. Figure 6 shows all values of GF.2. The fourteen general formulas GF.3 - GF.16 represent the possible bases for liberal rights arguments.

152. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

153. See *infra* Part 3.2.5.

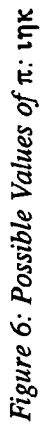


Figure 6: Possible Values of π : $\eta\kappa$

3. GENERAL FORMS OF ARGUMENT

The purpose of a π position is either to support, or to contest, the conclusion that a right was violated.¹⁵⁴ We will now examine how the π positions GF.3 - GF.16 form arguments as to whether rights within a corpus of positive law have been violated. Part 3.1 analyzes $\pi\kappa$ combinations as antecedents to conclusions regarding the violation or non-violation of rights. Part 3.2 considers those conclusions as expressions of broader jurisprudential theories of liberalism, paternalism, communitarianism, and State sovereignty.

3.1 *Violation and Non-Violation of Rights (ν positions)*

Any one of the fourteen values of π : $\pi\kappa$ serves only as a *premise* to A's *conclusion* that a right was *violated* (V) or to Z's conclusion that it was *not violated* (\sim V). Where it is useful to speak of a judicial finding generally, without specifying it either as a finding of violation (V) or of non-

154. In the standard jurisprudence of the Convention, the question whether or not there is a violation always depends on two prior questions. The first is whether the claim is encompassed by some Convention right. In *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) (1986), a previously married man and a woman were living together with their child. They claimed that Ireland's divorce prohibition violated their article 12 right to marry and article 8 right to respect for privacy and family life. The Court ruled that the case in fact depended on a right to divorce, which it found to have been excluded deliberately from the drafting of the Convention, and thus to be beyond the purview of articles 8 or 12. Where the Court or Commission does find an applicable right, however, the second question is whether there is any State interference with that right. In *Glaserapp v. Federal Republic of Germany*, 104 Eur. Ct. H.R. (ser. A) (1986), the applicant had been hired as a public school teacher contingent upon her signing a standard declaration of loyalty to the constitution of the Federal Republic of Germany. When she subsequently published a statement of affiliation with and support of the German Communist Party, she was dismissed from her employment. Her application complained of a violation of her article 10 rights of free speech and expression. The Court observed that the Convention contained no right of access to civil service positions, leaving government officials broad discretion to observe their own employment criteria. The applicant remained free to associate with and publicly endorse the German Communist Party; this freedom, however, did not include any Convention right to retain a civil service position. Although the applicant's statement of support for the Communist Party fell within the purview of article 10, the government's dismissal of her was not held to constitute interference with her article 10 rights. However, if the Court or Commission find both an applicable right and State interference with that right, they then proceed to examine whether the interference was justified. It is the response to this third question which determines whether there has been a violation. If either of the two initial questions is answered in the negative, there is no further inquiry as to whether the Convention was violated, and no question as to the substantive values of π : $\pi\kappa$ combinations arises. In virtually all cases that reach the Court, rather than being dismissed by the Commission, these initial questions have indeed been answered in the affirmative, and it is the question as to the existence of a violation that guides the judgment.

violation ($\sim V$), the second-degree variable v (upsilon) will be used.

As we have seen, one of the A positions in *Laskey* is that valid individual consent is given to incur harm inflicted upon oneself or upon others (A: $I \sim \phi^i C$) (F.19). The more precise formulation is that *if* valid consent is given to incur harm inflicted upon oneself or upon others, *then* State interference constitutes a violation (V) of the privacy right. Such a proposition states a *sufficient condition*¹⁵⁵ for a finding of a violation. The relationship of p as a sufficient condition for q is commonly denoted in symbolic logic with an operator known as an "arrow" (\rightarrow)¹⁵⁶ placed between the two variables, hence $p \rightarrow q$. In such a construction, terms preceding the arrow constitute an *antecedent* and terms following it constitute a *consequent*.¹⁵⁷ An assertion of this form is commonly read, "*If p, then q.*" In this case, A asserts "*If $I \sim \phi^i C$, then V*": the proposition's antecedent is $I \sim \phi^i C$, and its consequent is V:

F.25 A: $I \sim \phi^i C \rightarrow V$

One Z rebuttal asserts a State prerogative to determine that the harm is sufficient and cannot validly be consented to (F.18):

F.26 Z: $I H^i \sim C^{\sim w} \rightarrow \sim V$

An alternative A position avoids the issue of consent by asserting insufficient harm (F.20):

F.27 A: $I \sim H^i \sim \lambda \rightarrow V$

A display of all possible π positions (GF.3 - GF.16) as antecedents to v findings appears in Table 1. Formulas GF.3 - GF.16 all take the form of a revised general formula, which will be called an " v position":

GF.17 $\pi: i \eta \kappa \rightarrow v$

The correlative A and Z positions take the form:

GF.18 A: $i \eta \kappa \rightarrow V$

GF.19 Z: $i \eta \kappa \rightarrow \sim V$

155. See KLENK, *supra* note 119, at 59.

156. See HODGES, *supra* note 50, at 96-98.

157. See KLENK, *supra* note 119, at 59.

Table of ν Positions

A ($\nu = V$)	Z ($\nu = \sim V$)
GF.20 A: $P \sim H^i \sim \lambda \rightarrow V$ (cf. GF.7) GF.21 A: $P \sim \phi^i C \rightarrow V$ (cf. GF.12)	GF.22 Z: $P H^i \sim C^w \rightarrow \sim V$ (cf. GF.10)
GF.23 A: $I^p \sim H^i \sim \lambda \rightarrow V$ (cf. GF.8) GF.24 A: $I^p \sim \phi^i C \rightarrow V$ (cf. GF.13)	GF.25 Z: $I^p H^i \sim C^w \rightarrow \sim V$ (cf. GF.15) GF.26 Z: $I^p H^i \sim C^w \rightarrow \sim V$ (cf. GF.16)
GF.27 A: $\sim I \sim H^i \sim \lambda \rightarrow V$ (cf. GF.9) GF.28 A: $\sim I \sim \phi^i C \rightarrow V$ (cf. GF.14)	GF.29 Z: $\sim I H^i \sim C \rightarrow \sim V$ (cf. GF.11)
GF.30 A: $P H^{-i} \sim C^w \rightarrow V$ (cf. GF.5) GF.31 A: $P H^{-i} \sim C^w \rightarrow V$ (cf. GF.6)	GF.32 Z: $P \sim H^{-i} \sim \lambda \rightarrow \sim V$ (cf. GF.4) GF.33 Z: $P \sim \phi^{-i} C \rightarrow \sim V$ (cf. GF.3)

Table 1

Liberal rights disputes, then, are disputes about the values of the variables constituting one of the fourteen ν positions. No lesser degree of determinacy, but also no greater degree, should be assumed for liberal rights

discourse *generally*. More specific structure is possible only with a narrowing of the corpus. In *Belgian Linguistic*,¹⁵⁸ Z's failure to provide French-language instruction in Flemish school districts can be defended as imposing an unwarranted burden and, in that cost-based sense, an unacceptable harm upon the State ($Z: \sim IH^i \sim C$); this defense is challenged in contrary terms by A: $\sim I \sim H^i \sim \lambda$. Although this characterization is not inaccurate, specific problems posed by discrimination rights allow for more detailed analysis on the basis of a distinct meta-discourse specific to discrimination law.¹⁵⁹ While other positive rights disputes raise the question whether the State must recognize a given exercise of a right at all, discrimination law does not raise the question whether a right or benefit may be enjoyed at all, but whether it may or must be enjoyed equally. A meta-discourse of discrimination law can thus supplement the general liberal rights model proposed here with respect to the narrower corpus of discrimination cases. Discrimination cases will not be further examined because only the general model is of interest at the moment.

3.2 *Legal Regimes (p positions)*

A "V" conclusion can be called "liberal" in the tautological sense that it finds Z obliged to respect an individual interest over a countervailing State interest. Using the letter L to characterize that purely formal, liberal position, this means that *if* there is a finding of a violation (V), *then* that result is formally liberal (L):

$$F.28 \quad V \rightarrow L$$

For example, in F.25 ($A: I \sim \phi^i C \rightarrow V$) it is asserted that *if* it is the case that $I \sim \phi^i C$, *then* it is the case that V. We thus have two propositions linked in the form of a so-called "hypothetical syllogism":¹⁶⁰

158. See *supra* text accompanying note 77.

159. See Heinze, A Meta-Discourse of Discrimination, *supra* note 10, *passim*.

160. See KLENK, *supra* note 119, at 118-19. The rule of hypothetical syllogism simply formalizes an obvious intuitive deduction. Given the following values of p , q and r :

p = Holmes is a judge.

q = Holmes is irrational.

r = Holmes is unreliable.

We can then reason as follows:

If Holmes is a judge, then Holmes is irrational.

If Holmes is irrational, then Holmes is unreliable.

Therefore, if Holmes is a judge, then Holmes is unreliable.

In linear form, this principle can be written: $((p \rightarrow q) \cdot (q \rightarrow r)) \rightarrow (p \rightarrow r)$.

$$\begin{array}{l} p \rightarrow q \\ \underline{q \rightarrow r} \\ p \rightarrow r \end{array}$$

Hence,

$$\begin{array}{ll} I \sim \phi^i C \rightarrow V & (F.25) \\ \underline{V \rightarrow L} & (F.28) \\ I \sim \phi^i C \rightarrow L & (F.29) \end{array}$$

In linear fashion, this proposition can be written as follows:¹⁶¹

$$F.30 \quad A: ((I \sim \phi^i C \rightarrow V) \cdot (V \rightarrow L)) \rightarrow (I \sim \phi^i C \rightarrow L)$$

And condensed:¹⁶²

$$F.31 \quad A: (I \sim \phi^i C \rightarrow V) \rightarrow L$$

Similarly, for F.27 ($A: I \sim H^i \sim \lambda \rightarrow V$):

$$F.32 \quad A: (I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$$

$\sim V$ conclusions, however, are not so easily classified. Not all $\sim V$ conclusions can be classified as "non-liberal," as some $\sim V$ results are integral to a liberal regime. For example, punishment of rape, and the $\sim V$ finding that would result from any privacy claim, is quintessentially liberal. On the other hand, no political regime is purely liberal. Some $\sim V$ results clearly are non-liberal. *Laskey's* $\sim V$ holding that the State can prohibit persons from consensually harming themselves is standard paternalism. *Handyside's* $\sim V$ holding that the State can prohibit individual expression for the sake of public morals is vintage communitarianism.

As we saw in Part 1, however, no sooner do we introduce such natural-language concepts as liberalism, paternalism, or communitariansim, then are we reminded of the ambiguities and contradictions that they entail. We are indeed barred from shouting "Fire" in a crowded theater because of the harm that can be caused to others; however, does racially or religiously inflammatory speech carry the potential for even greater — if concededly more insidious, hence less causally demonstrable — harm? If so, is the result in *Otto-Preminger* just as liberal as it is communitarian? Moreover,

161. See discussion *supra* note 160.

162. This condensed form can be derived as follows: $[(p \rightarrow q) \cdot (q \rightarrow r)] \rightarrow (p \rightarrow r) \rightarrow (p \rightarrow q) \rightarrow r$.

as already suggested, we are barred from shouting "Fire" not only in the interest of other, specific individuals, but also as a general social interest in keeping the peace — it would be punishable even if no specific individuals were harmed — and indeed in the interest of protecting *ourselves* from any resulting harm, say, from an angry mob. Is the prohibition thus liberal *and* communitarian *and* paternalist? Meanwhile, the concept of communitarianism is so vast as to encompass utterly contradictory regimes, from religious fundamentalism to Marxism to radical feminism.¹⁶³

Given the tendency of these concepts to intersect and blur, one might wonder whether there is any point to using them at all. On the other hand, if we dispense altogether with broader conceptual schemes, we drown in a morass of de-contextualized particularism; we lose a vocabulary for characterizing rights jurisprudence in any way that is not purely fact and case-specific. Just as the substantive indeterminacy of actors, harm or consent does not preclude their formal determinacy in rights discourse, the substantive indeterminacy of theories of liberalism, communitarianism, and paternalism does not preclude the identification of a jurisprudence of formal liberalism, formal communitarianism, and formal paternalism, which would allow us to identify how rights discourse is used in adjudication, regardless of whether such use is ultimately, in a substantive context, ambiguous or indeterminate.

3.2.1 State Liberalism (L)

Where individual rights are restricted on the very narrow basis of unacceptable individually-caused harm to other volitionally non-consenting individual actors ($I^{-P}H^i \sim C^w$), that result can be defined as *formally liberal* (L): regardless of the restriction's motivation or impact, its formal rationale is the redress or prevention of *unacceptable harm to volitionally non-consenting others*. Accordingly, *if* it is the case that $I^{-P}H^i \sim C^w$ provides a sufficient condition of a finding of $\sim V$, *then* that result is formally liberal (L). As its formal character can be assumed, we will simply call the position *liberal*:

$$\text{GF.34} \quad Z: (I^{-P}H^i \sim C^w \rightarrow \sim V) \rightarrow L \quad (\text{cf. GF.25})$$

One correlative A rebuttal is:

$$\text{GF.35} \quad A: (I^{-P} \sim H^i \sim \lambda \rightarrow V) \rightarrow L \quad (\text{cf. GF.23})$$

Had the State in *Laskey* been able to adduce an assertion of harm to an

163. See Heinze, *supra* note 32, at 464-69.

unwilling participant, that assertion would have taken the form GF.34. A, assuming no challenge to volitional non-consent, would have had to rebut with GF.35. In *Ahmed*, Z's rationale for returning A to Somalia is to prevent future crimes; thus, Z's rationale seeks to prevent other individuals from harms to which they would volitionally withhold valid consent (GF.34).¹⁶⁴ A rebuts that any risk of recidivism is insufficiently harmful as compared with the risk facing A if deported (GF.35).

Theoretically, GF.34 could also be rebutted by A asserting C attributable to I^{-P} :

$$F.33 \quad A: (I^{-P} \sim \phi^i C \rightarrow V) \rightarrow L \quad (cf. GF.23)$$

In practice, however, such a case would never arise. If there is no dispute that I^{-P} gives valid consent to incur any harm, then there is no dispute on point at all.

3.2.2 State Paternalism (T)

Where individual rights are restricted on the basis of non-volitional non-consent to unacceptable harm to ourselves ($I^P H^i \sim C^{-w}$) or to others ($I^{-P} H^i \sim C^{-w}$), that result can be defined as *formally paternalist* (T): regardless of the restriction's motivation or impact, its formal rationale is the redress or prevention of unacceptable harm to individuals despite their possible willingness to incur that harm. As its formal character can be assumed, we will simply call the position *paternalist*:

$$GF.36 \quad Z: (I^P H^i \sim C^{-w} \rightarrow \sim V) \rightarrow T \quad (cf. GF.22)$$

$$GF.37 \quad Z: (I^{-P} H^i \sim C^{-w} \rightarrow \sim V) \rightarrow T \quad (cf. GF.26)$$

Correlative A rebuttals in response to GF.36 would be:

$$GF.38 \quad A: (I^P \sim H^i \sim \lambda \rightarrow V) \rightarrow L \quad (cf. GF.20)$$

$$GF.39 \quad A: (I^P \sim \phi^i C \rightarrow V) \rightarrow L \quad (cf. GF.21)$$

Correlative A rebuttals in response to GF.37 would be:

$$GF.40 \quad A: (I^{-P} \sim H^i \sim \lambda \rightarrow V) \rightarrow L \quad (cf. GF.23)$$

164. To be precise, by asserting an interest in preventing future crime, the State would also presumably be concerned with crimes against persons, such as children or persons otherwise incompetent to give valid consent, non-volitionally withholding valid consent (see *infra* Part 3.2.2), hence espousing a paternalist, as well as a liberal, rationale. Such a degree of precision is hardly compulsory, however, for the very simple point that the State is making.

GF.41 A: $(I^{-p} \sim \varphi^i C \rightarrow V) \rightarrow L$ (cf. GF.24)

One of the central disputes in *Handyside* concerns the effects of the impugned publication on individual children who might read it:

F.34 $\pi: I^{-p} \eta^i \kappa \rightarrow v$

The Z position is that children can be unacceptably harmed by the work and that the State therefore enjoys the prerogative to determine that children cannot give valid consent to read (GF.37). A responds that the book will not cause unacceptable harm to children; hence, no inquiry into consent is required (GF.40). In *Kjeldsen*, the parents, seeking to exercise rights over their children's education, claim that such control would cause less harm than would be caused to their children were they to be exposed to sex education (GF.38). Z's response is formally identical to that in *Handyside*: exercise of that right would unacceptably harm the children, by depriving them of knowledge about sex (GF.37).

Again, in *Dudgeon*, Z adduces paternalist concerns about unacceptable harm to individuals, such as minors or other "vulnerable members of society"¹⁶⁵ (GF.37). A can entirely concede this point, as these are not the actors whose interests are at issue in the case. As we have seen, the relevant actors are individuals able to give valid consent, which itself, as to the relevant sexual acts, renders the question of harm irrelevant (GF.41). Z might also have raised a second paternalist argument: homosexuality represents a harm with respect to which the State can protect individuals from themselves (GF.36).¹⁶⁶ This position is still common in debates on the age of consent.¹⁶⁷ However, given law reform based on contrary assumptions in England, Wales, and Scotland,¹⁶⁸ this view plays no significant role in the State's position. Here too, for A, it is one's own valid consent that renders the question of harm irrelevant (GF.39). One might query whether it is in fact the giving of valid consent which renders the question of harm irrelevant, or rather, the insufficient harm which renders the giving of valid consent irrelevant — *i.e.*, whether it is GF.39 or in fact GF.38 which properly characterizes the A position. After all, if homosexual acts are no more sick or dangerous than heterosexual acts, then what harm can come of them? Yet, even as to heterosexual acts, there is insufficient harm only insofar as valid consent is given. As suggested by the law of

165. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 20 (1981).

166. Cf. *id.* (Walsh, J., partially dissenting).

167. See *Sutherland v. United Kingdom*, App. No. 25186/94, Eur. Comm'n H.R. Dec. & Rep. (1997) (visited May 10, 1999) <<http://www.dhcommhr.coe.fr/eng/25186R31.E.html>>.

168. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 9-10 (1981).

rape, the acceptably or unacceptably harmful character of a sexual act is itself defined by the element of consent.¹⁶⁹ The selfsame act may be defined as sufficiently or insufficiently harmful solely on the basis of whether valid consent is given. For *Dudgeon* A, then, insufficient harm is itself the product of valid consent. One can synthesize a more general A position for I actors in *Dudgeon* (GF.39 · GF.41):

F.35 A: $(I \sim \phi^i C \rightarrow V) \rightarrow L$

The correlative Z position would combine GF.36 and GF.37:

F.36 A: $(IH^i \sim C^{-w} \rightarrow V) \rightarrow L$

That same A position, however, is by no means successful in *Laskey*. Rightly or wrongly (if one compares the acts at issue in these cases, say, with those occurring in lawful but dangerous athletic activities)¹⁷⁰ positive law does not define the harm at issue in *Laskey* in purely consensual terms. We have seen that, as with euthanasia, liberal rights jurisprudence has not generally accepted the libertarian proposition that valid consent renders the question of harm irrelevant. The Court thus accepts Z's challenge to the individuals' ability to give valid consent (GF.36, GF.37).

One justification for State interference in *Otto-Preminger* and *Jersild* is the protection of individuals from the unacceptable harm of hate speech (GF.37). The Court might have contemplated that some such individuals consent to incur any ensuing harm through a belief in free speech (GF.41). However, the Court does not examine this position, which, moreover, excludes persons who would not consent. Instead, A argues that any harm caused by the works is insufficient to justify State interference, thus rendering consent irrelevant (GF.40). The Court accepts GF.40 in *Jersild* and GF.37 in *Otto-Preminger*.

*F v. Switzerland*¹⁷¹ concerns an applicant who had been twice divorced. The third time he married a woman six weeks after meeting her and filed for divorce barely two weeks thereafter. Having found the grounds for divorce to be adultery, the divorce court, pursuant to national law, prohibited the applicant from marrying for a period of three years. The applicant asserted a violation of the right to marry,¹⁷² winning by only a 9-8 vote. The State

169. See SMITH & HOGAN, *supra* note 114, at 469.

170. See *Laskey v. United Kingdom*, 1997 Eur. Ct. H.R. (ser. A) at 147-48 (Mr. Loucaides, dissenting).

171. *F v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) (1987).

172. Article 12 provides that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." European Convention on Human Rights art. 12.

defends its temporary prohibition as a measure intended "to protect . . . the rights of others and even the person affected by the prohibition."¹⁷³ By "the rights of others," the State means not only future spouses, but also any children who might be born of the remarriage (GF.37).¹⁷⁴ Z also argues that the prohibition serves A's interests by creating a temporary cooling off period "to take time for reflection . . . to protect him from himself"¹⁷⁵ (GF.36).

As to GF.36, A might have argued that his valid consent to remarry obviates inquiry into harm (GF.39). However, the Court, unwilling to dismiss the relevance of harm, simply deems it to be insufficient. It finds that A would cause no unacceptable harm to himself in exercising the marriage right,¹⁷⁶ thus obviating inquiry into the validity of A's consent (GF.38). Of course, the complaint is brought precisely because A does claim to give valid consent to exercise the right in this case. The value of κ in GF.38 ($\kappa = \sim \lambda$) does not contradict that fact, but only evinces its irrelevance to the dispute.

As to GF.37, A might have adduced a classically liberal position that it would be the responsibility of a future spouse to "know what she's getting into" before consenting to marry the applicant. Such consent would obviate any inquiry into harm (GF.41). However, this is not the Court's approach. The Court notes the measure's punitive effect upon a future spouse who might want to exercise her own right to marry and whose interests are in no way better protected during the intervening period before the applicant is again permitted to wed.¹⁷⁷ However great the harm caused by the applicant's exercise of the Article 12 right, it is less than the harm caused by the State's abridgment of the right, and the harm thereby becomes insufficient to justify interference with the right. Similarly, as to the interests of future children, the Court finds that the harm caused by the abridgment of the right, namely the prospect that such children might be born out of wedlock, is greater than that caused by the applicant's exercise of the marriage right.¹⁷⁸ The comparative harm caused by A's exercise of the marriage right is thus insufficient to justify State interference (GF.40).

The desire to anchor State interference in a discourse of specific harm to others in order to avoid a discourse of general harm to society is illustrated in *Kokkinakis v. Greece*,¹⁷⁹ concerning imprisonment of Jehova's Witnesses for proselytism. According to the Greek trial court, the applicants

173. *F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 17 (1987).

174. *See id.* at 17-18.

175. *Id.* at 18.

176. *See id.*

177. *See id.* at 17-18.

178. *See id.*

179. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993).

"attempted to . . . intrude on the religious beliefs of Orthodox Christians, with the intention of undermining those beliefs, by taking advantage of their inexperience, their low intellect and their naïvety"¹⁸⁰ (GF.37). The Strasbourg Court, however, accepted that A's proselytism had caused insufficient harm to other individuals (GF.40).¹⁸¹

3.2.3 *State Communitarianism* (M)

Where individual rights are restricted on the basis of collective non-consent to unacceptable harm ($Z: \sim IH^i \sim C$), that result can be defined as *formally communitarian* (M): regardless of the restriction's motivation or impact, its formal rationale is the redress or prevention of unacceptable harm to society as a whole. As its formal character can be assumed, we will simply call the position "communitarian":

$$\text{GF.42} \quad Z: (\sim IH^i \sim C \rightarrow \sim V) \rightarrow M \quad (\text{cf. GF.29})$$

Correlative A rebuttals would take the form:

$$\text{GF.43} \quad A: (\sim I \sim H^i \sim \lambda \rightarrow V) \rightarrow L \quad (\text{cf. GF.27})$$

$$\text{GF.44} \quad A: (\sim I \sim \varphi^i C \rightarrow V) \rightarrow L \quad (\text{cf. GF.28})$$

Z's paternalist argument in *Handyside* (GF.37) comports with a communitarian argument that the book is harmful to the morals of society as a whole (GF.42):

$$\text{F.37} \quad Z: ((I \sim PH^i \sim C \sim^w \cdot \sim IH^i \sim C) \rightarrow \sim V) \rightarrow (T \cdot M)$$

The correlative A position is that any harm caused to society by the book is insufficient to justify interference with the right (GF.43). Conjoined with GF.40, a fuller A position can thus be written:

$$\text{F.38} \quad A: (I \sim P \sim H^i \sim \lambda \cdot \sim I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$$

F.38 can be written more economically:

$$\text{F.39} \quad A: (I \sim P \sim I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$$

180. *Id.* at 8 (quoting the Lasithi Criminal Court's judgment of March 20, 1986). *Cf. id.* at 20-21.

181. *See id.* at 20-21.

Indeed, if we wish to conjoin to F.39, the self-evident A position, that there is also no unacceptable I^p harm ($A: I^p \sim H^i \sim \lambda$), then a complete A position can be written even more simply:

$$F.40 \quad A: (\iota \sim H^i \sim \lambda \rightarrow V) \rightarrow L$$

In other words: "There is no unacceptable harm to anyone." The Court, however, accepts F.37.

The same $\sim I$ positions appear in *Kjeldsen*. A's belief that sex education is positively harmful to particular religious beliefs is an assertion of insufficient harm to society as a whole through exemption of the children (GF.43). The Court, however, accepts Z's assertion as to the comparatively greater risk of inadequate sex education to society as a whole. Z's assertion of risk of unacceptable harm to individual children (GF.37) is itself an assertion of unacceptable harm to society as a whole (F.37).

Z's principal argument in *Dudgeon* concerns offense to public morals (GF.42).¹⁸² A rebuts that sheer offense to a disapproving public constitutes insufficient harm, rendering collective consent irrelevant (GF.43). A also proposes a GF.44 argument by challenging the presumption of public non-consent as represented by the State position, asserting that public attitudes have changed and no longer support the prohibition. In *Otto-Preminger* and *Jersild*, the State justifies interference with the article 10 right of expression on grounds of protection of society as a whole, as well as other individuals, from unacceptable harm (F.37). A argues that any harm is insufficient to justify State interference (F.40). *Jersild* accepts F.40. *Otto-Preminger* accepts F.37.

The Z position in *Laskey*, too, refers to unacceptable moral harm to society in general, as well as to unacceptable harm to the individual participants:

$$F.41 \quad Z: ((IH^i \sim C^w \cdot \sim IH^i \sim C) \rightarrow \sim V) \rightarrow (T \cdot M)$$

However, the judgment makes little reference to harm to society as a whole. The "broader moral reasons" behind the prohibition are mentioned more with respect to the relationship between the individual participants ("the respect which human beings should confer upon each other") than with respect to the welfare of society as a whole.¹⁸³ Even if we do cite F.41 to describe the result in *Laskey*, it is clearly the paternalist element that dominates the opinion:

182. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 19-20 (1981). Cf. *id.* at 29 (Zekia, J., dissenting); *id.* at 40-47 (Walsh, J., partially dissenting).

183. *Laskey v. United Kingdom*, 1997 Eur. Ct. H.R. (ser. A) at 132.

F.42 Z: $(IH^i \sim C^{-w} \rightarrow \sim V) \rightarrow T$

The emphasis on the paternalist element in *Laskey* might, of course, be purely strategic. The judges may feel that, by anchoring the judgment in a discourse of physical harm to specific individuals, they can avoid more controversial moral questions. Even if we accept that the *expressly* communitarian arguments (GF.42) in the judgment are so slight as to be non-existent,¹⁸⁴ one might nevertheless feel that it was, in fact, more a communitarian, moral impulse than a sheer paternalist concern with physical harm that motivated the judgment.¹⁸⁵ Such suspicions, however, are unverifiable.

The purely formal character of the variables L, T, and M as jurisprudential concepts becomes apparent in the cases governing positive obligations. The State's assertion of unacceptable collective harm in *Rees*, *Cossey*, and *F. v. Switzerland* rests solely on undue administrative burden (GF.42), which is not a communitarian rationale in any profoundly moral sense. What makes it formally communitarian, however, is the fact that the State can assert all manner of harms which, substantively, may have little in common: prohibitions of, say, treason, passport defilement, and tax evasion may all be justified as being based on the good of society as a whole, although they envisage very different kinds of harms.

The Z positions in the transsexualism cases also include paternalist concerns about promoting medical procedures without full appreciation of their consequences on the individuals or their family members (GF.36, GF.37). As in *Handyside* or *Laskey*, it is these I concerns which might be said to form the basis of more morally laden $\sim I$ concerns about the effects of such "permissiveness" on society generally, although such concerns do not figure strongly in the opinions. An A position as in F.40 succeeds only in *F. v. Switzerland*. In *X, Y & Z v. United Kingdom*, Z positions as in GF.37 are more strongly emphasized.¹⁸⁶

In addition to I interests, the State in *F v. Switzerland* asserts $\sim I$ interests by seeking "to protect . . . the institution of marriage."¹⁸⁷ Z envisages society's continued approval of fault-based divorce, hence a collective rejection of the harm to society of "making a mockery of the institution of marriage."¹⁸⁸ (GF.42). As in *Dudgeon*, one possible rebuttal might take the form of an empirical submission that the more tolerant views

184. See *id.* at 144-45 (Mr. Bratza and Mr. Nowicki, concurring) (referring only to physical harms, and thus entirely embracing F.42).

185. See *id.* at 136 (Pettiti, J., concurring) (noting the overall dangers to society of a "laxisme effréné," i.e., "unrestrained permissiveness").

186. *X, Y & Z v. United Kingdom*, 1997 Eur. Ct. H.R. (ser. A) at 633-35.

187. *F v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 17 (1987).

188. *Id.* at 11 (citing the October 18, 1984, judgment of the Swiss Federal Court).

of society as a whole are not in fact faithfully reflected in the State's position (GF.44). Indeed, the Court notes the abolition of such waiting periods in other contracting States,¹⁸⁹ and its otherwise brief opinion devotes considerable attention to proposals for law reform in Switzerland.¹⁹⁰ Yet, ever loathe to challenge a State's claim to represent society's collective interest, the Court rejects that position.¹⁹¹ Instead, by resolving the case purely on the basis of the applicant's rebuttals on the I interests (GF.38, GF.40), the rebuttal by definition defaults to GF.43. The premise $A: I \sim H^i \sim \lambda$ provides, itself, a sufficient basis for finding that insufficient harm to society renders collective non-consent irrelevant ($A: \sim I \sim H^i \sim \lambda$). Hence, $A: (\neg I \sim H^i \sim \lambda \rightarrow V) \rightarrow L$ (cf. F.40).

3.2.4 State Sovereignty (R)

As observed in Part 2.3.5, A asserts lack of valid consent to incur State-caused harm in one of two ways.

(1) *Either* A *in fact* withholds consent to be arrested with excessive force, detained without counsel, tortured, sterilized, and the like ($A: I^p H^i \sim C^w$; F.24), in which case A asserts volitional withholding of valid consent to incur an unacceptable State-caused harm. Hence a liberal position:

GF.45 $A: (I^p H^i \sim C^w \rightarrow V) \rightarrow L$ (cf. GF.30)

(2) *Or* A's consent to be arrested with excessive force, detained without counsel, tortured, sterilized, and the like is non-volitionally invalid ($A: I^p H^i \sim C^w$, F.22), in which case A's assertion of non-volitionally invalid consent to incur an unacceptable, State-caused harm attributes to the State the obligation to treat individual consent as invalid, thereby attributing to the State a paternalist obligation. As such, under this position, the State *must* treat individual consent as non-volitionally invalid:

GF.46 $A: (I^p H^i \sim C^w \rightarrow V) \rightarrow T$ (cf. GF.31)

In comparison with all foregoing A positions, all of which are liberal, GF.46

189. *See id.* at 16-17.

190. *See id.* at 13-14.

191. *See id.* at 16-17 (noting that the mere retention by a State of an otherwise outmoded view does not perforce justify a finding of a Convention violation).

is the only paternalist V position. It is the only position in liberal rights discourse whereby A attributes to the State the obligation not to honor an act of individual liberty.

Z has two possible responses to either A position: (1) The State-caused harm is not unacceptable, rendering irrelevant the question of individual consent (F.23); or (2) A has given valid consent, rendering the question of harm irrelevant (F.21). Z's position, then, is either that the harm is acceptable regardless of consent or that the consent is valid regardless of the harm. There is thus no link between harm and consent. The State simply asserts its prerogative to exercise its police power, thereby creating what we will call a "State Sovereignty" (R) regime:

GF.47 Z: $(I^p \sim H^{-i} \sim \lambda \rightarrow \sim V) \rightarrow R$ (cf. GF.32)

GF.48 Z: $(I^p \sim \varphi^{-i}C \rightarrow \sim V) \rightarrow R$ (cf. GF.33)

To the extent that *Tyrer* presents a question of retroactive consent, it pits A's GF.46 position against Z's GF.48 position. *McCann, Tomasi*, and *Costello-Roberts* — and *Tyrer* to the extent that Z *does not* adduce an GF.48 position — present no question of non-volitional non-consent, and thus pit A's GF.45 position against Z's GF.47 position.

3.2.5 *Compulsory and Non-Compulsory Regimes* (ρ^c , ρ^{-c})

Where it is useful to speak of the legal regime comported by a v position without specifying it as liberal (L), paternalist (T), or communitarian (M), we can use the second-degree variable ρ (rho),

Ps.12 $\rho \in L, T, M, R$

GF.36, GF.37, and GF.46 all represent paternalist regimes. Their rationales, however, are not identical. GF.36 and GF.37 assert a State prerogative to take a paternalist measure. GF.46 asserts a State obligation to do so. GF.46 asserts that the State *must* do so, attributing to the State a *compulsory* paternalism, while GF.36 and GF.37 attribute to it a discretionary, or *non-compulsory*, paternalism. Similarly, GF.34 attributes to the State the prerogative to interfere with the individual exercise of a right on grounds of unacceptable harm to another individual withholding volitionally valid consent, while F.31 attributes to the State the obligation of respecting individual exercise of the right. Thus, GF.34 attributes to the State a discretionary liberal measure, whilst F.31 requires a liberal measure. An assertion that a regime (ρ) *must* be followed as a compulsory matter can be denoted by use of the marker "c," hence ρ^c . An assertion that a regime (ρ) *may* be followed as a discretionary, or non-compulsory, matter can be denoted by use of the marker " $\sim c$," hence ρ^{-c} . Hence, for GF.46:

$$\text{GF.49} \quad A: (I^p H^{-i} \sim C^{-w} \rightarrow V) \rightarrow T^c$$

For GF.36 and GF.37:

$$\text{GF.50} \quad Z: (I^p H^i \sim C^{-w} \rightarrow \sim V) \rightarrow T^{-c}$$

$$\text{GF.51} \quad Z: (I^{-p} H^i \sim C^{-w} \rightarrow \sim V) \rightarrow T^{-c}$$

For F.31:

$$\text{GF.52} \quad A: (I \sim \phi^i C \rightarrow V) \rightarrow L^c$$

For GF.34:

$$\text{GF.53} \quad Z: (I^{-p} H^i \sim C^w \rightarrow \sim V) \rightarrow L^{-c}$$

3.3 The General Formulas

Accordingly, arguments in liberal rights discourse are subsumed by the general formula:

$$\text{GF.54} \quad \pi: (\imath \eta \kappa \rightarrow \upsilon) \rightarrow \rho$$

As GF.54 represents the greatest degree of determinacy in liberal rights arguments as such, it will be called the *meta-formula of liberal rights*. All liberal rights arguments take some form of the meta-formula, and are expressed as general formulas in Table 2. These general formulas can also be called *meta-arguments*, or ρ positions.

The set of all possible, *i.e.*, all coherent ρ positions, is smaller than that of all conceivable values of GF.54. The following is a conceivable value, in the sense that it fulfills the GF.54 form, but is not a coherent value, as it is sheer gibberish and would never be made by any party:

$$\pi: (\sim IHC \rightarrow V) \rightarrow L^c$$

Thus, not all values that can randomly be “plugged in” to GF.54 generate coherent values. The suggestion that the ρ positions represent possible arguments in liberal rights discourse does not mean that they represent *only* liberal rights arguments. The meta-formula GF.54 states only the necessary conditions for liberal rights arguments and not the sufficient conditions. It does not state some essence of liberal rights discourse, which would distinguish it from other kinds of discourse, and does not necessarily represent a form of speech that would arise only in liberal rights discourse. It states only the conditions that must be fulfilled *if* an utterance is to be an argument about the resolution of a liberal rights dispute.

*Table of Possible Arguments in Liberal Rights Discourse
(p Positions)*

A (v = V)	Z (v = ~V)
GF.55 A: (I ^p ~H ⁱ ~λ → V) → L ^c GF.56 A: (I ^p ~φ ⁱ C → V) → L ^c	GF.57 Z: (I ^p H ⁱ ~C ^w → ~V) → T ^c
GF.58 A: (I ^p ~H ⁱ ~λ → V) → L ^c GF.59 A: (I ^p ~φ ⁱ C → V) → L ^c	GF.60 Z: (I ^p H ⁱ ~C ^w → ~V) → L ^c GF.61 Z: (I ^p H ⁱ ~C ^w → ~V) → T ^c
GF.62 A: (~I~H ⁱ ~λ → V) → L ^c GF.63 A: (~I~φ ⁱ C → V) → L ^c	GF.64 Z: (~IH ⁱ ~C → ~V) → M ^c
GF.65 A: (I ^p H ⁱ ~C ^w → V) → L ^c GF.66 A: (I ^p H ⁱ ~C ^w → V) → T ^c	GF.67 Z: (I ^p ~H ⁱ ~λ → ~V) → R ^c GF.68 Z: (I ^p ~φ ⁱ C → ~V) → R ^c

Table 2

3.4 *Institutional and Procedural Factors*

A meta-discourse applicable to liberal rights generally cannot account for many of the institutional and procedural factors which are specific to particular regimes. Although the discourse governing questions of admissible evidence, burden of proof or production, or judicial review may have their own internal discursive structure and corresponding meta-discourse, any such structure would be formally distinct from the meta-discourse of substantive liberal rights as developed here and would have to

be examined as a separate matter. What can be said, however, from the perspective of the present model, is that such institutional and procedural issues are nothing but means for deciding between an A and a Z position. A question, for example, about whether a piece of evidence is admissible is a question about whether an item serving to support a given π position should be considered. The question, in a given case, whether a court should defer to the act of a legislative body invoked to support a State interference with rights is simply a question about whether the court should accept a Z position.

Of particular interest to the European Convention is the question of derogations under article 15, which has prompted a number of controversial cases. Derogations provisions categorically differ from substantive rights provisions, as they do not invest individuals with additional rights, but, to the contrary, govern the conditions under which States may decline to observe Convention obligations. Whether the jurisprudence of derogations is subject to its own meta-discourse is a question that must be addressed some other time. From the point of view of the present analysis, however, it can be seen as a means for finding in favor of a party *despite* the merits of the opposing parties arguments. A Z position asserting that the State has complied with article 15 is an assertion supporting a finding of $\sim V$ *despite* the possibly superior strength of the A position on conventional, substantive grounds.

4. CONCLUSION

Rights discourse has become a dominant international language of fundamental human interests. That observation, however, only begs the question as to whether there is in fact a unified discourse of rights as such. Standard concepts of "liberty," "democracy," or "reasonableness" purport to provide a general language of liberal rights. However, as products of natural language, their indeterminacy leaves them unable to provide such a language at any significant level of generality.

The determinate elements of liberal rights discourse can best be expressed in a symbolic language, called here a *meta-discourse of liberal rights*. A symbolic language has allowed us to identify those elements without which assertions about liberal rights would be incoherent. Such elements take the form of symbolic variables, which combine to generate a finite set of formulas representing all possible arguments in liberal rights discourse. Those formulas are specific instances of the meta-formula $\pi: (\iota\eta\kappa - \upsilon) \rightarrow \rho$. All rights arguments are disputes about which formula — *i.e.*, which version of the meta-formula — disposes of a given dispute and are therefore also about the set of values that should be ascribed to the component variables of possible formulas. While the set of possible formulas is fixed, the set of values attributable to them is variable and

indeterminate. A meta-discourse affirms and delimits the indeterminacy of rights discourse within determinate bounds.