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THE REFORMATION OF ENGLISH ADMINISTRATIVE LAW? "RIGHTS", RHETORIC AND REALITY

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ABSTRACT. *This article examines and responds to a doctrinal claim, made by an increasing number of commentators, that English administrative law is in the midst of a "reformation" or "reinvention", with the notion of "rights" at the heart of this radical recalibration. The article is critical of such claims on several grounds. First, these claims are steeped in ambiguity, such that the nature and doctrinal scope of the claimed metamorphosis are not clear. Second, these commentators have not undertaken the sort of detailed doctrinal analysis which is required to make credible claims about the development of the law, meaning their broad claims have a strong propensity to mislead, and pass over the nuances and complexities of doctrine. An analysis of significant features of doctrine tends to tell against a wholesale recalibration of administrative law around rights, and indicates an increasingly pluralistic rather than unitary legal order. Third, despite the centrality of the idea of "rights" to their claims, these commentators do not squarely address what they mean by "rights", in general using the term indiscriminately, and thereby plunging their claims into uncertainty. The article demonstrates the importance of conceptual clarity in analysing "rights"-based developments through a doctrinal analysis of "rights" in administrative law, conducted through the prism of W.N. Hohfeld's analytical scheme.*

KEYWORDS: *Administrative Law, Judicial Review, Human Rights Act 1998, Principle of Legality, Anxious Scrutiny, Proportionality, Wednesbury unreasonableness, Public Duties, Rights, Hohfeld.*

Administrative law is not a homogenous body of jurisprudence, but is rather an agglomeration of diverse and complex branches of law … and

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judicial review in each individual branch of administrative law has tended to develop in a distinctive manner.

S.A. De Smith, "Wrongs and Remedies in Administrative Law" (1952) 15 M.L.R. 189, 189

I. Introduction

This article is prompted by a claim being advanced, in one form or another, by an increasing number of scholars whom I term "righting-theorists". Their claim, which I refer to as the "righting-thesis" or "hypothesis", is that English administrative law is being "righted", or put more sensationally that it is undergoing a "rights-based" "reformation" or "reinvention". Such claims are doctrinal or "positive" in nature, rather than normative or "interpretivist": these authors believe they are describing an important change in the nature of administrative law doctrine.

Roughly stated the crux of such arguments is that administrative law is in the midst of a drastic reconfiguration, with the notion of "rights" at the heart of this transformation. This formulation of the basic claim is unavoidably broad because, *inter alia*, there are different versions of the righting-thesis, the overarching claims are shot through with ambiguity, and concepts central to the thesis, such as "rights", are not analysed seriously.

This article critically analyses such claims. In doing so it focuses on the work of two prominent proponents of the righting-thesis, who have each dedicated scholarly papers to the topic: Thomas Poole in his 2009 article in this journal, "The Reformation of English Administrative Law"[1] and the late Professor Michael Taggart, in his 2003 chapter, "Reinventing Administrative Law".[2] The article proceeds by examining a number of issues raised by these righting-hypotheses. Section II explores whether the claimed reinvention or reformation of administrative law entails the creation of a new order of administrative law, which equates with the Human Rights Act 1998 (HRA) and which exists in parallel to a subsisting and unchanged older order, or the metamorphosis of an old order into a new and different order. Section III considers what it means for the law to undergo a rights-based reinvention or reformation. Section IV examines the central concept of "rights".

This article does not seek to provide a conclusive answer to whether administrative law is being "righted", has undergone a "reformation" etc.

[1] (2009) 68 C.L.J. 142 ["Reformation"].
[2] In N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart 2003), ch. 12 ["Reinvention"].

(principally because I doubt the usefulness of such broad brush claims), though it does cast doubt on the claims made by righting-theorists. It is critical of those claims principally on two grounds.

First, righting-theorists have not undertaken the sort of detailed analysis of doctrine which is required to make credible claims about legal development, meaning their broad claims have a strong propensity to mislead, and pass over the complexities of doctrine. Significant features of doctrine tell against a wholesale recalibration of administrative law around rights, and suggest an increasingly pluralistic legal order rather than one increasingly organised around one central idea.

Second, these theorists fail to recognise and take seriously the possibility that the notion of "rights", relied on by judges in a number of administrative law contexts, may have different meanings in different contexts. In Section IV, I demonstrate the importance of taking both doctrine and the concept of "rights" seriously in any analysis of "rights"-based developments through a doctrinal analysis of areas of administrative law where judges have relied on the notion of "rights", and which makes use of Hohfeld's analytical scheme. We observe that some references to "rights", as under the HRA, can confidently be said to denote the presence of individual legal claim-rights, whereas others cannot, such as references to "fundamental rights" within the principle of legality. Importantly, this analysis also demonstrates that notions of "rights" are being woven into administrative law in different ways. Such approach, which emphasises conceptual clarity, and takes seriously the nuances and complexities of doctrine, has the potential to enable us accurately to identify and explain the nature of legal change.

I note that I use the term "rights" relatively loosely in the first two sections of this article, in line with righting-theorists' use. In Section IV I make clear the senses in which I use the term.

II. A New Separate Order or a Reformed Old Order? Analysing the Basic Claims of Righting-Theorists

At least two possible variants of the righting-hypothesis emerge from the literature. On the one hand there is a narrow variant, which holds that the HRA has ushered in a new, rights-based order of review, which exists alongside a still subsisting old order. The old order includes traditional common law review doctrines, which are unlikely to undergo a rights-based transformation. On the other hand there is a broader, more radical variant, which holds that the old order of administrative law has been or is being transformed into a new, rights-based order, with the righting-process including but going beyond the HRA, affecting and transforming other significant aspects of the law in important ways. It is not clear which variant Poole supports; his work

evinces an unresolved tension between the two variants. Taggart's is closer to the broader variant. As advanced by their proponents, both variants are problematic.

Poole's over-arching claim is a broad one of the "reformation" of administrative law: a "profound"[3] change, "structural and fundamental",[4] and which has "rights" and proportionality at its core. Central to Poole's thesis is his drawing of a contrast between "old order", "older order" or "traditional" judicial review, and "reformation" or "new order" review, or the "new" administrative law,[5] within which "rights" and "substantive review" have come "centre stage", which is imbued with "talk about rights, proportionality and deference",[6] and characterised by a "new framework of rights".[7] However, Poole does not squarely address whether this "new order" is a distinct phenomenon, which equates with the HRA, and which is separate from and exists alongside a still-existing and more or less unchanged older order; or alternatively whether this "new order" is an evolution of the "old order", such that the reformation entails a fundamental recasting of administrative law in general, as a new rights-based or predominantly rights-based order. On the one hand, when Poole discusses the core features of this "new order" he *only* discusses the HRA, specifically the proportionality method, while not seriously addressing any other aspect of administrative law, which tends to suggest that the new order simply equates to the HRA and the jurisprudence under it.[8] On the other hand, at the level of language there is some suggestion that Poole intends the broader claim. There are indications that he considers the old order to have passed, speaking of it in the past tense: he speaks of what the "old order *offered*" and contemplates what "traditional" judicial review "*was*".[9] Suggesting the gradual metamorphosis of an old order into a new "rights"-based order is his claim that "[t]he era we are *leaving*" "*had* at its core concerns" with "the examination of powers and procedures",[10] while the era we are entering is one in which "[r]ights and substantive review, like Cinderella, have escaped subservient positions to take centre stage",[11] while he says that language of *Wednesbury* and *vires* "*increasingly gives way*" to "talk about rights, proportionality and

[3] "Reformation", pp. 165, 167.
[4] Ibid., p. 142.
[5] Ibid., pp. 142–147.
[6] Ibid., pp. 142, 144.
[7] Ibid., p. 153.
[8] E.g. ibid., pp. 146–147, 148ff. Similarly, Poole only discusses proportionality in his other paper which broaches the subject: T. Poole, "Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights" in L. Pearson, C. Harlow and M. Taggart (eds.), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart 2008), 34–42 ["Age of Rights"].
[9] "Reformation", pp. 146–147 (emphasis added).
[10] Ibid., p. 142 (emphasis added).
[11] Ibid., p. 144.

deference".[12] He has spoken of a "trend towards greater judicial protection of rights … in which human rights seem to find more varied and ever stronger juridical footholds",[13] and of the HRA "facilitat[ing]" "the restructuring of review",[14] which could be taken to suggest a process that extends beyond the HRA and entails a more general recalibration of judicial review, though the doctrinal scope of the claims is unclear. The language of "transformation", "reconfiguration" and "reformation" also suggest the forging of something new out of the old. In another paper written around the same time as his Reformation paper there are similar ambiguities. In one passage he equates "rights-based" review with review under the HRA, observing that while proportionality "governs" "rights-based" review, *Wednesbury* is the test of substantive review within "ordinary" review.[15] However, there are indications that he considers the righting-process to go beyond the HRA. For example, he observes the "embrace of rights" within administrative law which has occurred "particularly" – and by implication not exclusively – "as a result of the passing of the HRA".[16] Linked to this central ambiguity is his ambiguous treatment of cases at common law which refer to fundamental rights; it is not clear whether he considers such developments to form part of the reformation or not.[17]

Thus, it is difficult to know which thesis Poole intends. Either way the thesis appears flawed. If he intends the broader thesis, his acknowledgement that a large body of doctrine has not and will not be reconfigured, despite the "imperialist" quality of rights,[18] tends to undermine his claim of reformation, or at least calls for reflection. Of course there may be exceptions to a general trend. However, Poole's list of doctrines which have not changed and which he considers are unlikely to change is sizable and includes major doctrines of review which form the bread and butter of the Administrative Court's work, including the "familiar tests" for delegation, improper purpose, reason-giving, bias, relevant considerations "and so on";[19] indeed, this list suggests that a concern for "powers and procedures"[20] *remains* a core concern of administrative law, as opposed to having been displaced by

[12] Ibid., p. 142 (emphasis added).
[13] Ibid., p. 145.
[14] Ibid.
[15] "Age of Rights", p. 41.
[16] Ibid., p. 43.
[17] "Reformation", p. 145; ibid., pp. 19, 33.
[18] "Reformation", p. 147.
[19] Ibid. As Poole has said in another paper, "[m]any cases of judicial review do not involve rights, however defined. This being so, it would be possible to advance an argument that any theory that prioritizes rights is likely to be incapable of explaining – or likely to undervalue – many other aspects of the jurisprudence" ("Legitimacy, Rights and Judicial Review" (2005) O.J.L.S. 697, 703 ["Legitimacy"]); see also, S. Shah and T. Poole, "The Impact of the Human Rights Act on the House of Lords" [2009] P.L. 347, 370–371.
[20] See note 10 above.

a new rights-framework. Furthermore, Poole acknowledges that "[e]ven *Wednesbury* might survive as a test for unreasonableness outside the context of rights", while "[j]udicial review will continue to resist the urge to recast it purely and simply as an instrument for the protection of individual rights".[21] This hardly sounds like a reformation. This may explain why in another paper Poole is far less strident in the formulation of his overarching claims: "it is not necessarily an overstatement to regard the HRA as the catalyst for what *may* amount to a reformation of English administrative law", proportionality "carr[ies] the *potential perhaps* to revolutionise the discipline".[22] Despite the bold title and claims of his Reformation article, one is left wondering whether there has been a reformation or not?

If Poole intends the narrower thesis, it is likely to mislead to make bold claims of the reformation of administrative law; his Reformation article only focuses on one aspect of review, proportionality under the HRA, he considers much review doctrine will remain untouched by the righting process, and he does not undertake a serious analysis of the ways in which notions of rights or rights-related phenomena might be infiltrating administrative law outside of the proportionality method under the HRA. Therefore, it may be more advisable to say that administrative law has undergone a "rights"-based "expansion", as a result of addition of the HRA. And analyse this new addition as a separate phenomenon which encompasses a great deal more than proportionality and is distinct from other significant aspects of administrative law which have nothing to do with "rights". Further, if Poole intends the narrow variant, it is unclear why he adopts the confusing jargon of "rights-based"/"new order" review; one can more simply speak of "review under the HRA". It is not clear what such rhetoric adds, particularly given it is unclear what the "new order" entails (for example, does it include review under the HRA which does not entail proportionality balancing?), while the central concept of "rights" is never defined, leaving uncertain the reach of the notion of "rights-based" review.

While the nature of Poole's hypothesis is not clear, Taggart's is more readily discernible. His hypothesis approximates to the idea that a new order has been created out of and will ultimately supplant the old. He propounds that an old order, that characterised by the classic model of review and the unitary, "so unreasonable" standard of *Wednesbury* review, has been (or is being) "reinvented" as a new "constitutionalised" order, characterised by "rights", a "rights-centred approach" which requires justification for all rights-infringing

[21] "Reformation", p. 147.
[22] "Age of Rights", pp. 33–34 (emphasis added).

behaviour, balancing of rights and interests, application of proportionality method, and a "culture of justification".[23] Like Poole, Taggart briefly charts the development of administrative law from the judicial "awakening" of the 1960s through to the age of the "righting" of administrative law – a process that began before the HRA but which is "confirm[ed]" by the HRA, with its "rights-centred" approach and proportionality method.[24] In line with a broader conception of the righting-hypothesis, he has argued in other papers that human rights law, defined broadly to include domestic, regional, and international human rights instruments, is "influencing all the other parts" of "public law" and "unifying" the "tub" of public law, while rights-adjudication and proportionality are said to be capable of forging the elements of public law into a "coherent whole".[25] The claimed metamorphosis thus goes beyond the HRA and associated proportionality method, although those are core, emblematic features of the reinvention. Poole, although he has some criticisms, does appear to accept the broad thrust of Taggart's constitutionalisation thesis, but apparently *only* in the wake of the HRA,[26] reflecting the central tension in his work between the narrow and broad views.

There are two immediate problems with the righting-claims as they are advanced by righting-theorists, particularly in respect of the broad variant: (1) doctrine is not taken seriously, and (2) significant features of administrative law cast doubt on the claims.

[23] "Reinvention", pp. 311–312, 332–335; M. Taggart, "The Tub of Public Law" in D. Dyzenhaus (ed.), *The Unity of Public Law* (Oxford 2004), 475 ["Tub"]; and see D. Dyzenhaus, M. Hunt and M. Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 O.U.C.L.J. 5 ["Principle of Legality"]. For completeness I note that tucked away in the final footnote of Taggart's Reinvention paper he states that "[d]ue to space constraints" his argument is confined to administrative law cases concerning infringements of "rights" in rights-instruments and at common law (at p. 334, note 144). It is difficult to know what to make of this. Throughout the paper his claims are made in the broadest possible terms, his central argument expressly being that "British administrative law is in the process of being reinvented" (at p. 312), while his reinvention claim is repeated without caveat elsewhere (e.g. "Tub", p. 475; M. Taggart, "Proportionality, Deference, *Wednesbury*" [2008] N.Z. L. Rev. 423, 461). Muddying the nature and scope of this caveat are Taggart's view that the law's "role" in "protecting rights" may not be visible at the level of doctrine, and his adoption of a undefined notion of "rights" (at p. 326). In any case Taggart's express inclusion of generally applicable common law doctrines, such as *Wednesbury* and reason-giving, as well as the procedure governing review, within his reinvention thesis, coupled with his views that "rights" and proportionality are a fixture at common law (at p. 334), and that public law is being forged into a coherent whole, make clear that he considers there has been radical change well beyond the HRA. Further, his description of the remainder of administrative law, once the area concerning rights has been subtracted, as a "rump" suggests he foresees the area concerned with rights as predominant within a reinvented, "righted" administrative law (at p. 334 note 144, and see pp. 323ff).

[24] "Reinvention", pp. 323–327; "Reformation", pp. 142–145.

[25] "Tub", pp. 475, 479. On the unification theme see also D. Dyzenhaus, "*Baker*: The Unity of Public Law?" in D. Dyzenhaus (ed.), *The Unity of Public Law* (Oxford 2004), ch. 1; J. Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] P.L. 671, 683.

[26] "Age of Rights", pp. 18–19; "The Reformation of English Administrative Law" (LSE Law, Society and Economy Working Paper 12/07), 2–4 <www.lse.ac.uk/collections/law/wps/WPS12-2007PooleN2.pdf>.

A. Taking Doctrine Seriously

If commentators wish to explain the current state of administrative law as a whole, how it has developed, and the place of notions of "rights" within those developments, they ought closely to examine a cross-section of administrative law doctrine. However, Taggart and Poole do not undertake this task. They place heavy, if not exclusive emphasis on the proportionality methodology under the HRA. This is perhaps not surprising as a defining characteristic of post-HRA public law scholarship is a wholly disproportionate focus on proportionality and the linked concept of deference.[27] However, one cannot hope to sustain (or test) the claim that a vast body of doctrine is being drastically re-configured through analysis of only one or two doctrines.

For example, review on procedural grounds is largely ignored.[28] But even in respect of review on substantive grounds, there is no serious analysis of, for example, substantive legitimate expectations, despite some considering such norms to be a form of right,[29] and application of a proportionality-type method in that field.[30] Thus, Poole criticises Taggart's analysis on the basis that "there [is not] any real discussion of the relationship between the 'old' tests (legality, procedural fairness, unreasonableness and their like) and the 'new' principles of 'harder edged legality' and 'constitutional balancing'".[31] There is force in this criticism. However, Poole in his own account does not seriously address the interrelationship either: his consideration of the common law is cursory, this omission being linked to the tension between narrow and broad variants within his account.

A further serious omission, not uncommon in commentary on "English administrative law", is that review on EU grounds is not addressed. Neither Poole nor Taggart consider how such review fits or does not fit within their claims of fundamental change. This is despite EU law forming a fundamental "pillar"[32] of review and a staple part of the Administrative Court's work,[33] the language of "rights" permeating fields of EU law,[34] and proportionality forming a fundamental principle of EU law. Indeed, given the righting-theorists' focus on

[27] See similarly, R. Rawlings, "Modelling Judicial Review" (2008) 61 C.L.P. 95, 118–119.
[28] This is despite the central importance of procedural review in contemporary public law. See for example: A. Tomkins, "National Security and the Role of the Courts: A Changed Landscape?" (2010) 126 L.Q.R. 543.
[29] J. King, "Proportionality: A Halfway House" [2010] N.Z. L. Rev. 327, 363; *R. v Devon CC, ex p. Baker* [1995] 1 All E.R. 73, 88.
[30] See note 153 below.
[31] "Age of Rights", p. 18.
[32] Rawlings, "Modelling Judicial Review", pp. 96–97, 114–115.
[33] E.g. R. Gordon, *EC Law in Judicial Review* (Oxford 2007); G. Anthony, *UK Public Law and European Law* (Hart 2002); for a snapshot see: T. de la Mare, "The Use of EU Law in English Courts" [2012] J.R. 111.
[34] G. De Búrca, "The Language of Rights and European Integration" in G. More and J. Shaw (eds.), *New Legal Dynamics of European Union* (Clarendon 1995), ch. 3.

proportionality as *the* fundamental feature of the reinvention/reformation, it is not clear why proportionality under the HRA is placed at the heart of their claims, whereas the EU principle is ignored.

B. Casting Doubt on the Righting-Thesis

A full survey of administrative law would be required to analyse thoroughly the place of "rights" and proportionality. That is not possible here. However, consideration of certain significant features of administrative law, including those cited by righting-theorists in support of their claims, tends to cast doubt on the grand claims of reinvention and reformation, and reinforces the argument that such claims must be backed by thorough doctrinal analysis. The focus here is on the common law of review.

Taggart places particular emphasis on two aspects of the common law. He considers that the gradual development of the requirement on administrators to provide reasons for decisions forms part of the move towards a "culture of justification",[35] while he argues that *Wednesbury* is in the process of reinvention, is likely to be replaced by or blended with proportionality, and that a "rights-centred approach" and "the creation of justificatory mechanisms to instantiate the Rule of Law" are required to complete the "desired reinvention".[36]

It is true that the "trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons".[37] However, as recent authority affirms,[38] the duty has not been "reinvented" as a generalised obligation, as Taggart wished.[39] Nonetheless, senior judges have observed that the law may need to be reappraised in the wake of the HRA, "at least in relation to those cases where a person's civil rights and obligations are being determined", and which therefore fall within Article 6(1).[40] Whether this "wide-reaching review of the position at common law"[41] will occur remains to be seen. But it seems highly unlikely that it would result in a reinvention of the reason-giving duty. First, an individual can bring a claim directly under Article 6(1), meaning there is no gap to be plugged. Second, the scope of application of Article 6(1) is far narrower than that of the common law duty, being limited to circumstances where the individual's civil

[35] "Reinvention", pp. 332–334.
[36] Ibid., pp. 324, 335; Tub, pp. 474–475. Note that on a *normative* level Taggart originally favoured the proportionality method being applied to both rights and non-rights cases but later changed his mind, at least in the New Zealand context: Taggart, "Proportionality, Deference, *Wednesbury*".
[37] *Stefan v GMC* [1999] 1 W.L.R. 1293, 1300.
[38] *R. (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312, [2009] 3 All E.R. 539 at [8]; *Gupta v GMC* [2001] UKPC 6, [2002] 1 W.L.R. 1691; M. Elliott, "Has the Common Law Duty to Give Reasons Come of Age Yet?" [2011] P.L. 56.
[39] "Principle of Legality", p. 23; "Reinvention", p. 333.
[40] *Stefan*, [1999] 1 W.L.R. 1293, p. 1301; *Hasan*, [2008] EWCA Civ 1312 at [8].
[41] *Stefan*, ibid.

rights are at stake in judicial or quasi-judicial settings,[42] whereas the common law duty has, for example, been recognised where mere "interests" are at stake.[43] It is therefore difficult to see how Article 6(1) could stimulate generalisation of the common law obligation, while Article 6(1) demonstrates how, *contra* Taggart's thesis, a narrow focus on rights and the demands of a culture of justification can pull in opposite directions, rather than march hand-in-hand.

Wednesbury has been at the forefront of righting-claims. While there was a time in the early 2000s when it seemed likely *Wednesbury* might receive its "burial rights", and while there is the odd judicial pronouncement that *Wednesbury* has had its day,[44] *Wednesbury* is alive and kicking, having been applied by five-, seven- and nine-Justice panels of the Supreme Court within the last two years.[45] Even in the context of the anxious scrutiny variant the final legal question remains one of manifest unreasonableness[46] (while the variant plays a limited role outside the asylum context).[47] That *Wednesbury*'s "reinvention" has not occurred, and seems increasingly unlikely, tends to undermine Taggart's hypothesis of a more general reinvention of administrative law, especially given *Wednesbury's* "protean quality" makes it the kind of doctrine that is particularly "susceptible to reinvention".[48] One key reason why *Wednesbury* has not been supplanted by a free-standing proportionality ground is that the HRA removed the impetus for change.[49] In *Watkins* Lord Rodger, referring to the courts' increasing recourse to the language of "rights" within some review contexts in the pre-HRA era, candidly observed: "In using the language of 'constitutional rights', the judges were, more or less explicitly, looking for a means of incorporation [of the ECHR] *avant la lettre*, of having the common law supply the benefits of incorporation without

[42] M. Elliott, *Beatson, Matthews and Elliott's Administrative Law*, 4th ed. (Oxford 2011), 408; *R. (Wooder) v Feggetter* [2002] EWCA Civ 554, [2003] Q.B. 219 at [46].

[43] E.g. *R. v Higher Education Funding Council, ex p. IDC* [1994] 1 W.L.R. 242, 263.

[44] *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 A.C. 532 at [32]; *R. (ABCIFER) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] Q.B. 1397 at [32]–[37]; *Doherty v Birmingham CC* [2008] UKHL 57, [2009] 1 A.C. 367 at [135]; *R. (Quila) v Secretary of State for the Home Department* [2010] EWCA Civ 1482, [2011] 3 All E.R. 81 at [34]–[37] (cf. [78]).

[45] *R. (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, [2011] 4 All E.R. 881; *R. (KM) v Cambridgeshire CC* [2012] UKSC 23, [2012] 3 All E.R. 1218; *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245; see also *In re Duffy* [2008] UKHL 4.

[46] See note 252ff below. It is sometimes claimed that in *Daly* Lord Bingham applied proportionality at common law, and thereby departed from *Wednesbury*. Assuming he did apply a proportionality method, he did so in the context of the interpretive principle of legality, such that there was no departure from *Wednesbury*. That he saw the inquiry as one of *vires* is captured by his conclusion: "Section 47(1) of the 1952 Act does not authorise such excessive intrusion, and the Home Secretary accordingly had no power to lay down or implement the policy in its present form" (*Daly*, [2001] UKHL 26 at [21], and see [31]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167 at [13]).

[47] King, "A Halfway House?", p. 362.

[48] "Reinvention", p. 324; "Tub", p. 474.

[49] As Taggart has himself acknowledged: "Principle of Legality", p. 17.

incorporation. Now the [HRA] is in place, such heroic efforts are unnecessary".[50] Similar stymieing effects are observable elsewhere, for example in tort.[51]

There are examples within the common law of pockets of doctrine which have been significantly modified under the influence of ideas of rights and/or proportionality. The principle of legality, discussed below, is a paradigm example.[52] However, modification of several pockets of doctrine does not constitute a reinvention and we are far from witnessing the realisation of Taggart's extravagant (and somewhat ambiguous) vision of the "generalis[ation of] the methodology of constitutional balancing to the common law of judicial review",[53] the unification of public law through infiltration of human rights norms and the proportionality method,[54] and a "constitutionalised" administrative law "founded" on the protection of "fundamental" or "constitutional values" (not expressly defined), the foremost (or at least that by far and away most often mentioned) being "fundamental human rights".[55] It remains difficult to imagine how significant and traditional doctrines of review such as improper purpose, delegation, relevant considerations, bias, review for factual error, and "bog-standard" *vires* review, which forms the central plank of many review challenges and of which the principle of legality forms the tip of the iceberg, could be recalibrated around a "rights-centred"[56] approach or human rights, or "revolutionise[d]"[57] by the principle of proportionality,[58] nor where the impetus for such a disruption of settled doctrine would come from. The same can be said for other aspects of the law, such as the law governing the status of unlawful administrative action and the scope of review, as well as disputes concerning relationships between governmental institutions. In this vein the Preface to the tenth edition of *Wade and Forsyth on Administrative Law*, after acknowledging the significance of the HRA, warns that "this does not mean that classical administrative law has been displaced or will be displaced by some form of rights based judicial review. On the contrary many cases will still arise where there is no human rights question to be decided. Moreover, cases in

[50] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 A.C. 395 at [64].
[51] E.g. ibid., at [26], [64], [73]; *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225 at [136]; *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 A.C. 406. The development of the action for misuse of private information is the exception (*Campbell v MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457), but this was more or less directly required by the Strasbourg jurisprudence.
[52] See text to notes 116ff, 219ff below.
[53] "Principle of Legality", p. 31.
[54] "Tub", pp. 475, 479; ibid.
[55] "Principle of Legality", pp. 6–7, 30–34.
[56] "Tub", pp. 475, 479; ibid, pp. 30–32.
[57] "Age of Rights", p. 34; "Tub", p. 475.
[58] Though it is easier to see how some of these doctrines might to some extent be affected by rights-based thinking than others. Relevant considerations is one example: *Tavita v Minister of Immigration* [1994] 2 N.Z.L.R. 257.

which human rights issues are argued are, nonetheless, often decided on points of classic principle".[59] High-profile "rights"-based developments in the appellate courts may grab academic headlines, but the reality is that a vast number of review proceedings which never reach the appellate level or appear in the law reports are concerned with the application of axiomatic principles to street-level decision-making.[60]

Further, there are examples of a retreat from a focus on rights. In deciding whether a duty of procedural fairness arises the courts traditionally required an applicant to demonstrate that one of their "rights", generally in private law, had been affected. However, over time the courts have liberalised the conditions-precedent. For example, in *McInnes* Megarry V-C held that a duty of fairness could arise outside of a case where a right, "in the strict sense" of a right correlative to a duty, was at stake, such as in a case concerning a mere liberty.[61] In this way the law has extended procedural protection to a greater range of individual interests by moving beyond a focus on rights.

Similarly, within the cutting-edge developments on consultation individual interests are increasingly afforded procedural protection, but these developments do not rest on ideas of "rights", having expressly been driven by the imperatives of fairness and good administration.[62] Whether a common law duty to consult, say on a policy change, arises on the facts does not appear to depend on whether the change affects any individual or group of individuals' "rights", human or otherwise; what is relevant is whether there has been a past promise or practice of consultation or otherwise, whether the change in policy would have a "pressing and focussed" "impact" on "potentially affected persons" (there being no rider that the "impact" must be on "rights").[63] It is difficult to conceptualise the Sedley/*Gunning* requirements for a fair consultation as concerned with "rights", or entailing the application of rights-based standards; the focus is on fairness and good administrative practice.[64] Also, the courts have taken a flexible approach to the question of who ought to be consulted, there being no criterion, for example, that those whose "rights" are affected must be consulted, or that the class of persons who ought to be consulted is limited to those whose "rights" are affected.[65] Further, it is difficult to

[59] H.W.R Wade and C.F. Forsyth, *Administrative Law*, 10th ed. (Oxford 2009), xi.
[60] C. Harlow and R. Rawlings, *Law and Administration*, 3rd ed. (Cambridge 2009), 713–714; M. Sunkin et al, "Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales" [2007] P.L. 545. This is one reason why general conclusions about the impact of the HRA cannot be drawn from empirical studies of its impact in the House of Lords: Shah and Poole, "The Impact of the Human Rights Act", pp. 369–370; cf. "Reformation", pp. 144–145.
[61] *McInnes v Onslow-Fane* [1978] 1 W.L.R. 1520, 1528.
[62] e.g. *R. (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755 at [30], [50]; C. Sheldon, "Consultation: Revisiting the Basic Principles" [2012] J.R. 152.
[63] Ibid. at [49]–[50].
[64] *R. v Brent LBC, ex p. Gunning* (1986) 84 L.G.R. 168.
[65] Sheldon, "Consultation", pp. 156–157.

explain the emergent law by reference to a "culture of justification", given consultation concerns inputs rather than justifications for outcomes, while the vibrancy of such common law developments puts paid to any suggestion of an "old order" in decline, or that if the old order is to evolve it be will under the influence of rights or proportionality.

Procedure and remedies are not in general addressed by righting-theorists, yet these are fundamental features of modern judicial review. Harlow and Rawlings have demonstrated how standing, remedies and substantive law form a "system" in which the individual components are closely interconnected, and may morph as a result of changes up-stream or down-stream: "particular procedural and/or substantive changes frequently have knock-on effects elsewhere in the system".[66] If the substantive law of review has undergone a radical reformation it seems plausible to expect such changes to be reflected in procedure and remedies. Furthermore, remedies and procedure *are part of* administrative law, and warrant investigation in their own right. However, there is little evidence of fundamental change within these significant features of review.

In terms of procedure, if the focus of the law is increasingly on the individual's rights and their protection there would arguably be less of a rationale for allowing interest groups or publicly-spirited individuals, whose interests are not directly affected, to initiate proceedings, especially where the affected individual is capable of bringing the claim;[67] indeed, initiation of proceedings by unaffected parties could be viewed as an illegitimate interference with the right-holder's autonomy. We see the link between rights and narrow standing rules in private law, where standing is generally limited to the rights-holder,[68] and under the HRA, which limits standing to "victims" of alleged rights-violations i.e. generally only a person whose Convention rights are directly affected by the impugned act.[69] Thus, if the common law of review were being "righted" we might expect a gradual reversal of the liberal approach to standing that has subsisted since the *Fleet Street Casuals* case[70] and a return to an approach synonymous with

[66] Rawlings, "Modelling Judicial Review", p. 97; C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge 1992), ch. 7; *Law and Administration*, ch. 15.

[67] See D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55 M.L.R. 44, particularly 47, 49, 70; T.R.S. Allan, *Constitutional Justice* (Oxford 2001), 194–199. Note that the presence or absence of another responsible challenger is a relevant factor in deciding upon standing under the prevailing approach: *R. v Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd.* [1995] 1 W.L.R. 386, 395; *R. v Inspectorate of Pollution, ex p. Greenpeace Ltd. (No. 2)* [1994] 4 All E.R. 329, 350.

[68] E.g. *Morris v Beardmore* [1981] A.C. 446, 454E; *Hunter v Canary Wharf Ltd.* [1997] A.C. 655, 692, 724; *MCC Proceeds Inc. v Lehman Bros International (Europe)* [1998] 4 All E.R. 675, 685–686; *Alfred McAlpine Construction Ltd. v Panatown Ltd.* [2001] 1 A.C. 518.

[69] HRA, s. 7(1).

[70] *R. v Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617.

the classic model.[71] Within that "interest-based" model "administrative acts [were] not necessarily reviewable if they cause[d] no injury to an individual interest", or "merely because [the act was] unlawful";[72] "*Locus standi* … often depended on possession of a legal right".[73] However, today "[s]tanding is typically the dog that does not bark".[74] The dominant factor remains the merits of the case rather than the effect on the applicant's interests.[75] Pressure groups and publicly-spirited individuals are regularly granted standing.[76] Such proceedings have reached the House of Lords and Supreme Court a number of times in recent years, with no question raised as to the propriety of such groups being accorded standing,[77] including in cases where the challenged act directly affected the interests of an individual not party to the proceedings.[78] Lord Reed, in a recent Supreme Court decision, could not have been clearer when he contrasted the standing rules on review and the rights-based criteria in private law:[79]

> A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function [on review] of preserving the rule of law, so far as that function requires the court to

[71] An alternative hypothesis is that the common law is being "righted", or that the basic norms were already "rights", but that the nature of those rights is distinct from that of rights under the HRA: see J. Miles, "Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication" (2000) 59 C.L.J. 133; text to note 268ff below.

[72] C. Harlow, "A Special Relationship? American Influences on Judicial Review in England" in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Oxford 1996), 86.

[73] Ibid.

[74] Rawlings, "Modelling Judicial Review", p. 101 note 30.

[75] *World Development Movement*, op. cit., p. 395; *Inland Revenue Commissioners*, op. cit., p. 644; *R. v Somerset CC, ex p. Dixon* [1998] Env. L.R. 111, 116–118, 121; *R. v Monopolies and Mergers Commission, ex p. Argyll Group plc.* [1986] 1 W.L.R. 763, 773. Of course an applicant's case for standing can only be strengthened if their interests are directly affected: *R. (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546, [2004] 1 W.L.R. 1761 at [23].

[76] E.g. *R. (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC (Admin) 2497 at [3]; *R. (Hasan) v Secretary of State for Trade and Industry* [2007] EWHC (Admin) 2630 at [8]; *R. (UK Uncut Legal Action Ltd.) v Commissioners of Her Majesty's Revenue and Customs* [2012] EWHC (Admin) 2017; *R. (Greenpeace Ltd.) v Secretary of State for Trade and Industry* [2007] EWHC (Admin) 311; *R. (Greenpeace Ltd.) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWCA Civ 1656; *R. (CPAG) v Secretary of State for Work and Pensions* [2012] EWHC (Admin) 2579; *R. (CPAG) v Secretary of State for Work and Pensions* [2011] EWHC (Admin) 2616.

[77] E.g. *R. (CPAG) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 A.C. 15 (concerning *personal* obligations and liabilities of beneficiaries in respect of overpaid social security benefits); *R. (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 A.C. 756.

[78] E.g. *R. (Quintavalle) v Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 A.C. 561.

[79] *AXA General Insurance Ltd. v HM Advocate* [2011] UKSC 46, [2012] 1 A.C. 868 at [169]–[170]; see also *Walton v Scottish Ministers* [2012] UKSC 44 at [90]; *O'Reilly v Mackman* [1983] 2 A.C. 237, 275.

> go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing.

Oddly, Taggart links the emergence of rights-adjudication to the liberalisation of standing rules.[80] At times he passes over the narrowness of the standing rule under the HRA,[81] that liberal standing rules are synonymous with a "public interest" model of review as opposed to an individualistic rights-based model,[82] and that judges in leading cases, including Lord Reed (above), have justified the liberalisation of standing rules by reference to the importance of ensuring vindication of the rule of law, not rights.[83] Taggart also argues that changes to other procedural features, such as discovery and cross-examination, indicate that "[a]s administrative law is being reinvented so is the procedure that supports and sustains it".[84] The argument overreaches. In England (and the UK generally) the loosening of restrictions on discovery and cross-examination within review have occurred squarely within the HRA context, the courts drawing a bright line between HRA claims, specifically those entailing the proportionality method or a claim for damages, for which procedural restrictions may be loosened, and review proceedings on common law grounds, on the basis that the nature of the claims is fundamentally distinct.[85] Indeed, courts have gone so far as to hold that certain classes of HRA case *ought* to be brought via ordinary procedure.[86] This striking procedural cleaving of HRA claims, or at least classes of HRA claim, from those on common law grounds tends to suggest HRA claims are distinctive, rather than emblematic of a wholly reinvented administrative law.

Turning to remedies, if the focus of the common law were increasingly upon individual rights one might expect a move away from specific relief aimed at maintaining order in the administrative system and enforcing public duties, such as quashing and prohibiting orders, towards compensatory relief geared to correcting the negative effects of rights-violations on the individual. The link between individual rights and damages is demonstrated by the availability of damages under the HRA to compensate for personal losses consequent

[80] "Reinvention", pp. 329–330.
[81] Ibid., p. 330.
[82] Harlow, "A Special Relationship?", pp. 87–88, 92.
[83] E.g. *Inland Revenue Commissioners*, op. cit., p. 644; *World Development Movement*, op. cit., p. 395.
[84] Taggart, "Proportionality, Deference, *Wednesbury*", pp. 463–465.
[85] E.g. *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 A.C. 650; *Ruddy v Chief Constable of Strathclyde* [2012] UKSC 57; *R. (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 W.L.R. 419 at [24]–[27], [56]–[62].
[86] *Ruddy*, ibid.; *Wilkinson*, at [61]; *ID v Home Office* [2005] EWCA Civ 38, [2006] 1 W.L.R. 1003 at [105].

upon a rights-infringement.[87] It is also evident in the criteria for *Francovich* liability, the first of which is that the rule of law infringed is intended to confer "rights" on individuals.[88] Some have argued that the availability of damages for such claims, which are often pleaded concurrently with common law claims, would increase pressure for recognition of a compensatory remedy at common law.[89] If the common law were itself being recalibrated around the idea of individual rights, this pressure would presumably be palpable. Yet, the courts maintain the rule against monetary relief, insisting that any change is for Parliament.[90] The creation of a statutory remedy is "not on the cards in the United Kingdom"[91] following the kyboshing of the Law Commission's project on public authority liability,[92] with consultees opposed to creation of a damages remedy citing the traditional distinction between private law as concerned with individual rights, and public law as concerned with the enforcement of public duties, the nature of the obligations within the latter making a damages remedy inappropriate.[93] The Law Commission, although maintaining its view that damages ought to be available on a limited basis, apparently accepted that the relevant "wrong" at common law which opens up remedies is not breach of individual rights, but "public law illegality".[94]

There are suggestions that the discretion to refuse relief is narrowing at common law;[95] however, whether these high statements of principle reflect judicial practice is an open question, particularly as it is not uncommon to find cases where courts restate the importance of granting relief, while denying it.[96] Some have speculated that the influence of rights-based thinking is one factor driving a narrowing of the

[87] HRA, s. 8(2)–(5).

[88] Case C-6/90, *Francovich v Italy* [1991] E.C.R. I-5357 at [40]; C-46/93, *Brasserie du Pecheur S.A. v Germany* [1996] Q.B. 404 at [51].

[89] M. Amos, "Extending the Liability of the State in Damages" (2001) 21 L.S. 1.

[90] E.g. *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633, 730–731; *F & I Services Ltd. v Commissioners of Customs and Excise* [2001] EWCA Civ 762 at [73]; *R. (Quark Fishing Ltd.) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC (Admin) 1743 at [44]; *R. (Wells) v Parole Board* [2009] UKHL 22, [2010] 1 A.C. 553 at [5]; *Mohammed v Home Office* [2011] EWCA Civ 351, [2011] 1 W.L.R. 2862; *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 A.C. 395 at [26].

[91] *Mohammed*, ibid. at [24].

[92] Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com. No. 322, 2010); see the discussion of the fate of the project in *Mohammed*, ibid. at [20]–[24].

[93] Ibid. at [2.9]–[2.12].

[94] Ibid. at [2.58]–[2.59].

[95] E.g. *Berkeley v Secretary of State for the Environment, Transport and the Regions (No. 1)* [2001] 2 A.C. 603, 608, 616; *R. (Edwards) v Environment Agency (No. 2)* [2008] UKHL 22, [2008] 1 W.L.R. 1587 at [63]; *R. (C (A Minor)) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] Q.B. 657; *Tata Steel UK Ltd. v Newport CC* [2010] EWCA Civ 1626 at [15]; *R. (Corbett) v Restormel BC* [2001] EWCA Civ 330 at [17], [32], [34]. Cf. *Walton*, op. cit. at [103], [156].

[96] E.g. *Edwards*, ibid. at [63]–[65]; *R. (Hurley) v Secretary of State for Business Innovation and Skills* [2012] H.R.L.R. 13 at [99]; *R. (CPAG) v Secretary of State for Work and Pensions* [2012] EWHC (Admin) 2579 at [64]–[77]; *R. (English Speaking Board (International) Ltd.) v Secretary of State for the Home Department* [2011] EWHC (Admin) 1788 at [62]–[63]; *R. v Lincolnshire CC, ex p. Atkinson* (1996) 8 Admin. L.R. 529, 550.

discretion.[97] Intuitively this seems plausible, given the notion of entitlement entailed in the idea of "rights",[98] and the historical nexus between rights and remedies in English law.[99] Further, there is at least one instance where a judge has linked the human rights dimensions of a reasonableness challenge to a restrained approach to withholding relief, although it is difficult to identify a trend.[100] However, in those prominent cases where courts have held the discretion to be limited, "rights" have not featured. Often no reasoning is proffered in support of the proposition.[101] Where it is, the idea commonly invoked is the "rule of law", alongside linked ideas that public life ought to be conducted lawfully.[102] Similarly, extra-judicial calls for a restrained approach focus on formal rule-of-law concerns *viz*. that the discretion should be narrow and based on clear and publicly-stated rules to guard against arbitrariness.[103]

The foregoing analysis brings to light one of the central flaws of righting-theorists' claims: overreach. In Taggart's case this is the result of unconvincing induction from the particular to the general. For example the overarching argument of his Reinvention paper is that *Wednesbury* is "emblematic" of or "exemplifies" the classic model and that consideration of how the *Wednesbury* case would be decided under the HRA in accordance with proportionality method "illustrates the extent to which administrative law is being reinvented".[104] Putting to the side that *Wednesbury* is not emblematic of the classic model but an anomalous aspect of it, being concerned with substance rather than process,[105] there is no obvious reason to accept that adoption of proportionality pursuant to statute is illustrative or emblematic of a more general reinvention of administrative law, especially given *Wednesbury* itself is still going strong. Similarly, it does not follow from adoption of proportionality under the HRA and within some pockets of common law that the two areas of law have been or are likely to be "unified in … approach",[106] nor does it suggest "*the* methodology … of

[97] J. Caldwell, "Judicial Review: The Fading of Remedial Discretion?" (2009) 23 N.Z.U.L.R. 489, 498–499, 510–511.

[98] For example the role of habeas corpus in protecting the "right to liberty" has been relied on to explain its availability as of right: *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2012] 3 W.L.R. 1087 at [74].

[99] E.g. *Ashby v White* (1703) 2 Lord Raymond 938, 953.

[100] *R. v Ministry of Defence, ex p. Smith* [1996] Q.B. 517, 537–538.

[101] E.g. *Berkeley*, above note 95, pp. 608, 616; *Edwards*, above note 95, at [63]; *Tata*, above note 95, at [15]; *Bolton MBC v Secretary of State for the Environment* (1991) 61 P. & C.R. 343, 353; *Hurley*, above note 96, at [99].

[102] E.g. *C (A Minor)*, above note 95, at [41], [49], [54]–[55], *Atkinson*, above note 96, p. 550; *Corbett*, above note 95, at [32].

[103] T. Bingham, "Should Public Law Remedies Be Discretionary?" [1991] P.L. 64.

[104] "Reinvention", pp. 312–313, 335.

[105] For example Poole describes it as the "odd one out", a "long-stop category" and an "outlier of the conceptual system of which it was a part" ("Reformation", p. 143).

[106] "Principle of Legality", p. 31.

the public law game" has changed.[107] Myriad methodologies and approaches which have nothing to with proportionality are applied at common law, under the HRA, and across administrative law.

The focus here has been on the common law. However, it is worth noting that much of review on EU grounds does not entail rights-centred adjudication or proportionality analysis. For example, major doctrines such as direct effect or indirect effect have no necessary connection to "rights", being underpinned by an integrationist rationale, while EU administrative law principles such as the precautionary principle and transparency have no obvious connection to rights. Even the proportionality principle has no necessary connection with individual rights, constituting a free-standing principle in EU law, not being dependant on a rights-driver for its applicability or application, and being applied across a range of subject-matters.[108] Further, proportionality is "not the sole or dominant precept of judicial review within EU law", taking "its place alongside other well-established heads", with "many EU cases [being] decided on another ground … without any mention of proportionality".[109]

III. The Nature of the Righting-Process

If one is to claim that administrative law is undergoing a rights-based "reinvention" or "reformation", of which proportionality is a fundamental feature, then one must explain the nature of the overarching phenomenon one is seeking to describe. For example, in what way is administrative law being "reinvented" or might the law be "righted" beyond the adoption of proportionality under the HRA? Questions over the nature of the overarching change are particularly relevant to the broader variant, but also relevant to the narrow variant. In respect of the latter the righting-theorist's account of the change effected by the HRA is unconvincing, missing the truly fundamental change effected by the Act. In respect of the broader variant a central problem is that righting-theorists do not squarely confront the nature of the overarching change, leaving their claims steeped in ambiguity, while the tendency to depict the process of change as a unitary one, which is operating to unify public law, is highly problematic.

[107] "Reinvention", p. 329 (emphasis added).

[108] P. Craig, *EU Administrative Law*, 2nd ed. (Oxford 2012), chs. 19–20; Gordon, *EC Law in Judicial Review*, ch. 11; F.G. Jacobs, "Recent Developments in the Principle of Proportionality in European Community Law" in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart 1999), ch. 1.

[109] P. Craig, "Proportionality, Rationality and Review" [2010] N.Z. L. Rev. 265, 270–271.

A. Narrow Variant

It is unclear whether Poole equates the "deep, structural change"[110] brought about by the HRA with proportionality, or whether the change goes beyond this phenomenon. What is clear is that Poole considers the *change in method* from *Wednesbury* to proportionality to be fundamental: "Judicial review, at least the contexts where rights are in play, has adopted a different method – and with it, one suspects, a meaningfully different function. The move from *Wednesbury* to proportionality is totemic".[111] Poole observes, citing Taggart – who similarly considers the *methodological* change effected by the HRA to be "profound"[112] and "revolutionary"[113] – that "[t]he new method is seen, at least by some, to entail a radical move from older patterns of judicial review".[114]

There are several problems with this view of the change. First, there has been no move away from *Wednesbury*, only the *addition* of a new form of challenge under the HRA. *Wednesbury* still exists, although in variegated form, and continues to be applied in cases where important interests and "human rights" are at stake.[115]

Second, the analysis is overly narrow in comparing *Wednesbury* and proportionality, and arguably paints a false picture of fundamental methodological change. Putting to the side whether there is a fundamental difference between these two methods, the principle of legality is the elephant in the room. It is not examined by either commentator in their respective pieces on Reformation and Reinvention, although Taggart has considered it elsewhere.[116]

The righting-theorists' omission is marked given much pre-HRA writing[117] on the "righting" of administrative law focused on this "constitutional" principle.[118] In applying the principle the courts have

[110] "Reformation", p. 145; see also, "Age of Rights", p. 19.
[111] "Reformation", pp. 146–147.
[112] "Reinvention", p. 325
[113] Ibid., pp. 326, 329.
[114] "Reformation", pp. 146–147.
[115] E.g. *R. (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, [2011] 4 All E.R. 881 (*Wednesbury* pleaded concurrently with Article 8 claim); *R. (KM) v Cambridgeshire CC* [2012] UKSC 23, [2012] 3 All E.R. 1218 (provision of welfare services to meet needs of disabled person); *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245 (*Wednesbury* applied in the form of the *Hardial Singh* principles, in the context of deprivation of liberty: see [30]); *R. (Hillingdon LBC) v Lord Chancellor* [2008] EWHC (Admin) 2683 (anxious scrutiny applied where children's "human rights" at stake).
[116] It is clear that Taggart considers the principle of legality to form part of the constitutionalisation process, and to come close to proportionality analysis: "Principle of Legality", pp. 20–23; "Proportionality, Deference, *Wednesbury*", p. 431 (but see the contradictory remarks at p. 435, attributing emergence of proportionality to the HRA). It is therefore unclear why he places exclusive emphasis on the HRA as *the* source of fundamental methodological change in his Reinvention piece: "Reinvention", pp. 326, 329.
[117] E.g. M. Hunt, *Using Human Rights Law in English Courts* (Hart 1997), chs. 4–6; Jowell, "Constitutional Judicial Review", pp. 674–675.
[118] For explanation and analysis of the principle see text to note 219 below.

come very close to the sort of structured proportionality analysis associated with the HRA, both in the nature and sequence of the legal questions asked and the standard of scrutiny applied; as Taggart observed in an earlier article, "[t]his approach is rather more 'hard-edged' than the variable standard of [reasonableness] review approach, in that it more directly involves the reviewing court in making the determination as to whether there has been an infringement of the right concerned".[119] The "starting point"[120] is to identify the relevant "right/s", the court then moving to consider whether the interference can be justified.[121] The courts have variously held that only a "pressing social need" can justify an interference; the greater the interference, the more the court will require by way of justification;[122] the interference must be the minimum necessary to achieve statutory objectives;[123] "disproportionate" interferences are unlawful;[124] and interferences must be *objectively* justifiable.[125] Courts have undertaken searching scrutiny of purported justifications, including probing the evidential foundations of claimed justifications.[126] In this light proportionality under the HRA seems a far less radical deviation from common law patterns of review; indeed it raises the question of whether the *method* is novel in English law. And this is to say nothing of the fact that a proportionality principle has been applied in review proceedings on EU grounds for some time.[127]

Further, despite oft-made statements that proportionality is *the* test, method, or standard of review under the HRA,[128] proportionality is only *one* method applied under the HRA, and is only relevant to a subset of Convention rights. For example procedural Convention rights[129] and procedural aspects of substantive rights[130] do not entail the structured proportionality analysis. Such rights are not examined by

[119] "Principle of Legality", p. 20.
[120] *R. v Secretary of State for the Home Department, ex p. Simms* [2000] 2 A.C. 115, 125G.
[121] Ibid.
[122] Ibid., pp. 129–130, 130H-131B, 142; *R. v Secretary of State for the Home Department, ex p. Leech (No. 2)* [1994] Q.B. 198, 212F.
[123] *Leech*, ibid., p. 217G.
[124] *Simms*, [2002] A.C. at p. 142.
[125] *Leech*, [1994] Q.B. at p. 212E.
[126] Ibid., pp. 212E-214F; *Simms*, [2002] 2 A.C. at pp.127–129.
[127] *Thomas v Chief Adjudication Officer* [1991] 2 Q.B. 164; *R. v Ministry of Agriculture, Fisheries and Food, ex p. Roberts* [1991] 1 C.M.L.R. 555; *Stoke-on-Trent City Council v B & Q Plc.* [1993] A.C. 900; *R. v Ministry of Agriculture, Fisheries and Food* [1997] 1 C.M.L.R. 250; *R. v Chief Constable of Sussex, ex p. ITF Ltd.* [1999] 2 A.C. 418; *Gough v Chief Constable of Derbyshire* [2002] EWCA Civ 351, [2002] Q.B. 1213; *R. (Countryside Alliance) v Attorney General* [2006] EWCA Civ 817, [2007] Q.B. 305.
[128] E.g. P. Craig, "The Courts, the Human Rights Act and Judicial Review" (2001) 117 L.Q.R. 589, 594–596; *Administrative Law*, 7th ed. (Sweet and Maxwell 2012), at [20-033]–[20-034]; "Age of Rights", p. 41; "Reformation", p. 146.
[129] E.g. Articles 5(4), 6(1).
[130] See J. Simor, "Procedural Aspects of Convention Rights" [2008] J.R. 232.

Poole or Taggart,[131] yet they are important in examining the validity of their claims insomuch as the "methods" applied are very close in nature, if not identical to the approach to review on procedural grounds at common law. For example, as Elliott has said, "[t]o a large extent, the requirements of fairness flowing from Article 6 merely duplicate those which arise at common law: and since the scope of the common law principle is broader than that of Article 6, it is often unnecessary for claimants to rely on the latter".[132] This undermines Poole's central claim that "[j]udicial review, at least in the contexts where rights are in play, has adopted a different method".[133]

Lastly, we come to the most significant criticism: by focusing on method, which on closer inspection tends to undermine the claim that the HRA brought fundamental change, the righting-theorists miss the truly revolutionary and totemic aspect of the Act. Far more radical and important than any one doctrine, particularly for scholars interested in the place of rights in administrative law, is the fact that the Act, for the first time, enumerates a set of fundamental, individual and personal rights specifically against public authorities in positive law, makes interference with those rights unlawful under section 6, under section 7 establishes a dedicated action for the protection of those rights, and under section 8 provides for remedies for rights-violations, including damages.[134] The proportionality method reflects the gist of human rights law, to afford strong protection to basic individual interests.[135] But so do other significant features of the HRA and related jurisprudence. Indeed, the approach in the context of absolute rights not subject to general limitation clauses, such as Articles 2 and 3, where there is little scope for justification of rights-infringements and thus limited or *no* scope for deference to play a role,[136] far more clearly illustrates the protective functions of the law than proportionality, and more clearly

[131] Indeed there are indications that Poole conflates substantive review and review in terms of rights: "rights and other substantive interests" (Reformation, p. 143); "rights … and other substantive considerations" (at p. 144); "HRA by requiring courts to apply ECHR rights … squared the circle between the desire for more upfront application of substantive judicial review and the constitutional need for Parliament to sanction such a development" (at p. 145).

[132] Elliott, *Administrative Law*, p. 356.

[133] "Reformation", p. 146.

[134] How these "rights" differ from those within the legality context is analysed in Section IV below.

[135] That this is the primary function of human rights law is demonstrated by significant internal features of that body of doctrine: J.N.E Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 75 M.L.R. 750, 765–767; "Damages: Private Law and the HRA – Never the Twain Shall Meet?" in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge 2011), 232–235; *Damages for Breaches of Human Rights* (Hart forthcoming), chs. 2–3.

[136] E.g. *R. v DPP, ex p. Kebeline* [2000] 2 A.C. 326, 381; *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139 at [35]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] Q.B. 728 at [84]. One need only consider the approach in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 A.C. 72, concerning an Article 2 claim, where the Court rejected as "misplaced" a submission that a margin of appreciation ought to be afforded to the primary decision-maker (at [43]), and the relevant legal tests were applied as liability criteria in tort would be applied to a set of facts.

entails stricter scrutiny than pre-existing common law methods. Further, proportionality is just one step in a wider inquiry into whether certain rights have been violated; an undue focus on one doctrine, particularly when depicted as a "free-standing principle",[137] obscures or at least downplays the reality that it is "parasitic" upon the existence of free-standing individual rights.

B. Broader Variant

If the central problem with the righting-theorists' account of the change effected by the HRA is that it is wrong-headed, the central problem with their claims that denote widespread change across administrative law, is that the nature of the claims are not at all clear.

For example Poole has said variously that administrative law is being "reconfigure[ed]", that "[r]ights and substantive review" have come "centre stage",[138] that it would be hard to deny "rights *some* substantial role in contemporary public law",[139] that there has been an "embrace of rights",[140] that there has been an increase in arguments concerning "rights",[141] that there has been a "normative turn",[142] speculation that the "normative assumptions" (not articulated) underpinning proportionality may spill over to other areas,[143] talk of "righting",[144] and mention of a process whereby administrative law may be recast purely as an instrument for the protection of rights.[145] All of these could suggest across-the-board change in administrative law but not all of the statements suggest the same sort of change, and without more detail they do little to advance our understanding of the nature of legal development. The ambiguity is exacerbated by the omission to analyse developments beyond proportionality, such that it is not clear what other doctrinal changes may form part of the reformation, which do not, and the doctrinal scope of the claims. Similarly within Taggart's constitutionalisation thesis we know that the process "requires" adoption of proportionality, which is an "integral part" of the process,[146] but it is not clear what else is required or what else it encompasses, apart from reason-giving. It may be that the new paradigm is evolving, such that questions remain about aspects of doctrinal change and that there are debates to be had (as always) about how specific legal issues ought to be resolved within the new

[137] E.g. "Age of Rights", p. 34.
[138] "Reformation", pp. 142, 144.
[139] Ibid., p. 144.
[140] "Age of Rights", p. 43.
[141] "Reformation", p. 144.
[142] Ibid., p. 167.
[143] Ibid., p. 147.
[144] "Age of Rights", p. 43.
[145] "Reformation", p. 147.
[146] "Reinvention", p. 312.

order.[147] But if bold claims are made that administrative law has undergone a "fundamental" "development",[148] "fundamental" "structural" "changes"[149] or "mutations that go to the very heart of the discipline"[150] and, further, that "the general outlines of 'reformation' judicial review are becoming tolerably clear",[151] one ought to make clear the nature of the fundamental mutations, developments, changes, and chart how the transformation is manifested in developments across administrative law.

A central problem with the ambiguous overarching claims of "reformation", "righting", "rights" coming "centre stage", "embrace of rights" etc is that they could potentially describe and encompass a range of distinct developments. For example (i) ideas of human or constitutional rights might be invoked to justify affording the most important of individual interests greater weight and protection within the context of existing doctrines of review, without recognising free-standing legal rights, as in the context of the principle of legality or anxious scrutiny review.[152] (ii) Human rights may alternatively be afforded direct legal protection via creation of a new body of law, specifically constituted to afford strong protection to basic individual interests through the creation of free-standing legal rights and a dedicated action for enforcement, the HRA being the paradigm example. (iii) Principles or doctrines developed within a rights-based body of jurisprudence may "spill over" into other review contexts. For example a proportionality method similar to that applied in human rights law has been applied within the law of legitimate expectations.[153] (iv) An approach to a particular legal issue within the context of a rights-based body of law may influence doctrinal development within another body of doctrine. For example the Strasbourg jurisprudence under Article 6(1), along with comparative jurisprudence, influenced the Law Lords' decision in *Porter v Magill* to tweak the legal test for apparent bias at common law.[154] (v) The rhetoric of "rights" may be used instrumentally to further a goal other than the protection of individual interests for their own sake. For example it has often been claimed that the CJEU's motivation in adopting the language of rights in certain contexts is ultimately to further integration or to safeguard the legitimacy of the EU order. Common examples include the Court's emphasis on the

[147] "Reformation", pp. 148ff; "Age of Rights", p. 34.
[148] "Reformation", p. 145.
[149] Ibid., p. 142.
[150] Ibid.
[151] Ibid., p. 145.
[152] See further Section IV(A)(2)-(3) below.
[153] *R. (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]–[69]; *R. (Wood) v Secretary of State for Education* [2011] EWHC (Admin) 3256 at [52] onwards; *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 A.C. 1 at [38].
[154] [2001] UKHL 67, [2002] 2 A.C. 357 at [99]–[103].

importance of protecting individual rights in establishing state liability for breach of EU norms,[155] and the Court's recognition of "fundamental rights" as general principles of the EU legal order.[156]

These examples illustrate the problems with the vague claims made by righting-theorists. All of these phenomena could fall within the scope of a claim that administrative law is undergoing a rights-based change, but they are each manifestly not the same thing. The diversity of the examples also calls into question the utility of making broad overarching claims about the development of the law. Such claims do little to further our understanding of legal change, and may obscure our understanding of the exact nature, nuances, and complexities of change.

Some claims as to the nature of the overarching process are, relatively speaking, less ambiguous. However, this greater clarity brings other problems into focus, while ambiguities remain. Particularly problematic is the tendency to depict the process of doctrinal development as linear and unitary, entailing one process gradually working its way through, and transforming, administrative law. For example Taggart states that "administrative law is going through a process of constitutionalisation" and this "process" equates to the "reinvention of administrative law because of the magnitude of the departure from the classic model".[157] Even more problematic are claims that such process is moving the law towards some sort of unity. For example, Taggart claims constitutionalisation, with its features of rights-centred adjudication and proportionality, is serving to forge the elements of "public law" into a "coherent whole".[158] Could legal development really be this tidy? It seems unlikely that a unitary process – "the one new big idea"[159] – is sweeping administrative law, let alone the broader field of "public law", and especially unlikely that public law is being forged into a coherent whole.

These sorts of grand claims tend to downplay the reality that there are multiple processes of change at work, including different processes involving rights (as we saw above), while there are various significant

[155] Case C-6/90, *Francovich v Italy* [1991] E.C.R. I-5357 at [31]–[34]; C-46/93, *Brasserie du Pecheur S.A. v Germany* [1996] Q.B. 404 at [39]–[40] (Advocate General's opinion). For critical commentary see: C. Harlow, "Francovich and the Problem of the Disobedient State" (1996) 2 E.L.J. 199, 204ff; *State Liability: Tort Law and Beyond* (Oxford 2004), 57–58; R. Caranta, "Judicial Protection Against Member States: A New Jus Commune Takes Shape" (1995) 32 C.M.L.Rev. 703, 710; T. Tridimas, "Liability for Breach of Community Law: Growing Up and Mellowing Down?" in D. Fairgrieve, M. Andenas and J. Bell (eds.), *Tort Liability of Public Authorities in Comparative Perspective* (BIICL 2002), 149–150.

[156] For critical commentary see: J. Coppel and A. O'Neill, "The European Court of Justice: Taking Rights Seriously?" (1992) 12 L.S. 227, 245; A. O'Neill, "The EU and Fundamental Rights – Part 1" [2011] J.R. 216, 222.

[157] "Tub", p. 475.

[158] Ibid.; see also "Principle of Legality", p. 31.

[159] Taggart, "Proportionality, Deference, *Wednesbury*", p. 461.

and contemporary processes of change at work within the law of review which have advanced the law away from the strictures of the classic model, but have nothing to do with proportionality or rights (such as the emergent law on consultation), and may entail a move away from rights (as in the law of procedural fairness and standing).[160]

Telling against a unitary and unifying process of change is the diversity of legal doctrine. One source of diversity is the theoretical foundations of different sub-bodies of doctrine. Modern judicial review is a "multi-streamed" jurisdiction which has been likened to "Spaghetti Junction" because of its complexity and the plurality of doctrine it encompasses.[161] For example, while the idea of human rights and other non-economic ideas exert increasing normative force within the EU legal order,[162] "the EU's dominant focus remains economic".[163] Thus, many norms are underpinned by the instrumentalist goal of facilitating wealth maximisation and growth within and across EU countries by promoting market integration, or serve to protect individuals' economic interests; indeed EU law has been labelled an "economic constitution".[164] As a result economic freedoms such as "freedom of trade" and "freedom of competition" have the same status, as principles of "fundamental rights", as "human rights",[165] while in proportionality analyses economic norms have been accorded primacy with human rights taking a secondary role as countervailing concerns.[166] In contrast to the economic foundations of EU law, Convention rights are generally understood to be underpinned by the idea that we each have certain rights, which we enjoy simply by virtue of being human, and which protect the most basic aspects of human well-being such as liberty or life. Legitimate expectations are arguably underpinned by a number of rationales including promotion of legal certainty, trust and confidence in administration, and "good" administration.[167] The emergent duty to

[160] Taggart does, under the heading "'Righting' Administrative Law", very briefly mention a number of changes which have contributed to the "growth" of administrative law over the last half-century such as emergence of legitimate expectations and factual review, but it is not clear how these do or do not relate to the righting or constitutionalisation processes: "Reinvention", pp. 323–324.

[161] Rawlings, "Modelling Judicial Review", pp. 96, 114ff; Harlow and Rawlings, *Law and Administration*, pp. 669–679.

[162] For description of recent changes including according the Charter of Fundamental Rights Treaty-status, and the winding road towards EU accession to the ECHR, see: A. O'Neill, "The EU and Fundamental Rights – Part 2" [2011] J.R. 374. There remains scepticism about the priority accorded to human rights within a predominantly economic order: A. O'Neill, "How the CJEU Uses the Charter of Fundamental Rights" [2012] J.R. 203, 210; G. De Búrca, "The Road Not Taken: The EU as a Global Human Rights Actor" (2011) 105 A.J.I.L. 649; S. Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon" (2011) 11 H.R.L.R. 645.

[163] P. Craig and G. De Búrca, *EU Law*, 5th ed. (Oxford 2011), 364; Douglas-Scott, ibid.

[164] Rawlings, "Modelling Judicial Review", p. 121; C. Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17 E.J.I.L. 187, 195.

[165] E.g. Case 240/83, *Procureur de la Republique v ADBHU* [1985] E.C.R. 520, 531.

[166] Case C-438/05, *International Transport Workers' Federation v Viking Line ABP* [2008] 1 C.M.L.R. 51; C-341/05, *Laval un Partneri Ltd. v Svenska Byggnadsarbetareforbundet* [2008] 2 C.M.L.R. 9.

[167] E.g. *Nadarajah*, [2005] EWCA Civ 1363 at [68]; S.J. Schønberg, *Legitimate Expectations in Administrative Law* (Oxford 2000), ch. 1.

consult is similarly based on fairness and good administration rationales.[168]

Another source of diversity is that different bodies of doctrine have different sources and are influenced by different legal orders. For example EU law as it applies in domestic review proceedings and the law under the HRA, are to different degrees directly influenced by different supranational legal orders, whereas the common law in general is not. Doctrines such as the proportionality method under the HRA are a result of statutory intervention and judicial interpretation, whereas developments within the common law are principally the result of judicial creation.

As a result of these sorts of variations each body of doctrine can be said to have its own "genetic imprint".[169] It seems unlikely that one unitary process is radically influencing bodies of doctrine which have such disparate sources, are subject to different influences and pressures, and underpinned by markedly different philosophical foundations. Even if one "movement" is transforming these bodies of doctrine, it seems likely, given these variations, that the extent and effects of the movement will be rather different in each context, and that those differences are worth close examination given they will probably affect conclusions about doctrinal change.[170]

Crucially, these features of the law suggest a public law that is increasingly pluralistic. Taggart's sweeping claim that the elements of public law have been or might be forged into a coherent whole seems implausible given the disparate philosophical foundations and sources of different aspects of public law. The basis for Taggart's claim is the adoption of proportionality and rights-based adjudication within different public law spheres. If the claim of coherence is based on these features it must entail a very superficial sense of "coherence" (the sense in which the term is used is not made clear). If followed through the claim would lead to the conclusion that EU law and human rights law form part of a coherent whole because both areas of law have a justificatory method in common and entail "rights"-adjudication, despite the two areas having fundamentally different philosophical foundations, EU law being founded principally upon an ideology of market integration whereas human rights law is concerned with protection of inherently valuable basic human interests, a host of methods beyond

[168] See text to notes 62, 64 above.
[169] Rawlings, "Modelling Judicial Review", p. 121.
[170] Such variations also suggest that legal norms such as "rights" within these different bodies of doctrine likely perform different roles from one body of doctrine to the other. In contrast Poole has, like the common law constitutionalists he has criticised, approached the "role of rights" in administrative law as though "rights" perform *a single role* across administrative law, in his account to secure the legitimacy of and counter mistrust in government: Legitimacy; Reformation, p. 167.

proportionality being applied within each field, the existence of a multitude of norms which are not rights within EU law, and proportionality method having different features in each area of law[171] (which may reflect the differing philosophical foundations of each field).[172] Further, if the claim is one of the coherence of "public law" (or equally of constitutionalisation or righting of administrative law) it is not clear how the following areas, which are not considered by the righting-theorists, fit into the analysis: the law of devolution, local-central relations, the law of tribunals and inquiries, public contracting, public finance, public procurement, public employment, planning, public authority liability in tort, restitution as it applies to the Revenue, the Parliamentary and Local Government Ombudsmen, the Equality Act 2010, multiple types of regulation, as well as non-legal phenomena such as the practice of ex gratia payments, soft codes, policy guidance etc. Whatever the sense of coherence adopted by Taggart, it is difficult to see it as meaningful, it passes over significant diversity within the law, while the reasoning again smacks of an unconvincing extrapolation from the particular to the general.

IV. The Concept of "Rights": Central yet Neglected

In this section we come to perhaps the most important weakness of righting-claims: proponents do not squarely address what they mean by "rights", typically using the term indiscriminately. This is despite the centrality of the concept of "rights" to their theses, for example in stating the nature of doctrinal change and its scope, and their heavy use of and reliance on the language of "rights". After briefly considering references to "rights" within the righting-theorists' work, this section illustrates that references to "rights" in different administrative law contexts may refer to conceptually distinct phenomena, utilising Hohfeld's conceptual framework. In turn this suggests that those analysing the place of rights within administrative law must be open to the possibility that the term "rights" may be used to refer a range of different phenomena, and that they must ensure conceptual clarity in their analysis of rights, delineating different conceptions.

Poole speaks of "rights" generically, of "human rights and rights-related cases", of "individual rights", "Convention rights", "(ECHR) rights", "rights-based judicial review", "rights talk", "rights and

[171] For example in EU law proportionality is applied rather differently in different contexts, and in some contexts may impose only a limited justificatory burden on the defendant: for a summary see Craig, "Proportionality, Rationality and Review", pp. 267–270; *Administrative Law* at [21-021]–[21-024]; and see note 108 above. Other differences between proportionality in the human rights and EU contexts have been noted by the courts: e.g. *R. (Countryside Alliance) v Attorney General* [2006] EWCA Civ 817, [2007] Q.B. 305 at [158]–[159].

[172] As noted above, while human rights may be afforded primacy in human rights law, they may be a countervailing factor in EU law: text to note 166.

similar interests", "private rights", "rights-based litigation",[173] and "'fundamental' rights".[174] Wherever Poole makes an overarching claim as to the nature of the reformation he uses the term generically, referring simply to "rights".[175] It is unclear whether Poole intends "rights" to refer only to Convention rights under the HRA, or whether he believes, for example, that the common law of review has also recognised a set of "rights", and further, whether these sets of rights are similar phenomena.[176] Although Taggart does not define "rights", he is explicit in including within his analysis not only "rights" recognised in human rights instruments, but also those at common law,[177] and considers that "rights" and "'rights' issues" have long been present within administrative law albeit they were not always "visible".[178] He does not confront the possibility that "rights" in these different contexts may be distinct phenomena.

As a result of their reliance on an undifferentiated notion of "rights" the righting-theorists' analysis can be criticised for lacking precision and conceptual clarity, which in turn undermines their ability to identify and explain accurately the nature of rights-based developments. These theorists cannot hope to capture the nuances and complexities of how "rights" are infiltrating administrative law if they (1) do not begin with an acknowledgement that the term "right" could refer to a range of different phenomena and may have very different meanings in different contexts, and (2) do not have conceptual tools to differentiate between different senses of the term. Before going on, it should be noted that righting-theorists are not alone in using the term loosely; those who have "interpreted"[179] modern administrative law as having consistently had the protection of individual rights as its central concern have in general failed to address seriously the conceptual nature of those rights.[180]

A. An Hohfeldian analysis

To help differentiate between different meanings of the term "rights" this article utilises Hohfeld's conceptual scheme.[181] His scheme has stood the test of time, and been highly influential in philosophical discourses concerning rights, being the scheme adopted by leading theorists within the two major schools of thought on the nature of

[173] "Reformation", pp. 142–147.
[174] "Age of Rights", p. 33.
[175] See the text to notes 111, 138–145 above.
[176] See note 17 above.
[177] "Reinvention", p. 334; "Tub", p. 475.
[178] "Reinvention", p. 326.
[179] E.g. T.R.S. Allan, "Dworkin and Dicey: The Rule of Law as Integrity" (1988) 8 O.J.L.S. 266, 273; Craig, *Administrative Law*, ch. 1.
[180] As Poole has observed: "Legitimacy", p. 710.
[181] W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16 ["Hohfeld 1913"]; (1917) 26 Yale L.J. 710.

rights,[182] and in understanding the nature of rights in private law contexts of tort, contract and property.[183] Hohfeldian formulations also have the important benefit of capturing both the entitlement of the rights-holder, and the obligation of the duty-bearer, and can help to explain why it is the specific claimant and specific defendant, rather than any other two persons, that are brought together in a legal dispute.[184] Hohfeld's scheme has also been utilised by judges.[185]

At first blush it might appear odd to find Hohfeldian analysis deployed in a public law context, given such analysis has typically been utilised within private law fields. First, the lack of Hohfeldian analysis within English public law scholarship may simply be symptomatic of a more general lack of analytical engagement with rights in the field;[186] indeed Hohfeld himself "left largely unexamined" public law and criminal law.[187] Second, Hohfeldian analysis is often associated with *individual* rights, which have traditionally been considered the province of private law fields such as tort. In contrast public law has been traditionally associated with the pursuit of *collective* or *public* goals, such that Hohfeldian analysis seemed out of place.[188] However, (1) Hohfeld's scheme is just as useful in analysing collective legal positions as individual legal positions (see section 4 below);[189] and (2) the advent of the HRA in particular, and increased invocation of "rights" in other pockets of public law, on their face indicate a role for individual rights in public law, suggesting application of Hohfeld's scheme could provide us with interesting and valuable insights into the nature of these developments.

According to Hohfeld's conception "being endowed with a legal right … consists in being legally protected against someone else's interference or against someone else's withholding of assistance or remuneration, in regard to some action or certain state of affairs", and the "person who is required to abstain from interference or to render assistance or remuneration is under a duty to behave so".[190] The characteristics of Hohfeldian rights are that they are directly correlative to duties, which mirror the content of the right, and held by a specific

[182] See M.H. Kramer, N.E. Simmonds and H. Steiner, *A Debate Over Rights* (Oxford 1998).
[183] E.g. R. Stevens, *Torts and Rights* (Oxford 2007), ch. 2; P. Eleftheriadis, "The Analysis of Property Rights" (1996) 16 O.J.L.S. 31.
[184] By contrast "rights to" formulations, such as a "right to property", tell us little about specifically what the rights-holder is entitled to, or the precise obligations of others in respect of the subject of the rights-holder's entitlement.
[185] E.g. *McInnes v Onslow-Fane* [1978] 1 W.L.R. 1520, 1528; *In re F* [1990] 2 A.C. 1, 13; *R. (Quila) v Secretary of State for the Home Department* [2010] EWCA Civ 1482, [2011] 3 All E.R. 81 at [74].
[186] But see: N. Bamforth, "Hohfeldian Rights and Public Law" in M.H. Kramer (ed.), *Rights, Wrongs and Responsibilities* (Palgrave 2001), ch. 1.
[187] M.H. Kramer, "Rights Without Trimmings" in Kramer et al, *A Debate Over Rights*, p. 58.
[188] See for example, N.E. Simmonds, "Rights at the Cutting Edge" in Kramer et al, *A Debate Over Rights*, pp. 141–142.
[189] Kramer, "Rights Without Trimmings", pp. 49–60.
[190] Ibid., p. 9.

individual, the rights-bearer, against a specific individual, the duty-bearer. Thus, in Hohfeldian terms X's claim-right against Y, protected by the tortious action for false imprisonment, would be formulated as follows: X has a right that Y not confine him, while Y is under a corresponding duty to X not to confine him; equally Y is under a duty to X not to confine him, and X has a corresponding right that Y not confine him. By virtue of the universal nature of tort, X holds identical but discrete rights against each other person, and correlative to each of those rights is a duty specific to and owed by each person.

The analysis which follows is agnostic as to whether Hohfeld's conception of rights is the best one, though it has advantages as discussed.[191] Hohfeld's idea of claim-rights will be used as a conceptual tool in a "whistle-stop tour" of some instances in administrative law where the notion of "rights" has figured prominently, in order to demonstrate that we ought to be receptive to the possibility that not all uses of the term "right" necessarily denote the same sort of phenomenon, and the importance of conceptual clarity in debates about rights. Importantly, by honing in on the uses of the concept of rights across administrative law we are also likely to gain a better understanding of the *ways* in which such concepts are being weaved into the law, and the nature of doctrinal change.

1. Convention Rights under HRA, section 7

Let us start with Convention rights under the HRA. The analysis which follows addresses the nature of such rights in an action under section 7 against a public authority. In this context Convention rights can plausibly be analysed as entailing Hohfeldian claim-rights. There is a strong possibility, which cannot be fully explored here, that Convention rights are "chameleonic", i.e. such rights may denote claim-rights in certain contexts, but not in others. For example, where Convention rights are relied on in the development of common law doctrines which govern relationships between individuals ("horizontal effect"), Convention rights are arguably utilised as "principles" which inform or guide common law development.[192] The nature of Convention rights as they relate to Parliament is not clear. Under the HRA a judicial finding that an Act is incompatible with a Convention right does not affect the Act's validity.[193] It could therefore be conjectured that under the HRA Convention rights do not cast legal duties on Parliament, i.e. it is *not* the case that I have a legal right against Parliament that Parliament

[191] For a thorough-going analysis and response to criticisms and misinterpretations of Hohfeld's analytical scheme see: ibid., pp. 1–60.
[192] See G. Phillipson and A. Williams, "Horizontal Effect and the Constitutional Constraint" (2011) 74 M.L.R. 878.
[193] HRA, ss. 3(2), 4(6).

not interfere with my freedom of expression. On this view a declaration of incompatibility is *not* granted pursuant to a breach of legal duty, but on the basis of some "non-legal wrong".[194] On the other hand it might be that the Act *does* create individual legal claim-rights against Parliament, but judicial remedies are exceptionally weak.[195]

In an action against a public authority under section 7 Hohfeldian claim-rights can be said to be in play. It may not appear so at first as Convention rights, as they are formulated in Schedule 1 to the Act, are expressed as rights *to*, such as a right *to* liberty or a right *to* freedom of expression, rather than rights *that* another refrain from or perform some action.[196] However, this does not exclude the presence of Hohfeldian rights because Convention rights, as formulated in the Act, are explicable as "umbrella" or "summary"[197] terms: each Convention right is a marker of a bundle of norms united by their subject-matter (e.g. freedom of expression or privacy),[198] including a multitude of phenomena which are Hohfeldian claim-rights, held by specific individuals against specific public authorities.[199] On this analysis it is right to speak of "the rights of the applicants *under* article 8".[200]

I will first provide an example of how a Convention right can be conceptualised in Hohfeldian terms, then examine significant features of the Act and related jurisprudence which support such conceptualisation.

It is well-established that Article 2 imposes a number of "distinct duties"[201] which relate to the interest in life: some of these are "negative", requiring public authorities not to interfere with an individual's interests, while others are "positive", requiring public authorities

[194] D. Feldman, "The Human Rights Act 1998 and Constitutional Principles" (1999) 19 L.S. 165, 187.

[195] However this would be a difficult argument to make, not least as the Houses of Parliament and anyone exercising functions in connection with proceedings in Parliament are not public authorities under the Act: HRA, s. 6(4) and see s. 6(2), (6).

[196] For an analysis of these different formulations see: N.J. McBride, "Rights and the Basis of Tort Law" in D. Nolan and A. Robertson (eds.), *Rights and Private Law* (Hart 2012), ch. 12.

[197] Simmonds, "Rights at the Cutting Edge", p. 152.

[198] I leave open the possibility, which cannot be explored here, that Convention rights also entail legal phenomena other than claim-rights, such as Hohfeldian immunities or liberties. It is also worth noting that the *statutory scheme for protection* of Convention rights entails a range of phenomena which may be conceptualised as Hohfeldian powers, liberties and immunities. For example a "victim" has a *power* under section 7(1) HRA to initiate proceedings against the relevant public authority, and a *liberty* to exercise it. It is also likely that claim-rights under Convention rights and held vis-à-vis public authorities are accompanied by *immunities* which are also held against those authorities, such that the authorities are in general disabled from extinguishing the right-holders' claim-rights (but see: HRA, ss. 14–15): see M.H. Kramer, "Rights in Legal and Political Philosophy" in K.E. Whittington, R.D. Kelemen and G.A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford 2010), pp. 416–418.

[199] Rights in private law are also sometimes expressed as "rights to" or "rights of" (e.g. *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 A.C. 962 at [60]; *Allen v Flood* [1898] A.C. 1, 29), but this has not negated a Hohfeldian analysis.

[200] *R. (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 A.C. 621 at [44], [59] (emphasis added).

[201] *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 A.C. 72 at [12]; see similarly, *Porter v Magill* [2001] UKHL 67, [2002] 2 A.C. 357 at [87], in respect of Article 6(1).

to take positive steps to safeguard an individual's interests. On a Hohfeldian analysis such duties do not exist "in the air"; they are owed by specific public authorities to specific individuals, such that there are literally millions of discrete duties owed by specific public authorities to specific individuals. Thus the Home Office, being a public authority, owes me a negative duty to refrain from taking my life and I have a correlative right, which is unique to me, against the Home Office, which mirrors the content of the duty. Equally the Home Office owes you a duty of identical content, which is unique to you, and you have a negative right which correlates with that duty, which is again unique to you. The same analysis is applicable to "positive duties" under Article 2. For example by virtue of the *Osman* decision,[202] X has a claim-right that the relevant public authority, in certain circumstances, take reasonable steps to protect X's life when the public authority knows or ought to know of a real and immediate threat to X's life, while the public authority owes a correlative duty to X of identical content. This is a right possessed by a specific individual – the person whose life is at risk – against a specific public authority – that authority which knew or ought to have known of the risk. Thus, in Hohfeldian terms the Article 2 "right to life" is shorthand for a multiplicity of rights held by specific individuals against specific public authorities in relation to their interest in life; just as a jellyfish trails its tentacles in the warm sea, so from each enumerated Convention right dangle a plurality of discrete rights (and corresponding duties).[203]

The procedural provisions of the Act are consonant with and support the proposition that the Act creates rights that are held by specific individuals against specific public authorities. Only a "victim" of a violation may bring a claim. If rights are personal to individuals it makes sense that only those individuals who suffer a rights-violation are able to initiate proceedings.[204] Indeed, according to one leading school of rights-theory, an individual's claim only has the status of a right if the powers to, for example, enforce the right or waive enforcement, lie with that individual.[205] Under section 7 proceedings are brought specifically against "the authority" which "has acted (or proposes to act) in a way which is made unlawful by section 6(1)", whether that be the Governors of Denbigh High School, Pennine Care NHS Trust, or Belfast City Council. It makes sense that if duties are owed

[202] *Osman v United Kingdom* (2000) 29 E.H.R.R. 245.

[203] Paraphrasing Birks on an unrelated topic: "Rights, Wrongs, and Remedies" (2000) 20 O.J.L.S. 1, 7.

[204] The EHRC has the power to initiate proceedings under the HRA, but importantly it "may act only if there is or would be one or more victims of the unlawful act", and it may not be awarded HRA damages: Equality Act 2006, s. 30(3).

[205] H. Steiner, "Working Rights" in Kramer et al, *A Debate Over Rights*, pp. 239–247. For the *locus classicus* see: H.L.A. Hart, "Bentham on Legal Rights" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series* (Clarendon 1973), ch. 7.

by specific authorities, actions can only be initiated against the specific authority that is alleged to have breached its duty.

Within section 7 claims rights are consistently referred to by the House of Lords and Supreme Court in a manner which suggests they are personal to individual claimants; these rights do not exist in the air (e.g. as general standards of legality) but are "the rights of the applicants",[206] "the Convention rights of these particular young people"[207], "his" or "her" rights,[208] "the company's article 10 rights",[209] "individual's rights".[210] This explains Lord Wilson's dictum in *Quila* that "decisions founded on human rights are essentially individual"; a determination of breach is a determination only in respect of that specific claimant's rights.[211] Of course such a determination will probably signal that the same administrative action taken in respect of other similarly placed claimants will no longer be tenable. As Lady Hale said in *Quila*, "although we are only concerned with these young people, it is difficult to see how [the Secretary of State] could avoid infringing article 8 whenever she applied the rule to an unforced marriage".[212]

These rights are *legal* rights by virtue of section 6, which makes it unlawful for a public authority to act in a manner incompatible with the enumerated rights; within a Hohfeldian framework, and where the relevant norm is in the nature of a claim-right, we can explain the idea of "incompatibility" as a breach of a duty correlative to a right without lawful justification. In a triumvirate of landmark cases the Law Lords confirmed that Convention rights are legal rights as opposed to say, relevant considerations: "the question is … whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not".[213] It is because the courts are adjudicating legal rights that *they* rather than the defendant authority exercise the *primary objective* judgement as to the scope of the right and the justifiability of any interference.[214] This stands in contrast to

[206] *Quila*, [2011] UKSC 2 at [44]; *Belfast CC v Miss Behavin' Ltd.* [2007] UKHL 19, [2007] 1 W.L.R. 1420 at [12]–[13], [15]–[16], [20].
[207] *Quila*, ibid. at [61].
[208] *R. (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 A.C. 100 at [48], [59]; *Rabone*, op. cit. at [107]; *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 A.C. 650 at [5].
[209] *Miss Behavin'*, [2007] UKHL 19 at [90].
[210] *R. (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 W.L.R. 419 at [61].
[211] *Quila*, [2011] UKSC 2 at [59], [80].
[212] Ibid.
[213] *Miss Behavin'*, op. cit. at [12]–[15], [31], [44]; *Begum*, op cit. at [29]–[31]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167; And see: *Quila*, ibid. at [46], [61], [91]; *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66, [2009] 1 A.C. 536 at [13], [52] onwards; M. Amos, "Separating Human Rights Adjudication From Judicial Review" [2007] E.H.R.L.R. 679.
[214] *Begum*, ibid. at [30].

the position within the anxious scrutiny variant of *Wednesbury*, where the primary judgement as to justification is for the Minister, with the courts confined to a secondary, supervisory role.[215]

It is worth noting that, as is increasingly recognised judicially, significant features of the HRA action are similar to significant features of actions in tort.[216] For example, negative obligations in human rights law closely mirror the structure of torts actionable per se, such as false imprisonment and battery: only those whose interests are wrongfully interfered with by the defendant's conduct may bring an action, these actions are actionable without proof of loss, liability is generally strict, the onus is on the defendant to justify an interference with the protected interests, justifications are construed narrowly, and only the weightiest countervailing interests may justify an interference, while specific relief is available to bring an ongoing wrong to an end, and damages are available.[217] As I have argued elsewhere, these near identical structures demonstrate that the two areas of law perform identical functions, *viz*. to afford strong protection to fundamental human interests.[218] These similarities are also pertinent to the present analysis. This is because (1) these doctrinal features, along with the language used by official actors, are the only objective "pointers" we have as to the existence of underlying claim-rights, and their content; and (2) it is generally accepted that if claim-rights accurately capture the nature of legal relationships it is in private law fields such as tort and contract.

While Convention rights can plausibly be said to entail individual claim-rights it is not at all clear that judicial references to "rights" elsewhere in administrative law mark the existence of such rights.

2. The principle of legality

Courts refer variously to "constitutional",[219] "basic",[220] and/or "fundamental"[221] rights or some other variant, such as "fundamental

[215] See note 255 below.

[216] This has most often been recognised where the claim is initiated via ordinary proceedings, and the relief sought is damages: e.g. *Rabone*, op. cit. at [108]; *A v Essex CC* [2010] UKSC 33, [2011] 1 A.C. 280 at [116]; and see also *Ruddy v Chief Constable of Strathclyde* [2012] UKSC 57. Cf. *R. (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 W.L.R. 673; *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; [2004] Q.B. 1124 at [52]–[55], [72], [74].

[217] See note 135 above.

[218] Ibid.

[219] *R. v Secretary of State for the Home Department, ex p. Leech (No. 2)* [1994] Q.B. 198, 210B; *Raymond v Honey* [1983] 1 A.C. 1, 10E; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] Q.B. 728 at [70] onwards; *R. v Lord Chancellor, ex p. Witham* [1998] Q.B. 575, 580–586; *Ahmed v HM Treasury* [2010] UKSC 5, [2010] 2 A.C. 534 at [111].

[220] *Raymond*, ibid., pp. 13A, 14G; *R. v Secretary of State for the Home Department, ex p. Simms* [2000] 2 A.C. 115, 130E; *Ahmed*, ibid. at [184].

[221] *Roth*, [2002] EWCA Civ at [70] onwards; *Simms*, ibid. pp. 130E, 131F; *Leech*, [1994] Q.B. at p. 212D; *Ahmed*, ibid. at [111]; *R. (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 A.C. 604 at [31].

principles of human rights",[222] in the context of the principle of legality; as noted judicially the "expression 'constitutional right' has tended to be used, more or less interchangeably with other expressions".[223] That principle holds that such "rights" cannot be "interfered" with,[224] "hindered",[225] "taken away",[226] "encroached" upon,[227] "undermined", or "defeated"[228] except by "express enactment". In these cases the question is one of *vires*: does the parent statute "authorise" the authority to interfere with basic "rights"?[229] In the absence of express authorisation or necessary implication to the contrary any action by an authority interfering with such rights will be held *ultra vires* the parent statute. The public authority's actions are not unlawful because the authority has, through an otherwise lawful exercise of power under the parent statute, breached a duty directly correlative to one of these "fundamental rights" and owed to a specific individual, but because it had no power to undertake such action under the empowering statute in the first place. If any duty is breached it is a duty of the public authority to act *intra vires* the empowering statute (the nature of this duty is discussed below). "Rights", thus, form one part of an inquiry into the correct interpretation of the parent Act.

Thus such challenges are not founded on the breach of a duty directly correlative to one of these "fundamental rights". However, what is the nature of these "fundamental rights"? They are often referred to as "rights", but that is not determinative of whether they are legal claim-rights. Indeed these phenomena are referred to in various ways, for example as "principles",[230] "immunities", "freedoms",[231] and "interests".[232] The two main rights mentioned in the legality cases are the right of access to court[233] and the right to freedom of expression.[234] It is strongly arguable that such "rights" are not individual claim-rights or at least it is not clear that they are. One plausible explanation is that they are "liberties"; i.e. a freedom to do an activity, X, to the

[222] *Simms*, ibid., at p. 131E, G.
[223] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 A.C. 395 at [61], and [24].
[224] *Raymond*, [1983] 1 A.C. at pp. 12H, 13A; *Leech*, [1994] Q.B. at p. 210B.
[225] *Raymond*, [1983] 1 A.C. at p. 13A-B; *Leech*, ibid.
[226] *Leech*, ibid., p. 210C; *Raymond*, ibid., pp. 10H, 14G.
[227] *Ahmed*, [2010] UKSC 5 at [111], [184].
[228] *Simms*, [2000] A.C. at p. 130A, C.
[229] *Raymond*, [1983] 1 A.C. at p. 13A; *Leech*, [1994] Q.B. at pp. 202E, 208B, 216–217, 218C; *Simms*, [2000] A.C. at pp. 125C-D, 130C, 132C; *R. v Secretary of State for the Home Department, ex p. Anderson* [1984] Q.B. 778, 785D, 793C-D, 795B.
[230] *Simms*, ibid., at p. 131E, G; *Leech*, ibid., pp. 210A, 213F; *Anufrijeva*, [2003] UKHL 36 at [26].
[231] *Wheeler v Leicester* [1985] A.C. 1054, 1065.
[232] *Simms*, [2000] 2 A.C. at pp. 126H, 143C.
[233] E.g. *Raymond*, above note 219; *Anderson*, above note 229; *Leech*, above note 219; *Witham*, above note 219.
[234] E.g. *Simms*, above note 220; *R. (Calver) v Adjudication Panel for Wales* [2012] EWHC (Admin) 1172 at [40]–[42], [44].

extent this is not inconsistent with one's legal duties, and which entails no correlative duty on another not to interfere with one's doing of X.[235]

At common law there is no *direct* positive legal protection of freedom of expression through individual claim-rights, such that you may mount an action for an interference with your freedom of expression in itself. One's freedom of expression may be *indirectly* protected by existing rights; for example if someone physically restrains you from attending a political rally you could sue in battery. It is well-established by authority that at common law freedom of expression is a *liberty*. One may express oneself however one pleases to the extent consistent with law. The study of freedom of expression has therefore tended to be a study of the legal restrictions placed on exercise of this freedom, rather than what activities one positively has a "right" to do.[236] As Lord Bingham said in *Laporte*, "[t]he approach of the English common law to freedom of expression and assembly was hesitant and negative, permitting that which was not prohibited".[237] In *Duncan v Jones* Lord Hewart CJ said famously: "English law does not recognize any special right of public meeting … The right of public assembly, as Professor Dicey puts it,[238] is nothing more than a view taken by the Court of the individual liberty of the subject".[239] This was an area where Dicey and Jennings saw eye-to-eye. Jennings explicitly distinguished a liberty to freely express oneself from a right correlative to a duty under contract, observing that we must "be careful in using the word 'rights'".[240] He said: "the right of assembly is a liberty, a freedom from restriction. It arises from the tautologous principle that anything is lawful which is not unlawful. There is no more a 'right to free speech' than there is a 'right to tie up my shoelace' … The 'right' is the obverse of the rules of civil, criminal, and administrative law".[241]

Once the nature of the "right" is clarified we can more precisely explain the legality cases: the courts have held that the liberty of expression has a fundamental status on the basis of some unstated background moral or political theory, such that this liberty cannot be

[235] "Hohfeld 1913", pp. 32–44; Kramer, "Rights Without Trimmings", pp. 10–20; The distinction between claim-right and liberty has long been recognised in English law: e.g. *Allen v Flood* [1898] A.C. 1, 29. However, the distinction has not always been accurately expressed: *R. (Quila) v Secretary of State for the Home Department* [2010] EWCA Civ 1482, [2011] 3 All E.R. 81 at [37], and see the more orthodox analysis at [74].

[236] See W.I. Jennings, *The Law and the Constitution*, 5th ed. (London 1959), ch. VIII.

[237] *R. (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 A.C. 105 at [34]; see also *R. (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 A.C. 307 at [1]; *Wheeler*, [1983] 1 A.C. at p. 1065; *Attorney-General v Observer Ltd.* [1990] 1 A.C. 109, 283.

[238] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (MacMillan 1931), 499.

[239] [1936] 1 K.B. 218, 222.

[240] Jennings, *Law and the Constitution*, p. 262, see also pp. 259–260.

[241] Ibid, pp. 262–263.

interfered with by a public body save where expressly permitted by statute. Thus expression is a liberty, but one so important[242] that it is afforded extra protection from interference by public authorities through a "canon of construction".[243] Other "rights" referred to within the legality context can be similarly analysed, such as "the individual's basic right to live his own life as he chooses", "freedom of movement",[244] and "freedom of communication".[245]

The "right" to access court is trickier to analyse. Outside of the HRA context,[246] the law imposes legal duties which afford more or less direct protection to an individual's ability to access the courts, most clearly through the law of contempt; a Prison Governor committed contempt when he blocked a prisoner's letter containing an application to the High Court without lawful authority.[247] However, it is not clear whether such duties are owed to specific individuals who hold correlative rights or whether they are, for example, non-Hohfeldian, free-standing duties imposed on individuals but not owed to anyone in particular, duties owed to the public at large, or duties owed to the court. For example if the duty is one not "to obstruct or interfere with the due course of justice, or the lawful process of the courts"[248] – a formulation mirroring the legal definition of contempt – it is difficult to see how it could be owed to a particular individual. Thus, it is not clear outside the HRA that English law affords us each legal claim-rights against specific individuals not to be impeded in our access to court. Thus, as with freedom of expression, it may be that references to a right of access to court denote a *liberty* to access courts, and that this is a liberty of such importance that any interference calls for express statutory authority.

There may be other plausible explanations of these "rights", for example that they: (i) are moral (i.e. non-legal) rights or other norms, which reflect a particular background moral or political theory; or (ii) do not refer to norms at all but to interests i.e. basic aspects of human well-being. The key point of undertaking this analysis is to demonstrate that although judges refer to the right to freedom of expression in both the HRA and the legality contexts, the nature of the phenomena may be rather different (e.g. claim-rights versus liberties) while the "right" may play a different role in each context: it may

[242] E.g. *Watkins*, [2006] UKHL 17 at [24] ("In all these [legality] cases the importance of the right was directly relevant to the lawfulness of what had been done to interfere with its enjoyment").
[243] Ibid. at [61].
[244] *Ahmed*, [2010] UKSC 5 at [60].
[245] *R. v Radio Authority, ex p. Bull* [1998] Q.B. 294, 305–306.
[246] Access to court is directly protected by article 6: *Golder v United Kingdom* (1979–80) 1 E.H.R.R. 524 at [26]–[36].
[247] *Raymond*, above note 219.
[248] Ibid., p. 10.

form the basis of an action (as under HRA, section 7) or an aspect of statutory interpretation (as with the legality principle).

Lastly, it is important for completeness to record that the legality principle, albeit that it has not always gone by that moniker and not always entailed proportionality analysis, has long been applied so as to afford protection to norms in other common law fields which *are clearly* claim-rights. For example in *Morris v Beardmore* Lord Diplock, discussing trespass to land, said "if Parliament intends to authorise the doing of an act which would constitute a tort actionable at the suit of the person to whom the act is done, this requires express provision in the statute … The presumption is that in the absence of express provision to the contrary Parliament did not intend to authorise tortious conduct".[249] In a recent false imprisonment case Lord Dyson observed that "the right to liberty is of fundamental importance", "the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort".[250] As is evident from Lord Dyson's statement, judges have referred to rights protected by actions at common law as "fundamental".[251] As we have seen the "right" to freedom of expression has been described in similar terms. But it is important not to conflate conceptually distinct phenomena on the basis of the terms used to describe them.

3. Anxious scrutiny reasonableness review

Within the anxious scrutiny variant of reasonableness review judges may take into account "human rights" at two stages. First, to identify the case as one that requires anxious scrutiny: the administrative action must interfere with a particular sort of "right" to justify heightened scrutiny. Second, in the court's analysis of whether the action was unreasonable: "the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable".[252] As with the legality principle, the question before the court is *not* whether a duty directly correlative to the human right has been breached. The overarching question is whether the challenged executive action is "so untenable as to be absurd",[253] the courts approaching such cases "on a conventional *Wednesbury* basis adapted to a human rights context", rather than on

[249] [1981] A.C. 446, 455, and see 461–462, 463–465.
[250] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245 at [53]; see also *Secretary of State for the Home Department v GG* [2010] Q.B. 585.
[251] E.g. *Lumba*, ibid.; *Morris*, [1981] A.C. at pp. 463–465; *GG*, ibid.
[252] *R. v Ministry of Defence, ex p. Smith* [1996] Q.B. 517, 554.
[253] M. Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review" (2001) 60 C.L.J. 301, 306.

the basis that they are directly enforcing free-standing rights.[254] Thus, in *Brind* Lord Bridge said:[255]

> The primary judgment as to whether the particular competing public interest justified the particular restriction imposed falls to the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.

If there is any duty on authorities here it is one to act reasonably. As Bamforth says, the relevant "rights" are protected "only via the intervening agency of the grounds of review".[256]

Even if the basis of such challenges is not breach of a duty correlative to one of these "rights", are such rights otherwise legal claim-rights which are independently enforceable outside review? As with those "rights" in the legality context, "rights" within the anxious scrutiny context are probably not legal claim-rights. For example in *Brind* the "right" most commonly referred to by Their Lordships was "freedom of expression" or "speech",[257] although the "right [of broadcasters] to present a programme in such manner as they think fit"[258] and the "freedom to hold opinions and to impart and receive information"[259] were also mentioned. Perhaps reflecting a lack of clarity as to the nature of these phenomena, they were also described as "fundamental human right[s]",[260] "freedom[s]",[261] "principle[s]",[262] and "liberties".[263] As discussed above, at common law neither individuals nor public bodies owe others a legal duty not to interfere with their freedom of expression. When we express ourselves, broadcasters make editorial decisions, or we receive information we are exercising our liberties. *Brind* establishes that where an authority undertakes an action which purports to interfere with such liberties, the courts will take a stricter approach to reasonableness review.

Surprisingly, in the famous case of *Smith*, concerning a review challenge to a ban on homosexuals serving in the military, the Court of Appeal did not specifically identify the human rights which justified anxious scrutiny, the judgments being replete with generic references to the "human rights context" or "[t]he applicants' rights as

[254] *Smith*, [1996] Q.B. at pp. 540, 554.
[255] *R. v Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696, 748–749.
[256] Bamforth, "Hohfeldian Rights and Public Law", p. 11 (emphasis omitted).
[257] *Brind*, [1991] 1 A.C. at pp. 747–749, 750–751, 757, 759, 763.
[258] Ibid., p. 751.
[259] Ibid., p. 763.
[260] Ibid., p. 757.
[261] Ibid., p. 763.
[262] Ibid., pp. 750, 763.
[263] Ibid., p. 764.

human beings".[264] Article 8 of the Convention was discussed but the Judges held it could not form the basis of a challenge given it did not (at that time) form part of municipal law; the Convention was relevant as "background" only.[265] In the Divisional Court Simon Brown LJ referred to the "right of privacy" and the "individual's freedom to live in accordance with his or her sexual orientation".[266] The latter is naturally conceptualised as a liberty, although both references could be to a moral right or other norm. In any case it is difficult to conceptualise these "rights" as legal claim-rights. Before creation of the action for misuse of private information and the action under the HRA, there was no action which directly protected privacy interests. As Simon Brown LJ observed: "[W]ere judicial review not to be available here, there would be no domestic remedy whatever available".[267] It is also worth noting that in *Watkins* the Law Lords held that interferences with those "constitutional rights" referenced within the common law of review were not independently actionable under the rubric of misfeasance in public office.

4. Collective claim-rights and the duties of legality, reasonableness and procedural propriety

The term "rights" may refer to the entitlements of a "collective", as opposed to an individual. Kramer has demonstrated how Hohfeld's scheme can just as usefully be applied to the analysis of such collective legal positions, through the idea of collective claim-rights.[268] Put simply, such rights share the correlative structure of individual claim-rights, but the rights-holder is a group or collectivity[269] or the public as a whole. In the foregoing analysis the view was ventured that if legal duties are at stake in the legality or anxious scrutiny contexts they are duties on authorities to act lawfully and reasonably in the exercise of their public functions. Many judges, including at the highest level, have conceptualised these legal norms as "duties" or "public law duties".[270] For example in a recent case Lord Dyson referred to "the basic public

[264] *Smith*, [1996] Q.B. at pp. 554, 556, 564.
[265] Ibid., p. 558.
[266] Ibid., pp. 532, 539.
[267] Ibid., p. 540.
[268] "Rights Without Trimmings", pp. 49–60.
[269] Such as: "the general body of … taxpayers" (*R. v Inland Revenue Commissioners, ex p. National Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617, 647, 651), or "that section of the public that may be in need of legal advice, assistance or representation" (*Swain v Law Society* [1983] 1 A.C. 598, 607).
[270] E.g. *Law Society v Sephton & Co.* [2006] UKHL 22, [2006] 2 A.C. 543 at [66], [83]; *Stovin v Wise* [1996] A.C. 923, 950B, 956E; *R. (Wells) v Parole Board* [2009] UKHL 22, [2010] 1 A.C. 553 at [44]; *R. (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 A.C. 604 at [15]; *R. (West) v Parole Board* [2005] UKHL 1, [2005] 1 W.L.R. 350 at [1], [27]; *First Secretary of State v Sainsbury's Supermarkets Ltd.* [2005] EWCA Civ 520 at [14]; *R. (Cawser) v Secretary of State for the Home Department* [2003] EWCA Civ 1522 at [48]–[52].

law duties to act consistently with the statutory purpose … and reasonably in the *Wednesbury* sense" and "the public law duty of adherence to published policy".[271] One possible way of conceptualising such duties is as duties owed to the public at large, which are correlative to claim-rights held by the public at large; thus a breach of duty is not an individual wrong, but a "public wrong".[272] On this analysis the Home Office owes a duty to the public as a whole to perform its public functions reasonably, and the public has a correlative right that the Home Office perform those functions reasonably. The Home Office also owes a duty to the public to perform its public functions *intra vires*, and another to perform those functions fairly. On this view each public authority could be said to owe a discrete set of duties, to act reasonably, lawfully, and with procedural fairness, in the exercise of its statutory functions, each of which is correlative to a public right.

At least two points support the view that such duties are collective. First, authorities are under a legal obligation to act reasonably and lawfully in the performance of their public duties imposed by statute. There are various statements from the higher courts that these are "duties to the public at large" as opposed to any one individual – individuals may benefit from the performance of such duties but they are owed ultimately to the public – and courts, and judges writing extra-judicially, have distinguished such duties from those in private law fields where duties are owed to specific individuals.[273] For example at common law "police officers owe to the *general public* a duty to enforce the criminal law",[274] while statutory duties on specified authorities to take measures to prevent road traffic accidents are "not owed to any individual. [Section 39 of the Road Traffic Act 1988] imposes a duty owed to the *public as a whole*. It forms part of … public law, not private law, and can only be enforced by the procedures and remedies available for enforcing public law duties".[275] Further, it is consistently stated that such duties (and the discretions and

[271] *Lumba*, [2011] UKSC 12 at [30], and see [196], [341], [359].

[272] E.g. *R. v Somerset CC, ex p. Dixon* [1998] Env. L.R. 111, 121; *Inland Revenue Commissioners*, [1982] A.C. at p. 648.

[273] E.g. H. Woolf, "Public Law–Private Law: Why the Divide? A Personal View" [1986] P.L. 220; *Bourgoin S.A. v Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716, 761B-C, 763G; *O'Reilly v Mackman* [1983] 2 A.C. 237, 255–256, 275; *Anns v Merton LBC* [1978] A.C. 728, 754; *IRC v City of London* [1953] 1 W.L.R. 652, 661–662; *Lord Leconfield v Thornely* [1926] A.C. 10, 17–18; *M v Home Office* [1994] 1 A.C. 377, 416A; *Swain*, [1983] 1 A.C. at p. 607. But note that statutes may create individual claim-rights without providing for a statutory action for their enforcement, such that they fall to be enforced via review. Consider *R. v Gloucestershire CC, ex p. Barry* [1997] A.C. 584 in which the Law Lords held that section 2(1) of the Chronically Sick and Disabled Persons Act 1970 created a duty owed by a local authority to an individual *personally* (at pp. 595, 598, 605–606, 610), Lord Lloyd observing that such provision is "almost unique in the field of community care" (at p. 595). Contrast *Ali v Birmingham CC* [2010] UKSC 8, [2010] 2 A.C. 39; *R. (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 W.L.R. 2557 at [35]–[36].

[274] *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53, 59 (emphasis added).

[275] *Gorringe v Calderdale MBC* [2004] UKHL 15, [2004] 1 W.L.R. 1057 at [70] (emphasis added).

powers conferred to fulfil them) are bestowed "for the public good",[276] "for the public benefit",[277] "for public purposes",[278] "protection of the public",[279] or to be carried out "in the public interest",[280] rather than for the "special interests" of particular individuals;[281] the courts' supervision of public power cannot be "resolved according to the private interests of the parties".[282] If the duty of reasonableness runs with and regulates the performance of duties owed to and which exist for the benefit of the public, it might be thought to cut against the grain of the nature of such duties and the purpose for which they have been conferred,[283] if concurrent duties were owed to individuals, and superimposed for the benefit of specific individuals.[284] This was certainly the view of Oliver LJ who in *Bourgoin*, discussing legality review, said: "a mere 'right' to have the provisions of the law observed, shared as it is by every member of the public whether or not he is likely to suffer by breach, is, it seems to me, the antithesis of an 'individual' right requiring protection".[285] Similarly, Sedley J., before the entry of the HRA, said "[p]ublic law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power".[286]

Second, significant doctrinal features of review support a collectivist conception, although each feature is not determinative.[287] For example, the liberal standing rules at common law are consonant with a collectivist conception. If the duty is owed to the public it makes sense that publically-spirited individuals and representative groups, as members of the political community to whom the duty is owed, ought to be accorded standing so as "to call the attention of the court to an apparent misuse of public power", even though they have "no particular stake in the issue or outcome".[288] It is also consonant with the collectivist conception that available remedies such as quashing and

[276] *Stovin*, [1996] A.C. at pp. 935D, 951H.
[277] *Cutler v Wandsworth Stadium Ld.* [1949] A.C. 398, 408.
[278] *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633, 737; *Swain*, [1983] 1 A.C. at p. 618.
[279] *Swain*, ibid., at p. 607.
[280] *R. (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755 at [41]; *Cutler*, [1949] A.C. at p. 409.
[281] *Swain*, ibid., at p. 607.
[282] *R. (CJ) v Cardiff CC* [2011] EWCA Civ 1590 at [21].
[283] It does not follow that it is conceptually impossible for a public authority to owe duties to individuals in the context of a duty owed to the public. For example authorities may owe duties of care to individuals in tort in the context of performance of public duties.
[284] Though the matter cannot be fully explored here Mashaw's distinction between "individualistic" ideas of rights, which emphasise autonomy and consent, and "statist" ideas of rights, concerned with "pursuit of the general welfare", may help to explain the difference in philosophical foundations between individual rights under the HRA and public rights at common law: "'Rights' in the Federal Administrative State" (1983) 92 Yale L.J. 1129.
[285] *Bourgoin*, op. cit., p. 767.
[286] *Dixon*, [1998] Env. L. R. at p. 121.
[287] Within the will-theory of rights, the liberal standing rules would conclusively tell against the duties of reasonableness, legality etc being conceptualised as individual rights: see note 205 above.
[288] *Dixon*, [1998] Env. L. R. at p. 121.

prohibiting orders are geared to regulating the exercise of public power, rather than compensating setbacks to interests personal to specific individuals.

That the obligations at common law might plausibly be conceptualised as duties correlative to rights is pertinent because it would mean that legal rights subsisted within administrative law before the HRA, undermining claims that rights are a recent development in administrative law. That these rights were collective as opposed to individualist also calls into question a common tendency in righting-theorists' work to associate "rights" in administrative law exclusively with protection of individual interests. The analysis also helps to explain legal change; according to the foregoing analysis the fundamental change effected by the HRA is that it introduced into English administrative law a field of law with the protection of basic human interests as its dominant function and individual claim-rights as its basic norm. Developments such as anxious scrutiny suggest that how individuals may be affected by the exercise of public power is a relevant concern in formulating the content of common law duties in some contexts, but do not alter the nature of the basic norms within the common law, for example through creation of individual claim-rights.

5. Applying the conceptual scheme to understand rights-based change

In order to demonstrate the importance and utility of conceptual clarity in analysing "rights", let us apply the foregoing conceptual framework to navigate two hypothetical ways in which common law procedural fairness could be "righted". According to the foregoing analysis procedural fairness is a duty owed to the public by public authorities in the performance of their public functions. Individuals may enforce the duty, and the court may take into account[289] the individual's claim-rights, liberties, or interests which may be adversely affected in formulating the content of the duty, but any protection of their claim-rights etc is a product of the court ensuring the authority complies with its duty to act fairly, which is owed to the public.

Consider two hypothetical examples of how the duty may "morph" under the influence of "rights"-thinking. First, wherever the enjoyment of a "fundamental right", such as the *liberty* of expression, may be affected by the exercise of public power, the court could require more stringent procedural safeguards to be put in place than has previously been the case. For example, a full hearing characterised by many of the safeguards applied in judicial hearings, as well as the application of formal rules of evidence, procedure and disclosure, may be required by law. Not only would a fully reasoned written decision be required, but

[289] E.g. *West*, [2005] UKHL 1 at [30].

the decision-maker, in that decision, would be required to address and respond to every substantive argument made by the individual, and set out and elaborate upon each consideration taken into account. The common law would thus afford strong procedural protection where public power touched on fundamental liberties. Second, the courts may assert that procedural fairness is no longer a public duty but one owed by authorities to specific individuals, and which is correlative to individual rights. The doctrinal content of the duty may remain unchanged, but procedural fairness would now be the claim-right of each individual.

Both scenarios could be said to entail the "righting" of procedural fairness or an "embrace of rights". But each course is different. The first revolves around the idea of fundamental rights, whereas the second entails rights-simpliciter. The first would entail judicial consideration of the nature of the applicant's liberty in formulating the substance of the obligations, within the context of a public duty. The second would entail the primary obligation being reformulated as an individual claim-right, while the individual's liberties would be given no greater weight in formulating the requirements of fairness. In both cases there could be knock-on effects. For example, within the first course judges may become increasingly reluctant to exercise their discretion to refuse relief given the procedural protection of "fundamental rights" is at stake, although provision for damages would still be out of place given the duty remains a public one. In the second course standing may be narrowed on the basis that the duty is personal to an individual, while there would be a stronger argument for compensating personal harm, given the wrong is personal to the individual.[290]

V. Conclusions

The righting-theorists' claims are problematic. In respect of the narrow variant, if one's claim relates to one aspect of administrative law broad claims of the righting of administrative law, which suggest radical change across the field, have a strong propensity to mislead. Further, protagonists of the narrow variant fall into error in claiming that the fundamental change instigated by the HRA was methodological. As a result of this misplaced focus on proportionality they miss the truly revolutionary change under the Act, the creation of directly actionable and free-standing personal and individual legal rights against public authorities in statute, and a jurisprudence which has the protection of fundamental human interests as its primary function. In respect of the

[290] By analogy, damages are available under the HRA for violations of procedural rights: *R. (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 W.L.R. 673; *R. (Faulkner) v Secretary of State for Justice* [2013] UKSC 23.

broader variant, such claims are not grounded in a thoroughgoing analysis of doctrinal developments across administrative law, and are therefore, as well as lacking nuance, not reliable. When one considers features of administrative law relied on by righting-theorists as well as vast tracts of administrative law not examined by them, one finds evidence that tells against broad claims of a wholesale recalibration of administrative law. Further, the righting-theorists' claims as to the nature of this purported fundamental recalibration are shot through with ambiguity, and do not in general differentiate between different ways in which the law may be "righted". It also seems highly unlikely that administrative law is, as a general proposition, being gradually recalibrated around one central idea. Rather, the complex and varied nature of modern administrative law suggests an increasingly pluralistic order. The righting-theorists' claims are plunged into further ambiguity by their reliance on an undifferentiated notion of "rights".

If we wish to accurately and precisely record, explain and analyse "rights"-based developments in English administrative law, two points are fundamental. First, we must ensure conceptual clarity about "rights", and acknowledge that references to "rights" within administrative law may denote disparate phenomena. Second, it is crucial to take doctrine seriously. Only if one closely examines significant internal features of bodies of administrative law doctrine, and embraces the complexity and nuances of doctrine, can one hope to accurately explain and understand the nature of "rights" and "rights-based" developments in different doctrinal contexts, different ways in which notions of "rights" are being woven into and afforded protection by the law, and different processes of change at work within the law. To do otherwise is to risk obscuration of our understanding of doctrinal development.