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LEGAL RIGHTS

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What are legal rights? How do they relate to moral rights? It is common for philosophers to turn to the law for a model for their analysis of rights in general. Several leading legal philosophers, such as W. N. Hohfeld and H. L. A. Hart,[1] have proposed explanations of legal rights without establishing whether they apply to non-legal rights as well. They have thus assumed that the nature of legal rights can be established independently, that the success of an account of legal rights does not depend on its applicability (possibly somewhat modified) to other rights. Other philosophers like L. Becker, C. Welman and R. Flatham,[2] make some account of legal rights, usually Hohfeld's, the starting point for their explanation of rights in general.

This mode of approach is not, and has never been, universal. J. Feinberg and R. M. Dworkin are but two prominent contemporary writers who base their analysis of legal rights on an explanation of rights in general.[3] Elsewhere I have proposed a general account of rights.[4] Its gist is that to say of an individual or a group that he or it has a right is to say that an aspect of their well-being is a ground for holding another to be under a duty. My purpose in this article is to show that this account applies to legal rights and to defend my approach which regards moral, rather than legal, rights as the model for a general explanation of the concept. The article does not attempt a classification of legal rights. Nor does it offer an analysis of special kinds of rights. Its sole concern is the general idea of a legal right.

1. AGAINST THE INSTITUTIONAL MODEL

Not all writers who have been inspired by a legally-based account of rights, like that of Hohfeld, have chosen to base on it their explanations of rights in general by reason of its foundation in the law. Many of them simply saw it as a promising

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1 See W. N. Hohfeld, *Fundamental Legal Conceptions* (Yale U Press, New Haven); H. L. A. Hart, *Definition and Theory in Jurisprudence* (Oxford U Press 1953); 'Bentham on Legal Rights' in A. W. B. Simpson, ed, *Oxford Essays in Jurisprudence* (2nd series, Oxford U Press 1973).

2 See L. Becker, *Property Rights* (Routledge and Kegan Paul, London 1977); C. Welman, 'A New Conception of Human Rights' in E. Kamenka and A. E. S. Tay, eds, *Human Rights* (Arnold, London 1979); R. Flatham, *The Practice of Rights* (Cambridge 1976). Cf also T. D. Perry, 'A Paradigm of Philosophy: Hohfeld on Legal Rights' 14 *Am Phil Q* 41 (1977). Those deontic logicians who consider rights at all tend to base their work on Hohfeld's.

3 See J. Feinberg's *Rights, Justice and the Bounds of Liberty* (Princeton U Press, New Jersey 198c), essays 6–8. Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) passim.

4 'The Nature of Rights' *Mind* (1984).

starting-point. Since any complete theory of rights has to apply both to legal and to non-legal rights it may be thought unimportant whether a writer's source of inspiration is reflection on the law or not. The issue does, however, suggest a few points which deserve attention.

Some non-legal rights resemble legal rights more than others. Closest to them are institutional rights. These are rights conferred by the rules of associations such as political parties, trade unions, educational institutions and sports associations. They share with the law several of its defining characteristics. They are normative systems regulated by adjudicative institutions and by rules of recognition determining membership of the system.[5] Just as the law is a particular type of institutional normative system, so legal rights are a particular type of institutional rights.

Some other rights are custom-based. They derive from rules, customs and conventions observed in a certain community. Institutional rights are custom-based. But not all custom-based rights are institutional. Many social rules and conventions do not belong to systems of rules identified by rules of recognition and enforceable in courts or tribunals.[6]

It is at least arguable that many rights are not custom-based. People who believe in fundamental human rights usually believe that these rights do not derive from social practices which recognize and implement them even where such practices exist. They further believe that people have such rights even in societies in which the rights are neither recognized nor respected.

It is plausible to regard the law as the model for the analysis of institutional systems generally. The reason is not its greater importance but its greater self-conscious articulateness. Modern law is not just an institutional normative system, it is also a bureaucratic system. Its institutions are manned, for the most part, by professionals. Its proper functioning depends on full-time judges, barristers, solicitors and other legal officials, their professional associations, law schools and the like. Though legal systems have preceded their bureaucratization, contemporary law relies heavily on bureaucratic processes, many of which are designed, at least in part, to give conscious, explicit and complete articulation to the law. This makes it a particularly clear instance of an institutional normative system.

This high degree of self-conscious articulation may also incline one to regard legal rules and institutions as a paradigmatic example of all rules and normative arrangements. And, therefore, to view legal rights as a basis for the analysis of all rights. This tendency is, however, not without risks. The danger is that it will lead to an account based on the specific institutional features of legal rights and will distort our conception of rights in general.

5 See on institutional systems generally and on the law as a special kind of such systems, my *The Authority of Law* (Oxford U Press 1979), essay 6.

6 This way of distinguishing customary from other rights is crude and unsatisfactory but will do for present purposes.

One family of explanations which suffer from this pitfall is that comprising accounts basing rights on normative powers to enforce duties or to apply sanctions for disregarding them. Because the law is an institutional system it is concerned primarily with those rights and duties which it is willing to enforce or following the violation of which it is willing to provide remedies or sanctions. Let us examine the reasoning leading to this conclusion. Being an institutional normative system means being a system consisting of source-based rules which certain adjudicative bodies are bound by their rules of recognition to recognize and apply. That is, institutional systems consist of rules which are subject to adjudication before official bodies. Such adjudication is normally undertaken to obtain remedies or secure sanctions for violation of rights or for breach of duties, or to prevent such behaviour. The only important exception in modern legal systems is litigation to obtain a declaratory judgment. But even that is usually undertaken to facilitate or make unnecessary action for enforcement, remedies or sanctions, or in circumstances where by convention it is respected as if it were an ordinary enforcement or remedial action.[7]

Since litigation is almost invariably either for the enforcement of rights or duties or for remedies or sanctions for disregarding them, it is tempting to think that only rights and duties which can be litigated with a view to such results can be legal rights and duties. This is a mistake. There are legal rights and duties which cannot be enforced and violation of which does not give rise to action for penalties or remedies. The most important class of such exceptional legal rights and duties is certain rights and duties of or against officials. Rights and duties of officials and rights against them regulate the activities of courts and other legal officials and are therefore subject to adjudication. That is why they can meet the conditions for being legal rights and duties. But they are not always themselves protected by action in the courts. The law determines what appeals the highest Court of Appeal has a right to hear but if it decides to hear an appeal that it has no right to hear then no one can take legal action to stop it. I do not claim that the law must contain unprotected rights and duties, merely that all legal systems in fact contain them. They are, however, clearly exceptional and in a sense parasitical on rights and duties which are enforceable or which do give rise, when disregarded, to actions for remedies or for sanctions. Therefore, their existence does not disprove the statement that the law is primarily concerned with rights and duties which it is willing to enforce or for the violation of which it is willing to provide remedies or sanctions.

Moreover, the law typically, though not invariably, endows right-holders with power to take legal action to enforce their rights or obtain redress for their violations. This is normally a very sound policy. There are strong reasons for limiting access to court. If anyone could go to court to complain of the violation of any right regardless of whose right it was, the result would be that individuals would often face action alleging that they had transgressed someone's rights when

7 As is the case in action against the Crown in Britain.

the action was frivolous or malicious or based on no evidence. Right-holders are those most directly affected. They have in most cases the motivation to protect their rights and good access to available evidence. It is far better to give them access to the court and deny it to all others. We all know the flaws in any argument that the initiative for all legal actions to protect rights should rest exclusively with the right-holder. Our present interest is not, however, with these considerations of legal policy, but with their unfortunate impact on certain theories of rights.

Some writers on legal rights, seeing that most legal rights are protected by remedies, sanctions and enforcement measures and that right-holders normally have legal power to invoke such protective measures, have concluded that to have a legal right (or at least to have one kind of legal right) is to have control over its corresponding duty, i.e. to have legal powers to take protective legal action. Other writers, who found their accounts of rights generally on some such explanation of (one kind of) legal rights, have concluded that all (or one kind of) rights are no more than the possession of a normative power to control duties corresponding to the right. They have, therefore, looked for non-legal analogues of legal remedies and sanctions and of legal rules of locus standi.

The results were only too often a distorted view of morality. In the search for analogues of legal sanctions and remedies expressions of views about the rightness or wrongness of actions were often interpreted as sanctions. People's judgments that they had behaved badly were often regarded as internal sanctions. Pangs of conscience were compared with jail sentences.[8] Of course, people sometimes punish themselves or each other for wrongdoing. Of course, we all recognize obligations to compensate the victims of our wrongdoings. But punishment and demands for compensation are based on and justified by judgments about wrongdoings. Neither the formation of such judgments, nor their natural expression (be it through their open avowal or through feelings of shame or rage or whichever emotion is appropriate to one's belief, or through the natural expression of such feelings in word or action) should be confused with punishment. Punishment is a deliberate act intended to hurt because of a (believed) wrongdoing by the punished (or, in the case of collective punishment, by one of the punished). It is distinct both from the belief on which it is based and from its natural expression in words or deeds.[9]

Such distortions cannot be dismissed as aberrations which do not undermine credence in an account of (all or some kinds of) rights as the possession of a power to control a duty. Without these aberrations this account loses its appeal. Any sound morality recognizes rights whose purpose is not to protect economic interests, rights whose violation does not cause harm nor does it give rise to a

8 See on these points P. M. S. Hacker's important article 'Sanction Theories of Duty' in A. W. B. Simpson, ed, *Oxford Essays in Jurisprudence* (Oxford U Press 1973).

9 Though, of course, people can, and occasionally do, punish each other by expressing views in order to hurt, on the ground that the wrongdoer deserves such treatment.

right to punish or to obtain compensation. Many people believe in a right not to be deceived by members of one's family, a right not to be insulted or treated with contempt by anyone, and many other rights which derive from recognition of a person's dignity rather than a need to spare his feelings or his pocket. But their belief is not merely false but incoherent if rights consist in controlling another's duty by being able to punish its violation or demand compensation.

Some philosophers draw an analogy between legal locus standi rules and moral rules concerning the appropriateness of complaints about wrongdoings. While some similarity exists, it cannot be used to provide an account of rights as power to control duties without leading to exaggeration and distortion. Many conventions about the propriety of poking one's nose in other people's affairs are mere matters of etiquette or of good manners and cannot affect underlying moral rights. Some moralities, while recognizing rights, impose no moral restrictions on the right to punish their violation or to demand that compensation be given to the victims. Everyone is morally entitled, or even required, to do so, if his action is likely to be helpful. Where moral restrictions on the right to complain exist, they often fail to point to the right-holder. According to certain moral theories children are not allowed to complain of violations of (some of) their rights. Furthermore such restrictions may exist even where no right is violated. For example, breach of certain religious duties or of duties to the public at large is often not viewed as a violation of any right, and yet only the head of the family or the priest may be allowed to punish or demand compensatory action.

2. LEGAL JUSTIFICATIONS

I have dwelt on the shortcomings of one family of explanations of rights to illustrate the dangers in taking legal rights as the model for an explanation of rights in general, the danger of basing one's account on the institutional features of the law which are absent in non-institutional rights. My proposed account of rights generally as grounds for holding others to be subject to duties is certainly free of this danger. It identifies rights by their role in practical reasoning. They indicate intermediate conclusions between statements of the right-holder's interests and another's duty. To say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty, i.e. a duty to take some action which will serve that interest, or a duty the very existence of which serves such interest. One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously.[10] One uses the statement that a right exists to derive (often with the aid of other premises) conclusions about the duties of other people towards the right-holder.[11]

10 One cannot specify in the abstract what importance those reasons must assign to the interest except circularly by saying 'sufficient to justify the conclusion that that person has a right'. One can and should of course develop a theory of which interests are protected by rights and when.

11 A duty is towards a certain person if and only if it is derived from his right.

Such an account of rights certainly does not rely on any institutional features of law. When coming to use it to explain legal rights one encounters the opposite problem. The law, one may say, like other institutional systems, is primarily concerned with aspects of individual behaviour which can be adjudicated in courts and tribunals. It is, consequently, a system of rules for the guidance of behaviour. It is not a system of practical reasoning, but of operative action-guiding rules. An explanation of rights in terms of their role in practical reasoning is, therefore, incapable of explaining legal rights.

To prepare the ground for applying my general account of rights to legal rights it is, therefore, important to consider briefly the extent to which the law, as well as other institutional normative systems, are systems of practical reasoning. To regard them as such is compatible with thinking of them as normative systems, i.e. as systems of rules. All that is involved is the view that legal rules are sometimes hierarchically nested in justificatory structures. That the law is a system of practical reasoning means no more than that it follows from this fact that belief in the normative force of some of the legal rules commits one to belief in the normative force of some of the others.

To say of the law that it is a system of practical reasoning is then to claim that it consists of rules some of which justify some of the others. It is a statement of the logical properties of the law. It is not a psychological or sociological statement about people's beliefs about the law or their attitude to it. Nor is it a moral or other value judgment about the value or merit of the law.

Lawyers commonly conceive of the law as made of sets of nested rules linked by justificatory chains. One rule in a set justifies one or more of the others which in turn justify a few of the rest, and so on. A rule enacted by a Minister of the Crown derives its legal force from an Act of Parliament. Anyone who believes that the Act of Parliament is normatively binding[12] is committed to believe that so is the ministerial rule, since that conclusion is entailed by his premise (together with certain true factual premises). This illustrates the fact that the law is a structure of authority. The authority of some of its rules is vindicated by the fact that they were created in modes authorized by other of its rules.

There is no reason to think that each legal system is a pyramid of authority leading to one apex, to one supreme legal rule which authorizes all the others. I am merely pointing to the familiar fact that some rules of law authorize the creation of some others. Many legal rules can be grouped by their common origin. In Britain statutory law, for example, derives its authority from the authority of Parliament to make law, whereas case law derives its authority from the power of the higher courts to do the same. Borrowing Hart's terminology,[13] we can call the type of

12 I use the expression 'normatively binding' where others may have used 'morally binding'. Though on occasion I will refer to moral force or to moral justifications, 'moral' is often used in a narrower sense in which 'moral' considerations are only one kind of normative consideration.

13 H. L. A. Hart, 'Moral and Legal Obligations' in A. I. Melden, ed, *Essays in Moral Philosophy* (Seattle 1958), and *Essays on Bentham* (Oxford 1982) 254.

justificatory nexus we have considered so far content-independent justification. In our example it was assumed that the ministerial regulation is normatively binding regardless of its content, becase it was issued by a person who had authority to do so.[14] But some legal rules provide content-dependent justification for some others.

Consider the relation between the following three (hypothetical) legal rules:

(1) Every person has a right to freedom of expression.

(2) No person shall be subject to a duty restraining the publication of a sincerely-held opinion or of true information without his consent, unless such restriction is necessary for reasons of security of state or of the maintenance of essential public services.

(3) Publication of details of the working of an essential public service such as the water supply cannot be prohibited by law, even if possession of such information can assist anyone who may wish to disrupt such service, unless there is a clear and immediate danger that it may be used for such a purpose.

I should emphasize that it is not my claim that these rules either are or should be law. They are merely useful since they resemble several actual rules and they illustrate typical justificatory relations between rules. Each of these rules justifies the ones that follow it. They, therefore, form a justificatory hierarchy. The first rule is the most general. It justifies not only the other two but many more. For example it justifies the rules:

(4) There is no legal duty protecting the reputation of the dead.

(5) Journalists have a right not to disclose the sources of their information except when this is necessary to secure prosecution and conviction for an offence for which the maximum penalty is five years or more.

Rule (2) justifies (3) but not (4) or (5). It is, therefore, lower in the justificatory hierarchy than (1) but higher than (3). The justificatory structures these rules exemplify are content-dependent. In this they differ from structures of authority which are content-independent justificatory structures. But otherwise they greatly resemble them. Both determine partial ordering among certain legal rules and yet neither is a connected relation.

They can be said to divide the law into (possibly overlapping) groups of rules in each of which one (or several in combination) provide a justification for the rest. When the justification is content-independent the groups are identified by their common, direct or indirect, source. When the justification is content-dependent the groups it creates are based on doctrinal unity. They are all articulations and implementations of one or more core doctrines.

Let me try and explain the justificatory relation I have been referring to more precisely. All legal statements can be expressed by 'It is the law that P' sentences where 'P' is replaced by a (non-legal) sentence. Let us define a relation of legal justification as follows. The statement 'It is the law that P' legally justifies the statement 'It is the law that R' just in case 'It is the law that P' is true and there is a set of true statements (legal or non-legal) <Q>, such that <Q> and it is the law

14 Though his authority may be and usually is, limited to rules which meet certain conditions.

that P state a complete reason to believe that R (and <Q> by itself does not state such a reason).

I shall refer to the embedded statement P of a legal statement 'It is the law that P' as its content. The content of a legal statement may be true even if the legal statement itself is false and vice versa. It is true that one ought to keep one's promises but false that it is the law that one ought to do so. It is (in many legal systems) true that it is the law that one may kill one's pets at will but it is false that one may do so. The sentence-forming expression 'it is the law that . . .' is not a truth functional operator. To establish the truth of a legal statement one has to establish not that its content is true but that it has legal status, that it has the force of law. Justifying a legal statement is not to be confused with proving or establishing its truth. It concerns the truth of its content. Since in normal discourse part of a reason, i.e. an incomplete reason, is a reason, a legal statement justifies another legal statement if it states a reason to believe in the truth of its content. But while the justifying statement provides a reason for believing in the truth of the content of the justified one, it falls short of proving its truth. The reason it provides need not be a conclusive reason. It may rely on inductive or on practical (deontic) inferences both of which are defeasible.

We can define a conclusive justification as follows. One legal statement, it is the law that P, conclusively justifies a second legal statement, it is the law that R, if there is a set of true premises <Q> which does not entail R but such that <Q> and 'it is the law that P' entails 'R'. Finally a justification should be distinguished from a complete justification. A complete justification of a legal statement is the set of all the non-redundant premises which constitute a complete reason to believe in the content of the justified statement.

As our examples illustrate, the justificatory relation between legal rules[15] is not that of a complete justification. The doctrine of free speech stated in (1) is not a complete reason for believing in the content of the rule (2), nor is (2) itself a complete reason for believing in the content of (3). The route from (1) to (2) goes through additional premises. Some elaborate and explain (1), its scope and its point. They may be premises which explain what is an act of expression and what counts as a restriction on its freedom. They also include explanations of why it matters. They will lead to the conclusion (which (1) by itself does not yield) that suppression of sincerely held opinion is worse than the suppression of the publication of opinions not held by the speaker, or that (1) protects only unconsented-to restrictions on publication (or at least that consent to a restriction on publication makes it less objectionable). Beside these premises, rules such as (2) and (3) reflect the force of other doctrines which conflict with (1), doctrines such as:

(6) The public interest in the maintenance of essential services warrants measures necessary to guarantee their continued operation.

15 One legal rule justifies another in case the statement of the one justifies the statement of the other.

Rules (2) and (3) reflect the legal resolution of conflicting legal doctrines. They do not just apply their general justifying doctrines such as (1). They also indicate their limits and allow for certain exceptions to them.

When we refer to one rule as justifying another we rarely have a complete justification in mind. Nor do we always assume the justification to be successful. I can reject the suggestion that (1) justifies (2) if I believe that the additional premises which are required to entail the contents of (2) are false. I may then say that it is a mistake, albeit a common one, to think that (1) justifies (2). Here 'justifies' means successfully justifies. But in another key I can say that the rule that the suitability of a person to have custody of his child depends entirely on the interest of the child is the justification of the legal practice of denying custody to homosexuals, without regarding the justification as successful. Here 'justification' means what is taken by the courts or the law or by people generally, to justify. In this article this will be the sense in which 'justifies' will normally be used.

3. LEGAL JUSTIFICATION AND VALIDITY

To recap: a legal system can be regarded as a system of practical reasoning for many of its rules are nested in justificatory structures. Rules are so nested if, of any two of them, one legally justifies the other. The relation of legal justification between legal rules is just an instance of a wider relation of legal justification between legal statements. It holds between 'it is the law that p' and 'it is the law that q' if and only if 'it is the law that p' is true and there is a set of true statements <Q> such that <Q> and 'it is the law that p' are a complete reason to believe that q. In other words one legal statement justifies a second legal statement just in case it is a reason to believe in the content embedded in the second.

It should be obvious why the justificatory relation is said to exist between legal statements if the justifying legal statement is a reason for accepting *the content* of the justified one. A rule should have the force of law only if its content is successfully justified—whether by another legal rule (i.e. by a legal justification) or not is immaterial. This necessary condition can be strengthened into a sufficient condition as follows: if p is justified and if the matter it deals with should be regulated by law then it should be the case that it is the law that p.[16] The general justificatory relation helps in the evaluation of the merit of the law. Our specific interest here is in legal justification only, i.e. those justifications based on legal premises. We are concerned only with the way one legal rule justifies another.

Where the justification starts from non-legal premises it is clear that it cannot establish the truth of a legal statement or the validity of a legal rule. At best it is part of an argument for its desirability. But where a successful legal justification is concerned does it not establish the validity of a legal rule by showing that its content is entailed by another legal rule and other true premises? Is not this

16 This of course does not entail that it is now best to change the law to that effect. Though it is best that p has the force of law it may be wrong to enact it because of the consequences of the very act of introducing the change.

precisely the way that the validity of delegated legislation is established? Consider, for example, (7) and (7a):

(7) Everyone has a legal right to his good name (i.e. it is the law that everyone has a right to his good name).

(7a) Jimmy has a legal right to his good name.

Is not the fact that (7a) is legally justified by (7) the only way in which its truth can be established?

This crucial and difficult problem has not received as much explicit attention as it deserves. I do not know of anyone who denies that a successful legal justification does, under certain conditions, establish the truth of the justified legal statements. Kelsen came close to doing this. He denied that content-dependent justification can ever establish the truth of the justified legal statement.[17] He would have denied that the truth of (7a) can be learnt from that of (7). His reasons for this view, if consistently pursued, would, however, lead to the conclusion that content-independent justifications also fail to establish the truth of the justified statement. That means that the validity of delegated legislation cannot be established by reference to the authorizing statutes but depends on judicial declarations of their validity. But this undermines the very emphasis on the structure of authority which is the backbone of Kelsen's theory of law. It also raises questions about the authority of the courts to make decisions validating delegated legislation. That authority itself rarely rests on the historically-first constitution. It depends on the very chain of reasoning that Kelsen is committed to reject.

I am not sure whether anyone has advocated the opposite view, namely that all successful legal justifications establish the truth of the justified statement. It is possible that this is R. M. Dworkin's view. My own view is determined by the Sources Thesis. It says that the existence and contents of the law can be determined without resorting to any moral argument. In its widest and strongest interpretation the thesis applies not merely to the existence and content of all legal rules, but more generally to the truth and content of all legal statements. It follows that a successful legal justification can establish the truth of the justified legal statement only if it does not resort to moral arguments (i.e. if no moral premises are among the additional premises <Q> which form part of the complete justification concerned).[18] Subject to that condition it is true that a successful legal justification establishes the truth of the justified statement.

Therefore, content-independent justification which does not involve moral premises does indeed establish the validity of the delegated legal rules. Similarly the truth of (7a) can be established by reference to (7). On the other hand while (1) justifies (2) it cannot establish its legal validity. If (2) is valid law it is so in virtue of courts' decisions which have adopted it and which have the force of precedent,

17 See Kelsen, 'Law and Logic' in *Essays in Legal and Moral Philosophy* (Reidel, Dordrecht 1973).

18 See J. Raz, *The Authority of Law*, chap 3; *The Concept of a Legal System* 2nd edn (Oxford 1980) 210–16.

or in virtue of being incorporated into a statute. It cannot be regarded as valid law just on account of being successfully justified by (1).

A successful justificatory relation between one legal statement and another is of great legal significance even when it does not by itself establish the truth of the justified statement.[19] If the justified statement is not a true statement of law the justification provides a reason for changing the law so as to make the justified statement true. As has already been noted it is not necessarily a conclusive reason. Though the change is shown by the justification to be desirable, its introduction may have undesirable aspects or consequences which outweigh the reason for it. If on the other hand the justified legal statement is already the law then the justification shows that it is a morally-valid law. A morally-valid law may not be a good law if its validity derives from an authority-based content-independent justification. The moral validity of a rule means that it has the moral force that it purports to have. If a rule imposing a certain duty on its subjects is morally valid then its subjects have the duty it imposes on them. It does not follow that it is best that they should have it. They may have it because of the authority of the person who made the rule but he may have made a mistake in making the rule, which should be rectified by changing it.

A content-dependent successful legal justification of an existing legal rule does establish not merely that it is morally valid but also that it is good that it exists. It is therefore a reason against changing it but once more this is not necessarily a conclusive reason. The very introduction of a change, even one substituting a less satisfactory rule for the existing one, may have aspects and consequences which make it desirable and which may outweigh the reasons against it.

We now have a reasonably complete picture of the sense in which law is a system of practical reasoning. First, some legal rules justify some others. In this they illuminate their point and purpose. The former are invaluable guides to the interpretation of the latter and they help decide what weight to give the latter when these conflict with others. Secondly, legal rules constitute legal reasons for developing the law in certain ways. The importance of the fact that they are *legal* reasons for developing the law is that they are reasons on which courts are required to act, given the appropriate opportunity. Elsewhere I have likened them to directed administrative powers.[20] Consider a case in which an administrative authority is given the power to grant certain privileges and rights (say, grant planning permission) and directed to do so if certain conditions are met (e.g. the development proposed preserves the character of the neighbourhood, meets the required safety standards and will not significantly increase the traffic in the area).

19 The following remarks assume that the justification proceeds from a morally-justified legal rule. (That is they represent the perspective of a person who is willing to make the justifying legal statement in a committed way. I am using the distinction between committed and detached legal statements explained in *The Authority of Law*, essay 8). This is normally the point of view of the courts. Hence its importance to legal analysis.

20 See my 'The Inner Logic of the Law' forthcoming in the proceedings of the 1983 Congress for Legal and Social Philosophy.

The authority is required by law to use its powers as directed. The fact that one legal statement successfully justifies another which does not yet have the force of law is a reason for courts, which have the power to do so, to give it legal effect. It makes their power to change and develop the law into a directed power.

4. LEGAL RIGHTS AND LEGAL JUSTIFICATIONS

If rights are protected interests in that a person has a right if and only if an interest of his is a sufficient ground for holding another to be subject to a duty then legal rights are legally-protected interests. Such an account gives 'rights' the same sense in legal as in non-legal contexts. It presupposes that the law is (at least in part) a system of practical reasoning. The previous two sections explained the sense in which this is so. How do their conclusions help to clarify the nature of legal rights?

An explanation of legal rights has to include two parts. It has to explain how it is possible to come to have legal rights and it has to explain what can be the legal consequences of having a right. People can come to have legal rights in the same ways in which they can come to have duties, powers, liabilities or any other legal condition. Legal right-statements are either pure or applied. A legal right-statement is pure if its truth can be established by reference to the existence of certain laws alone. Other legal right-statements are applied statements. Their truth can only be established by facts which include facts other than the existence of law. It should be remembered that both kinds of legal right-statements are subject to the condition imposed by the Sources Thesis, namely that their truth can be established without using moral argument.

Consider the following examples:

(8) Everyone has a right to damages against anyone who defames him without lawful excuse.

(8a) Jim has a right to damages against anyone who defames him without lawful excuse.

(9) Jim has a right to £1,500 defamation damages against Smith.

(9a) Smith has a duty to pay Jim £1,500.

(10) Children have a right to maintenance against their parents.

(10a) Jill has a right to maintenance against her mother.

(11) Jill has a right that her mother pay for her piano lessons.

(11a) Jill's mother has a duty to pay for her piano lessons.

Of these (8) and (10) are pure legal right-statements. So is (7). (7) justifies (8). It is wrong, however, to think that (8) is applied. Its legal force is due to the legal sources, precedents and statutes which establish it in law. Its justification by (7) presupposes moral arguments and is therefore incapable of establishing its legal force. Common lawyers are more likely to say that (7) is inferred from (8). The Common Law is preoccupied with providing remedial rights. But the reasoning used by the courts shows clearly that they regard the remedies as justified by a

right to reputation. The choice of remedies and their adequacy is assessed (in part) by their adequacy in protecting that right. Given the discussion of the previous section there is no surprise in one rule which creates a right justifying another such rule, which derives its legal force not from that justification, but from independent legal sources. Nor is there any surprise that (7a), (8a) and (10a), which are justified respectively by the rules (7), (8) and (10) without recourse to any moral argument, derive their very legal force from that justification, and are applied legal statements.

The crucial question is how can one tell that an enactment or a precedent establishes a right. We normally think that the question arises only if the language adopted in legislation or in a judicial decision is obscure or ambiguous. Otherwise it all depends on the language of the enacted rule. But though, where the language is plain, the question may be easy to answer it still requires an answer. Why do we say that the rule made is the one expressed by the language of the enactment understood in its ordinary meaning, or in the meaning its language has, according to legal rules and conventions? The reason lies, crudely speaking, in the fact that where a law is laid down by authority its meaning is dictated by the intentions of that authority. If it were not so then there would have been little reason to ascribe law-making power to that authority.[21] This lesson is particularly important when the issue is, not what precisely is the duty or the right that the law creates, but does the rule in question impose a duty or does it merely set a condition for one's ability to achieve certain consequences? Does it grant a power or a right? And suchlike doubts about the very type of legal condition the law creates.

H. L. A. Hart has shown that one cannot tell the difference between a duty breach of which incurs, e.g. a fine, and an activity one is free to undertake but has to pay a tax if one does, except by reference to the intentions of the law, i.e. of the legal institutions which have created and which enforce the rule.[22] In a similar vein I have argued that one cannot identify a legal power with the ability to perform an act which has legal consequences. This would yield the paradoxical consequence that people have legal power to break the law. (Do we need legal powers for *that*?) A legal power can only be identified by the reasons which led the law (i.e. the institutions which make and sustain it) to attach those legal consequences to the act. The act is an exercise of a legal power only if the reason for attributing to it the legal consequences it has, is that it is held desirable to enable people to perform that act as a means to achieve those consequences, if they so wish.[23]

Similarly, a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be

21 Needless to say this brief answer is a rough one. Among many complications let me mention that this answer cannot be the whole story regarding old laws. But the details of a doctrine of interpretation need not concern us here.

22 H. L. A. Hart, 'Kelsen Visited', 10 *UCLA L Rev* 709 (1963).

23 Cf *Practical Reason and Norms* (Hutchinson, London 1975), s 8 and *The Authority of Law*, 17–18.

subject to a duty. One way of creating a right is therefore by the use of the term 'right'. (For example: 'An employer shall have the right to . . .'.) This is an obvious way for the law to confer rights, for given that 'a right' means that an interest is sufficient for holding another to be subject to a duty, its use is a natural way to express that thought. But, as Bentham pointed out long ago, this is neither the only nor the most common way in which the law creates rights. It may do so by the use of specific technical terms such as 'a holding' or 'a share'. Or it may do so by imposing duties with the intention to protect someone's interest thus endowing him with a legal right.

An individual has a right if an interest of his is sufficient to hold another to be subject to a duty. His right is a legal right if it is recognized by law, that is if the law holds his interest to be sufficient ground to hold another to be subject to a duty. This is the core of the account here proposed. It explains why I said above that a rule is identified as a right-conferring one by the reasons for its adoption. To be a rule conferring a right it has to be motivated by a belief in the fact that someone's (the right-holder's) interest should be protected by the imposition of duties on others.

The other aspect of the explanation of legal rights follows naturally from the core idea. If a legal rule creates a legal right then its consequences are that others have duties to protect an interest of the right holder. Such duties are the consequences of a right in the sense that it legally justifies those duties. This legal justification can have either of the two results we distinguished in the previous section. If the justification does not involve any resort to moral argument then the justification establishes the justified duty as a legal duty. In this way if A has a right to £5 against B then B has a duty to give £5 to A. But very commonly the right can justify the duty only in conjunction with other moral premises. In this case the legal right is insufficient to endow the duty with legal force. But the legal right is a reason for giving that duty legal force, for making it into a legal duty.

Consider statements (9), (9a), (11) and (11a) above. (9a) is justified by (9) and (11a) is justified by (11) without resort to moral argument. But while both (9) and (9a) are justified by (8), and (11) and (11a) are justified by (10), these justifications do involve moral judgments about the adequacy of certain payments. Therefore the rights and duties specified in (9), (9a), (11) and (11a) are not legally binding until there is a decision in the court, or an agreement between the parties to that effect. But (8) and (10) provide powerful reasons for reaching such agreements and for rendering these judicial decisions.

An important part of our understanding of legal rights consists in grasping their logical consequences. These are, as we have just seen, that they legally justify other rights and duties. Some of these derive legal force from this justification. Others will be legal rights and duties established by independent legal sources. Others still are not yet legally binding. These last consequences of legal rights deserve special attention since they show legal rights to constitute legal reasons for giving the justified rights and duties legal force. They establish the dynamic

aspect of rights. Legal rights can be legal reasons for legal change. They are grounds for developing the law in certain directions. Because of their dynamic aspect legal rights cannot be reduced, as has often been suggested, to the legal duties which they justify. To do so is to overlook their role as reasons for changing and developing the law.[24]

5. LEGAL RIGHTS AND MORAL PRINCIPLES

The core account of legal rights presented above requires further explanation and refinement. These can best be supplied by examining a few of the objections which are liable to be raised to it. This section explores two groups of objections concerned with the relations between law and morality.

(*a*) *Legal rights need not be recognized moral rights*

The Objection: according to the account proposed above every legal right is a legally recognized pre-existing moral right. This assumes a stronger connection between law and morality than in fact exists. It also misconstrues the nature of this connection. There are two reasons why a legal right may not be the giving of legal force to a pre-existing moral right. First, the law may quite deliberately create a right where none existed. There was no right to initiate the liquidation of a company or to obtain planning permission prior to their creation by law. Secondly, while intending to recognize a pre-existing right the law may fail to do so. It may detect an interest which deserves protection where none exists. Alternatively, the interest may exist but may be insufficient to be the ground of a duty on another. Where a legal right does not recognize a pre-existing moral right it may yet create a moral right based not on the interest of the right-holder but on the reasons we have or may have to obey that law. On the other hand where such reasons are absent or insufficient no moral right is created by the law, but it does create a legal right, one with no moral force.

The Reply: to begin to respond to this complex objection it is useful to remind ourselves of the different kinds of legal discourse. There is the sociological description of social institutions and of people's attitudes and beliefs which H. L. A. Hart called discourse from the external point of view. In this way we talk of the beliefs and actions of courts and legislators. Occasionally sentences such as 'x has a right to y' are used in such discourse to state that legal institutions hold x to have a right to y.

Much more common is the use of such right-sentences to make statements which Hart described as internal, or statements made from the internal point of view, and which I called committed statements.[25] Committed right-statements

24 I have discussed this point in *The Concept of a Legal System*, 225–7.

25 See H. L. A. Hart, *The Concept of Law* (Oxford 1961) 55–6, 86–8. J. Raz, *The Authority of Law*, 140–3, 153–7.

state that the right-holders do have those rights, that they are, if you like, moral rights or rights that morality recognizes as valid. (One should remember that in this article 'morality' is used very widely to include binding normative considerations of any kind.) The important point is that a committed statement that someone has a legal right simply means that that person has a right which is recognized in law, i.e. by the legal institutions.

The elucidation offered above explained 'legal rights' as used in committed statements, for they are the central type of legal discourse. First, not only is it the type of discourse most commonly employed in discourse concerning the law in countries in which the population is not estranged from the government, but it is also the normal mode of discourse in the sense that the law claims normative force and validity to itself. It is treated as it requires to be treated only by people who recognize its normative force and are therefore normally talking of it in committed discourse. Secondly, in every legal system, the officials manning its legal institutions have the internal point of view and are normally using committed statements to describe the law.

Finally, the non-committed modes of discourse are parasitical on the committed discourse. This is evident in the case of external statements. It is also true of the third common type of legal discourse which I call detached discourse. A statement is a detached normative statement if it describes a normative situation as seen from a committed point of view without being committed to it. A person who asserts the existence of legal rights in a detached way is not committed to the moral or normative validity of those rights. His statement is true if it would have been true had the law moral or normative force. Saying that there can be legal rights which have no moral force, or even such that are immoral, is saying that one can make true detached statements about legal rights while morally condemning them and being right to do so.

There is another point raised by the objection which is still to be met. While some legal rights are legally-recognized moral rights, (for example, one's right to a good name) other legal rights are legally-created moral rights. They are moral rights one has because the law has granted them. The account of legal rights which I have offered fails to explain these cases.

There are three types of cases where a legal right can be thought of as a legally-created moral right. My explanation of legal rights adequately accounts for two of them. It requires a certain natural extension to apply to the third.

First is the case where the law changes a person's interests. Thereby it changes his moral rights which it then proceeds to recognize. Strictly speaking this is not a case where the law creates the moral right, it merely creates the interest which is the foundation of the right. Consider the following example. Until planning restrictions were introduced everyone was free to build on his land as he liked. Then the law prohibited building without planning permission and appointed planning authorities with powers to grant such permission. This created for some people an interest they did not have before, i.e. to obtain planning permission.

Given general moral principles and the circumstances of those people it is probable that some of them had a (moral) right to be given planning permission. In some countries the law recognizes those rights by giving a legal right to planning permission when certain conditions obtain, and where these conditions are those which morally entitle the applicants to the permission. It may look as if the law creates a moral right to planning permissions, for the whole of planning law is the law's creation. But upon inspection we can see that the law creates an interest which is the basis of a moral right which is in turn recognized by the law. This combination is in fact very common in technical legal areas such as company law, or licensing law.

Secondly, the possession of some rights depends on the consent or authority of others. I have a right to be on your premises if you consent to my being there. In such cases the right is there to protect some interest of the right-holder. But that interest is sufficient to justify holding another subject to a duty only if the condition is met. My interest in being on your premises if I wish is insufficient by itself to establish a duty on you to let me do so unless you consent to my being there. Your consent removes certain objections to holding you bound to respect my interest and it thus enables the interest to found a right.

Similarly, there are many cases where a moral right exists only if it is recognized by authoritative legal institutions. Sometimes they even have a duty to give their recognition to the right in order to bring it into existence (both as a moral and as a legal right), just as sometimes you ought to consent to my being on your premises, even though I do not have a right to be there unless you consent. In all cases where the consent of a legal authority is a moral condition for the existence of a moral right, a legal right *is* a legally recognized moral right. The legal recognition is self-referential, that is it recognizes that once it (i.e. the legal recognition) is given, a moral right comes into force.

The third type of case involves an extension of the core account. It concerns legal rights which though they purport to be recognized rights fail to be so, and yet they create a morally recognized legal right. Suppose that in a certain country Parliament enacts a legal right to use contraceptives. Some people believe that there is no moral right to use contraceptives, not even a moral right conditional on legal recognition. They recognize of course that Parliament in granting this legal right assumes otherwise. But they do not agree. Yet they think that Parliament's authority carries such moral force as to entail that once the legal right is granted people are morally bound to respect it and not to stop others from using contraceptives. On my account, strictly speaking this is not a case of a moral right. One's moral duty not to prevent the use of contraceptives which is the consequence of the law is not based on the interest of the right-holder, but on respect for the authority of Parliament. But since this is respect for Parliament's mistake about moral rights, and since its moral consequences are to give individuals all they would have had, had they a right to contraceptives, it is a natural extension of the concept to regard such legislation as conferring a (legal)

right. (Though of course it is, in the eyes of the anti-contraceptionists, a right to do wrong, and therefore one which should not be exercised.)[26]

(*b*) *If rights are subject to the Sources Thesis then in many areas there are no legally justified rights*

The Objection: Legal rights have two kinds of legal implications. They justify other existing legal rights and duties and they are legal reasons for developing the law by creating further rights and duties where doing so is desirable in order to protect the interests on which the justifying rights are based. The second objection concerns the first implication—the role of legal rights in providing legal justification for other existing legal rights and duties. The objection arises out of the claim that, in accordance with the Sources Thesis, all rights and duties can be identified without resort to any moral argument.

Legally-justified legal rights are either legally valid because they are successfully legally justified without recourse to moral argument, or they are legally valid because they have been directly enacted or acquired the force of precedent. Let us take the first case first. Can a right ever derive legal validity from the fact that it is successfully justified by another legal right? The objection is that this cannot happen in a way consistent with the Sources Thesis for the justification of any right requires moral argument. Consider, for example, the right of a child to be maintained by his parents. To conclude that in virtue of it he has any more specific right (to three meals a day, to proper clothing, etc.), one has to engage in moral argument on the purpose of the right and its place among other moral concerns: is it a right to minimal or to optimal support, is the level of support required relative to the parents' ability to pay, or to their life-style (they may be rich people who lead very simple lives), is it relative to the parents' moral beliefs (so that they may deny him certain experiences or opportunities because they object to them)? Does it include moral as well as material support? The right to maintenance against one's parents has no specific implications which do not involve answering these or some similar questions. These questions cannot be answered without using moral argument. Therefore no legal right has concrete legal implications if the Sources Thesis is to be believed.

Turning to the other class of legally-justified legal rights, i.e. those which derive their legal force from statute or precedent, even they cannot be explained in conformity with the Sources Thesis. At least such explanation is impossible in those areas of the law where rights are liable to be overridden by moral considerations. This is true, it could be claimed, of all equitable remedies and equity-based rights. It is also true wherever considerations of public policy or public morality entitle the courts to override otherwise established rights. It is arguable that the courts have an inherent jurisdiction to this effect in all cases brought before them. Wherever they have this discretion no concrete rights or

26 These objections are suggestive rather than conclusive. For an excellent detailed discussion of the issue see J. Waldron, 'A Right to Do Wrong' 92 *Ethics* 21 (1981).

duties can be attributed to the legislated right which is thus deprived of content. Its content can be restored only if we allow that the content of the law and of legal rights is determined by moral considerations.

The Reply: Both parts of the objections are based on simple mistakes. The fact that a given right can be overridden by moral considerations, just like the fact that it can be overridden by another legal right, shows nothing except that it is not an absolute right which defeats all contrary considerations. But legal rules rarely, if ever, have absolute force. In general they are liable to be overridden by contrary legal considerations where such exist, and where the law gives them greater force. Often, it is true, they are liable to be overridden by certain moral considerations as well, for often the law provides for this. But the account offered in the previous section is an account of defeasible rights. It does not presuppose that they have absolute force.

As to the objection concerning legal rights which derive their legal force from being justified by other legal rights, it is simply incorrect that all such justifications depend on moral assumptions. Suppose that it is morally right that parents can do with their children whatever they think is in the children's best interest (including killing them). If so, it is false that children have a right to maintenance against their parents. One cannot argue that this is what that right means. One cannot argue that a child's right to maintenance is respected by a parent who starves him because he, the parent, sincerely but falsely believes that this is in the best interests of the child. 'A right to maintenance' has as part of its meaning a descriptive content which can be established without use of moral argument. It establishes the legal force of those rights and duties which can be justified in virtue of its core descriptive content without invoking other moral principles.

6. FURTHER OBJECTIONS

In order further to explain and defend my account of legal rights I will briefly consider three other possible objections to it which, unlike the objections considered above, do not turn on the relation between legal and moral rights.

(*c*) *Legal rights as reasons for legal change*

The Objection: much play was made in section 4 of the fact that legal rights not only justify other existing legal rights and duties but also direct the courts to develop the law in certain ways. They are legal reasons for creating new laws, new rights and duties. They are therefore not reducible to a compendium statement of existing duties. One may object to this and claim that a statement that someone has a right to something is logically equivalent to a statement of existing duties. The dynamic aspect of rights, the fact that they are reasons for new duties simply means that there is an existing duty on the courts to impose certain new duties on other people in certain circumstances. A's right to ø is a reason for the court to allow him to ø, to stop others from hindering him, etc.

The Reply: the courts may have reasons to do all that they are required to do in order to protect a right but these reasons are based on different grounds. They may be based on considerations of general welfare or of public safety, or public order, etc. Sometimes their duty is grounded on A's rights. The nature of the grounds for the courts' duties is clarified by a right statement, but lost by the reduction. Stating the legally-recognized ground of the court's reason for certain actions is no mere rhetoric. It may, for example, be crucial for determining the weight the court is allowed to attribute to this reason when it conflicts with others.

(*d*) *Rights of officials and corporations*

It could be objected that even if my account explains individual rights it cannot explain official rights, nor those of corporations. Their rights are not meant to protect their interests, but the interests of others who are not the right-holders. This objection is based on a misunderstanding. Rights protect the interests of the right-holders. But these interests need not be intrinsically valuable. The reason for protecting them may be that by doing so one does protect the interests of others. Officials have interests. They are determined by their powers and duties, for their interest is to be able to use their powers and to discharge their duties. Corporations also have interests determined similarly by their purposes, powers and duties. It is true that protecting these interests is not intrinsically valuable. Nevertheless corporations and officials have rights in the same sense as other individuals. They have rights if and only if their interests are sufficient to justify holding others to be subject to duties.

(*e*) *Liberty rights*

Some may object that at best I have explained one sense of 'rights', that in which they correspond to duties. But there is a second quite separate sense of rights, i.e. the absence of duty. One has a right to ø if it is neither wrong for one to ø nor is it wrong if one does not.

The issue of the so-called liberty rights is a complex one. Here I will confine myself to a few brief and rather dogmatic observations. The absence of duty does not amount to a right. A person who says to another 'I have a right to do it' is not saying that he has no duty not to or that it is not wrong to do it. He is claiming that the other has a duty not to interfere. It is not necessarily a duty not to interfere in any way whatsoever. It is, however, a claim that there are some ways of interference which would be wrong because they are against an interest of the right-holder. 'I have a right to do it and you have a right to stop me if you can' is paradoxical only if it means 'if you can with no holds barred'.

The difficulty is that though a statement of a right to do something is not a statement that it is right to do so, it is sometimes impossible to decide whether the speaker claims one or the other. The difficulty is all the greater because people rarely say, 'I am acting wrongly but I have a right to do what I am doing'.

Nevertheless, they can say this. There is no contradiction in this statement. It is paradoxical for if I know that I am acting wrongly why don't I stop? Consider, however, the past tense of the same sentence: I acted wrongly but I had a right to do what I did. This is not only in perfect logical order, it lacks the air of paradox. In fact it is quite a common thing to say. It is used when one concedes that one should not have done what one did and yet claims that nonetheless the other had no right to interfere. Such statements exemplify the fact that to have a right to ø is not the same as to have no duty to ø or not to ø.

Though the objection is based on a mistake, it points to an important distinction which is yet to be introduced. We need to distinguish between legal rights and what I shall call legally-respected rights. It is arguable that the right to privacy is respected by English law. This means that there are no legal duties compliance with which violates the right to privacy. If this is so, then the right to privacy fares better than the right to establish a family because in England immigration officials have a duty to prevent entry into the country of husbands and fiancées of some women who have a right of permanent residence in England. This duty violates the right to establish a family. Though the right to privacy is respected (in the technical sense I have given this expression) in English law, it is not a legal right in England. The courts refuse to use it as a ground for imposing duties on officials or on other citizens to stop them from invading privacy.[27] Nor is it used by the courts to justify already existing rights.

Failure to distinguish between a legal right and a legally-respected right may lead to the view that mere absence of a duty is a right. But if so, then privacy is a legal right in English law, and everyone agrees that this is not so.[28]

27 See *Re X (a minor)* [1975] 1 All ER 703 (CA) and *Malone* v *Comnr of Police of the Metropolis (No. 2)* [1979] 2 All ER 620. One important aspect of the right to privacy is at least partially recognized as a legal right in English law, i.e. the right to confidentiality.

28 I am grateful to P. A. Bulloch and to the Editor for helpful comments on the draft of this article and to Wayne Sumner for a very useful discussion of a much earlier draft.