Philosophy of Law
An introduction

2nd Edition

Mark Tebbit

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

7 Legal and moral rights

Rights we take for granted today include a maze of political, civil, legal and human rights so complex and deep-rooted that the idea of rights being indispensable to moral and legal discourse seems to be part of the fabric of social life. We have rights in property and rights created by contract. Everyone has the right to a fair trial and access to civil and criminal justice. We have rights as citizens and as consumers. The basic rights to 'life, liberty and security' are protected by the European Convention and the 1998 Human Rights Act. At a more mundane level, everyone has the right to voice an opinion and to express dissent. We regularly claim the right to know or the right to reply. Controversy on these matters usually relates to the genuineness of each of these rights, or the extent to which they should be allowed. Nevertheless, in the debates that have raged around the subject of rights in recent years, there is one particular issue that, logically speaking, precedes all the others. This is the question of whether we can meaningfully say that there actually are any rights at all, human or otherwise. While the rights theories of Dworkin, Rawls and Nozick begin from the assumption that there are indeed rights to theorise about, others are more sceptical.

So do rights really exist or are they phantoms? Sceptics argue that all our talk of rights is nothing but rhetoric and bluster, designed to draw public attention to specific moral claims. There are two extremes here. At the realist end of the spectrum, we find writers such as Norberto Bobbio declaring that the problems about rights are not philosophical at all, that the real problem is 'to find the surest method for guaranteeing rights and preventing their continuing violation' (Bobbio 1990: 12). From this eminently practical point of view, the existence of rights and meaningfulness of rights-claims is presupposed. At the sceptical end of the spectrum, we hear Alasdair MacIntyre comparing belief in rights with belief in witches and unicorns, claiming that 'every attempt to give good reasons for believing that there *are* such rights has failed' (MacIntyre 1981: 67). From this standpoint, there are no rights to be guaranteed. What we will be examining in this chapter is the philosophical support for each of these positions.

A more cautious scepticism than the outright denial of rights as such is expressed by those who regard it as meaningful only to talk of legal rights.

On this view, the background to any right properly so-called must be that of legal definition and sanction. Without this background, the language of rights as used to explain moral relations between people is at best metaphorical, and at worst meaningless. This denial of the intelligibility of moral rights is of course contested vigorously by those who regard legal rights as merely the codification of pre-existing human rights, which some philosophers describe as natural. As we shall see, this dispute is not easily resolved.

An equally prominent theme here is the most general consequence of taking a realist view of rights. If there are indeed rights to be recognised, the bearing this has on the matter of the law's authority is immediate and problematic. To what extent is the state compelled to accept individual or collective rights as an effective constraint on the implementation of public policy through the criminal and civil law? What limiting effects do they have on the reach of the law? This will be taken up in the next chapter in the specific context of personal privacy, but the problem here is more general. It is a question, philosophically speaking, about how rights stand in relation to utility. What are we committed to when we accept that there really are rights? Does it mean merely that they should always be respected in the sense of being taken into account in every calculation of the common good? Or does it mean more than this, that rights can on no account be overridden by utility?

This points to the closely related problem of identifying 'basic' rights, those supposed to be guaranteed as a bare minimum. Are these the ones that should be defended unconditionally against utility or convenience? If so, which among the vast numbers of rights claimed today should qualify as basic? Does being basic mean that they are to be regarded as absolute, in the sense that there are no imaginable circumstances in which they might reasonably be suspended or overridden? The problem at the heart of the rights-utility conflict is that of determining the extent to which legislators have a free hand in deciding what is to be included, allowing in pragmatic concerns about resources and practicability; and the sense in which these choices are pressed upon them by the intrinsic nature of the rights in question.

Overall, the question of how rights and legality are to be understood is the paramount one. A great deal of the rights analysis in twentieth-century legal theory has focused exclusively on legal rights, independently of the question of how they relate to rights in general. The most important single influence on this development was the analysis initiated by Wesley Hohfeld (1880–1919), who was inspired by the closely connected aims of legal realism and analytical jurisprudence. What Hohfeld sought was an analysis that would clarify the real structure of legal relations between people, expressed in terms of rights and duties as they actually exist and are operated in the courts. The twin objectives were conceptual clarity and a faithful reflection of legal reality. To this purpose, Hohfeld stipulated a deliberately rigid eight-term structure, consisting of four pairs of conceptual opposites and correlatives, through which all rights-related legal phenomena should be

viewed. This structure has been revised and reworded in various ways by others, but this was how Hohfeld originally presented it:

Jural Opposites	{right	privilege	power	immunity
	{no-right	duty	disability	liability
Jural Correlatives	{right	privilege	power	immunity
	{duty	no-right	liability	disability

Source: Hohfeld (1919: 36)

The main purpose of this method was to dispel the confusion created by indiscriminate use of the word 'right' when something else (a privilege, a power, an immunity) was meant. Each word commonly used to designate a right is given its real meaning in terms of what it is not and what it implies as a correlative. Thus, a right, as opposed to a 'no-right', held by X, always corresponds to a duty in Y, instead of the privilege that would be had if X had no-right. X's privilege in doing something, as opposed to a duty, implies that Y merely has no-right against X, rather than the duty that would be created by X's right. If X has a legal power, as opposed to a disability, Y has a liability instead of the immunity that would be had if X was legally disabled. If X has a legal immunity, as opposed to a liability, then Y has a disability against X, rather than a power.

The general point of Hohfeld's analysis was that it is wrong to talk about rights when what we are seeking to indicate is a different kind of legal relation, with very different practical implications. It is only correct to speak of a right in the strict sense when there is a correlative duty. This is known as the correlativity thesis. There are several points to be grasped for present purposes. First, this schema was only intended to apply to the classification of legal rights. It has no direct implications for non-legal rights. Second, it does not imply that there are only legal rights. Third, Hohfeld did not mean that there are no rights at all, either legal or moral. The purpose was only to sharpen up talk about legal rights, to lay the foundations for more accurate and useful analysis. Hohfeld's main thesis was that the only legal rights in the full sense of the word are those with correlative duties. The Hohfeldian terminology will not be used in this chapter, but the reader should bear in mind the restriction of the use of the term 'right' to indicate a claim to which there must be a correlative duty.

Rights and rights-scepticism

In everyday language, most people have little doubt about what a right is. It is something about which they are entitled to protest if they are deprived of it, or it is withheld without justification. Consider now exactly what it means to assert, for example, that you have the right to the repayment of a loan. Clearly you would like it repaid, but is this all? Beyond the expression of a

desire, there is an insistence with all rights-claims that you 'ought' to have certain things or be free to perform certain actions.

A right is usually understood to mean more than a standard moral claim, but when we move beyond this, the interpretation becomes controversial. If the right to the repayment of the loan is a genuine one, it may be argued, it is not merely a morally reasonable or worthy claim, the merits of which are to be evaluated against others, such as the use of the money for other purposes; it is something that you can demand as an entitlement, something to which you can lay claim. What you are laying claim to is in a sense already yours; it is not something that you merely ought to have. If you do have the right, you are in possession of a distinctive moral force or power to insist upon receiving it.

This is one popular interpretation of what a right means. It is a particular kind of strong moral claim. There is another interpretation, however, of how rights go beyond standard moral claims, which is inconsistent with it. According to this line of thought, rights are not held by people as a kind of natural property, they are granted or ascribed to people with a guarantee of protection. One does not merely have a moral case for the right to recover a loan; the right can, if necessary, be enforced. What we are talking about here is actual force rather than moral force. This is what makes a right a right; it can be insisted upon with the backing of the sanctions of law. What this means in effect is that for rights to be more than standard moral claims – which is to say, to exist as distinctive rights at all – they must be legal rights. This in turn implies that there are only legal rights.

A historical point of some significance is that the idea of a singular right ('a' right, rather than 'right' or 'the' right) held by individuals dates only from the early seventeenth century. The concept of an individual right as something held against other individuals or against the world was virtually unknown to the Greeks or Romans, or to medieval Europe (Finnis 1980: 205–10). Second, the idea of the reality of such a right was steadily eroded over the period between the French and American Revolutions and the Second World War.

A central philosophical problem, then, concerns the ontological status of a right. If it is taken to be an 'entity' of some sort, can we give a coherent account of what kind of entity is involved when we speak of someone having a right, for example, to compensation for an injury? It is clearly not an entity in the sense of an ascertainable object such as a physical attribute like weight, or a mental faculty like memory. The mere existence of either of these can be demonstrated. How does one demonstrate the existence of a right? If it is anything, it would seem, it is not a natural, observable phenomenon.

On the face of it, the most promising interpretation is that it is a moral power. Leaving aside for a moment the question of legal enforcement, which may or may not be available, the belief of an injured person that he has a right to compensation is a belief that he has a power that other people do

not, a power to insist upon it. This would be a power that could be used to exert pressure on the party or parties alleged to owe compensation. This kind of analysis of rights as moral powers has been the target of a prominent strain of thought in European philosophy since Bentham, i.e. rights-scepticism. From the standpoint of this scepticism, a right is not seen as a natural entity of any kind, nor does it exist in another mysterious moral domain. It simply has no existence, and beliefs to the contrary are explained in various ways, ranging from dishonourable political motives to belief in the supernatural.

Bentham's attack on rights

Bentham was in the forefront of the attack on the theories of natural law and the social contract, both of which were associated with the idea of natural rights as natural powers. His own writings displayed a general unfriendliness to the idea that rights could pre-exist their legal codification. There were two reasons for this, one political, the other philosophical. Bentham was developing the doctrine of utility at the same time as the revolutionary movements in America and France were asserting the rights of man, under the influence of the doctrine of natural rights, especially as expressed by Locke and Rousseau. It is against the background of the Jacobin Terror in France that Bentham's intemperate and apparently eccentric outburst against the idea of 'the rights of man' should be understood. As far as Bentham was concerned, the only way in which it is appropriate to speak of rights is in acknowledgement of those codified in law. In short, there are only legal rights, no moral or natural rights, any talk of which is confusing and dangerous political rhetoric.

As a thoroughgoing empiricist, Bentham regarded all rights, including those codified in law, as at best 'fictitious entities' and at worst imaginary conjurings. *Legal* rights, then, along with the legal concepts of duty and obligation, and most of the language of the common law, he regarded as 'legal fictions'. These legal concepts, however, can be interpreted by Bentham's method of paraphrasis. A sentence containing the word 'right' can be rewritten and translated as a legal duty. Thus, 'X has a property right' can be translated into a sentence of equivalent meaning: 'Y has a duty to refrain from appropriating or trespassing on X's property'. But a 'duty' is also a fictitious legal entity. This in turn can be translated into the language of coercion: 'If Y appropriates or trespasses on X's land, then Y will be liable to a certain punishment'. Every legal term can be traced back in this manner to the pleasure–pain calculus of utilitarian social welfare. The threat of punishment is a perceptible and tangible, hard empirical reality. Bentham believed that all legal terms could be explicated by this method of paraphrasis.

The important contrast that Bentham draws is between these 'translatable' fictitious entities, which do have a meaning to be uncovered, and non-legal rights, which are not translatable at all. If they cannot be thus rendered into the

language of coercion, we have to accept that they are literally unintelligible, or just plain nonsense. 'Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts' (Bentham 1987: 53).

Bentham regarded talk of natural and imprescriptible rights as 'terrorist language' and as so much 'bawling upon paper'. A natural right, which cannot be translated into a corresponding duty-sentence, is a self-contradiction. It is as nonsensical as the term 'cold heat'. There are no rights in nature. Natural rights are conjurings of the imagination. Talk of the 'Rights of Man' is 'a preposterous fraud', because it cannot be rendered into concrete meaningful terms.

Bentham's main substantial point which is of lasting importance is his argument that the legal rights which are actually recognised should be those that, having had their claims considered on their merits, are freely ascribed by government and are thereafter permanently on probation. If they turn out to be contrary to utility, it is self-evident that they should be suspended forthwith. It is worth noting at this point that while this may be self-evident to a utilitarian, if this is what legal rights amount to, then they are not rights in any deeper sense at all – *they are merely licences*.

Elimination of rights

As indicated earlier, there has been a general trend in modern jurisprudence towards the complete elimination or negation of the concept of a right; however, what exactly does it mean to 'eliminate' rights as a concept? Broadly speaking, it means that those who use the popular terminology of rights are labouring under the delusion that their language has objective reference, that there is something at some level of reality corresponding to the words they are using.

This ultimate conclusion applies as much to a legal right (and duty) as it does to a moral or natural right. It was expressed concisely by the Scandinavian realist Karl Olivecrona (Olivecrona 1971) in his assessment of the legal meaning of rights and duties. Rights are chimeras or imaginary entities 'interposed between the operative facts and their legal effects'. What this means is that in the situation in which we assume a right and a correlative duty to be created in law, such as the drawing up and signing of a contract, and the contract taking effect, the only reality is the complex of facts surrounding the contract and the actual consequences in law, all of which can be described in empirical terms. The idea that a right is created somewhere in this process is at best a metaphor or expressive abbreviation for a complex of facts. Between the two terms, the operative facts and the legal effects, which do have objects of reference, there is a universal tendency to conjure up the concepts of right and duty, which have no such objective reference. They are simply unreal figments of the imagination, as unreal as ghosts or hobgoblins. The same can be said, *a fortiori*, about the prelegal moral institution of promise making.

The rooting out of the idea that the concept of a right has objective reference was rather like a process of exorcism. The ghostly object to be laid to rest was the moral power assumed by natural law theory. This was the power assumed to be held in the prelegal state of nature, the power to which the term natural 'right' refers. This concept continued to hold sway in theories such as the willpower theory of the early positivist Savigny (1779–1861), in which important features of natural law were retained, such as the continued recognition of an independent but accessible spiritual realm of reality in which rights existed. The denial of the existence of this spiritual realm was an essential theme in the working through of the philosophical recognition of the implications of the advance of the physical sciences.

The same sceptical line of thought was developed by Oliver Wendell Holmes:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. *The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else*.
>
> (Adams 1992: 93)

What Holmes recommends is that for heuristic purposes one takes up the point of view of 'the bad man', who only wants to know what the courts will make him do. A legal duty means no more to a bad man than that 'if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money' (Adams 1992: 93).

In Holmes's vivid metaphor, the legal analyst needs to follow the example of the bad man who applies 'cynical acid' to the legal concepts he encounters. In the case of legal rights and duties, the application of cynical acid strips down the ideas of such things to their real legal consequences. In reality, Holmes insists, all rights-claims come down to no more than prophecies of the ways in which the courts will decide concrete cases. If the courts ignore them, they are not in any meaningful sense 'rights'.

Response to rights-scepticism

In the light of these sceptical arguments against the very existence of the rights that are dealt with as a matter of course in contemporary litigation, in the criminal courts and in the European Court of Human Rights, what should the proper response be? Most people today believe that they do have equal rights, that they have procedural and substantive legal rights, that typically rights are universal, and that it is often possible to enforce them in the courts. Should we conclude that all these people are deluded and that their belief in rights is analogous to, and no more justified than, belief in the supernatural?

Rights-sceptics may answer these questions in one of two ways. The first is that the denial of the reality of rights does not have any practical implications of this nature. Statutory 'rights' will continue to be claimed and enforced, regardless of what we call them, and in the struggles for civil rights campaigners against governments that practise genocide, torture or the suppression of civil liberties will no doubt continue to use the phrase 'human rights' without embarrassment. This type of answer suggests that the ontological issue is purely philosophical, that the denial of rights as 'entities' has no practical implications.

The second type of answer is quite different, and more fraught with ambiguity. On this kind of argument, rights-scepticism does affect the practical realities of the claims to legal and moral rights, but not in the sense of dispensing with rights altogether. The implication is that with this theoretical enlightenment, the status of 'rights' changes, that they are to be understood not as objective entities which are owned or held by every individual, which is precisely what has been disproved by the sceptical arguments, but rather as claims to our moral attention, claims that can have greater or less moral worth. None of these claims can be properly construed as an entitlement. This line of argument suggests a discriminating critique of any declarations of human rights that proceed on the assumption that they are merely declaring or endorsing rights that already exist. It is this assumption that the various versions of rights-scepticism are denying. The important point here is that this approach affects the content of any such declarations of rights. It is this second kind of interpretation of the implications of rights-scepticism to which the defence of the reality of rights must be addressed. First, however, we have to consider what is involved in the reassertion of this reality against the kinds of scepticism as outlined in the last section.

It is often asked how it can be true that there are human rights when they are routinely abused and almost universally ignored. This kind of scepticism is quite easily refuted. Widespread abuse or even universal neglect of rights does not count as an argument against their existence, any more than the failure to develop physics would have shown that there are no such things as electrons. Furthermore, just as the doctrine of natural law was only ever developed to counteract cultural relativism, it is only because people and their governments often act as if there were no human rights that the existence of such rights was ever asserted. The classical natural rights doctrines of the early modern period were developed mainly in resistance to the absolutist governments that almost completely ignored such rights. The later modern movements for women's rights and the rights of ethnic minorities started from a position of almost complete neglect.

More importantly, the insistence that rights are real must confront the reductivist and eliminativist arguments that deny their reality. The overall argument against reductivism – the claim that there are only legal rights – is that it is incoherent. If it is conceded that legal rights exist, then there must also be prelegal rights. Rights cannot suddenly spring into existence with the wave of a

legal wand. Statutory recognition of a right only provides legal backing for what already exists, for example, a slave's right to be free. The legal emancipation does not suddenly create the right to be free, it merely acknowledges it and provides a sanction to prevent the continuation of slavery.

One reductivist reply to this is that it is merely one interest among others, with no special claim to our attention, which pre-exists the legal right. A law transforms an interest into a protected interest, which is all a legal right is. It exists in the sense that it is tangible, by virtue of its real effects. The realist argument, however, is stronger than this. If rights are suddenly created as legal entitlements, and this is on the grounds that there are interests that need to be given legal protection, then the legal rights are merely licences that can be revoked at the first sign of difficulty. On this conception, legal rights have no deep foundation. In other words, legal rights are not rights at all and reductivism is incoherent, because if prelegal rights are denied, then legal rights must also be denied. Reductivists can in turn reply that this would make all rights absolute or unconditional, which is absurd. They could never be overridden by other considerations or conflicting rights. We will see later how this objection can be countered.

The response to eliminative rights-scepticism – the claim that there are no rights of any kind, moral or legal – is more difficult. In what sense, we are asking, is the rights-theorist asserting or reasserting that rights do exist, when faced with the claim that there are no entities whatsoever corresponding to the concepts of legal and moral rights? Does it have to be reasserted that rights are things that exist in a 'spiritual' realm? Do they have to assume again that rights are magical or supernatural 'powers'? Are rights moral powers after all? Is a legal right a mysterious power held by the right-holder in addition to the observable facts about the legal process?

The argument against eliminative rights-scepticism that there are rights, both within the law and beyond it, would be implausible if it rested solely on the fact that it is widely believed that there are ways in which people should or should not be treated, solely by virtue of certain qualities they possess, such as reason or consciousness. The fact that it is widely believed that there are UFOs does not mean that UFOs have a certain kind of existence. The fact that in the nineteenth century virtually no one believed that women had the right to vote does not show that they had no such right. What the claim that there are rights means is that people who have rights have a stronger than standard moral claim, and that there is a *prima facie* case for their prevailing over moral claims that do not embody rights.

The irreducibility of rights

A central question, then, is whether there is any more to a right than that which can be expressed in moral or legal language that makes no reference to rights. Are rights reducible to needs, desert or utility, or does the entitlement implicit in a right give you a stronger claim than this? Consider again the

case of *Donoghue v. Stevenson* (1932) (see Chapter 4), which established the general duty of care in English law. The question here relates to the nature of the claim made by the plaintiff who had suffered illness as a result of a defective product due to a manufacturer's negligence. Did she deserve or need compensation? Possibly. Is the right reducible to these deserts or needs? Did it enhance the overall utility of everyone concerned? This was not really the point. The Law Lords eventually determined that she did have a right to compensation, despite arguments that there was no clear precedent in English law and that the case would open a floodgate of litigation.

One argument against this decision – that it would make the manufacturer of a defective axle liable after a train crash – was a consequentialist argument against the recognition of this right. The claim to compensation that the plaintiff had was more than a standard moral argument based on desert, need or utility. Many people deserve compensation, but are not awarded it. Mrs Donoghue had brought the case and taken it to appeal because she believed that she was morally entitled and must be legally entitled, despite legal advice that she was not. What does this entitlement mean? Legally speaking, it might be simply that the law will back your claim. If you have a 'title' to it, the law *should* back your claim. Legally speaking, an entitlement is more than a desert or a need. The decision to recognise the right to recover for, say, emotional damages may originate in the recognition of desert or need, but it becomes more than this, and irreducible to it. A legal right to X means that you already have X; you are trying to claim what is already yours. If you merely deserve compensation, you are making out a case for being given what is not yet yours as of right.

Morally speaking, Mrs Donoghue's belief that she was entitled to compensation is also irreducible to the belief that she deserved it. It might include this belief, but it states something more. Once the moral right is recognised, there is no alternative but to hand it over. If it were merely desert, one might argue that there are more deserving claims. If it were merely need, it might be argued that there were others in greater need. Given that it is a right, she can demand it in a way that others cannot.

Absolute rights

It is very commonly argued against rights-based moralities that, for a right to have any force at all, it must be regarded as absolute. Rights must be either subordinate to utility or they must be held to be completely inviolable. Either way, they are absolute and unyielding, or there is no way of stopping them dissolving into utility. Jonathan Glover, for example (1977: 83{-}4) argues that anything short of a defence of absolute rights, falling back on a theory of *prima facie* rights, is indistinguishable from his own utilitarian position.

There are essentially two rights-based positions on this. Either they take the middle course advocated in Dworkin's rights thesis, according to which rights that are less than absolute nevertheless have a quality which enables

them to prevail more often than not over non-rights considerations (i.e. they can 'trump' them), or they can take the line that absolute status means in practice that they can 'virtually never' be violated.

A standard argument to the effect that no rights, however apparently basic, can be absolute, proceeds from an imagined 'ticking bomb' scenario in which one is forced to choose between violating the rights of one individual and allowing the deaths of millions. If the only way to prevent a nuclear attack is to torture the person who knows the whereabouts of the bomb, in such a case it is said to be self-evident that nobody has the absolute right not to be tortured. If such a right is less than absolute, the argument continues, then all the more so are all the other 'basic' rights, for each of which possible exceptions can be imagined. There are many faults with this argument, but the most relevant one for present purposes is that it highlights rather than detracting from the absolute status of these rights. The extremity of the examples required to undermine them only illustrates their intrinsically absolute status.

This is what Finnis means (1980: 223–6) when he defends absolute rights against utilitarians, for whom only utility is absolute. When we say that the right not to have one's life taken as a means to an end, or the right not to be condemned on false charges is absolute or exceptionless, what we mean is that even the violation of rights in these extreme circumstances is absolutely wrong. It may be a lesser evil, but it is still an evil. Anybody who commits it is not exonerated. The value of absolute rights-talk, for Finnis, is that it keeps the idea of justice in the foreground and undercuts the persuasiveness of pure consequentialism.

Rights versus utility

The concept of a right is intimately connected with the concept of justice. If the modern natural lawyers are right to regard justice as a necessary feature of the law, the consequence of this is that the concept of a moral right is equally indispensable. On Dworkin's thesis, it is not optional for the courts to take rights into account in their deliberations; on his reading of the meaning of law, they are legally required to do so. The demand for justice relating to any particular situation is translatable into an insistence on the recognition of all the genuine and justifiable rights relevant to that situation. The point of identifying and defending any specific right is to raise an obstacle against arguments from utility, whether this means the general welfare or overall aggregate of benefit, or merely more effective government.

Bentham on utility and rights

For Benthamite utilitarianism, the above line of argument is complete nonsense. From Bentham's point of view, it was by definition false to argue that it was morally defensible to raise obstacles against social utility. A rational legal system as he imagined it would withhold or suspend the status

of legal right from any interest that did obstruct the general welfare in this way. The common law system, with its entrenched principles protecting traditional privileges, was abhorred by Bentham precisely because it did not balance real interests in the cause of the general social good. In Bentham's rational legal system, any codified right that turned out to obstruct the general good would be revoked.

The important point to stress against Bentham, though, is that legal rights – properly understood – as much as moral rights, *must* operate to some extent as obstacles to utility. If there were no presumption at all in favour of rights prevailing over other interests, thus diminishing to some extent 'the general good', they would not in any effective sense be rights at all. They would merely be protected interests, protected only for as long as they do not become inconvenient. Rights only become important when they are likely to be denied, that is, precisely when they are inconvenient and unwelcome to the majority, especially when the majority in a democratic society is faced with the accusation that withholding minority rights constitutes an injustice. Defending them in these circumstances is one of the things Dworkin means by taking rights seriously.

J.S. Mill on utility and rights

Although the Benthamite doctrine was highly influential, it did not prevail unchallenged. John Stuart Mill's (1806–73) discomfort with the utilitarian tradition was manifested in his rejection of Bentham's pleasure–pain calculus and his attempt to reintroduce the non-legal notion of a moral right. What he was attempting here was the modification and completion of the utilitarian doctrine by arguing that it was compatible with moral rights and justice. Mill's attitude to rights differed sharply from that of Bentham, but his ultimate conclusion was not entirely dissimilar. Mill was more aware than Bentham of the dangers inherent in unchecked majority rule. With some prescience, he saw the main source of injustice in modern industrial democracies in the growing suppression of the rights of individuals and minorities, for the sake of the greater good of the majority, rather than in the oppression of the masses by small governing circles. At the same time, however, he was defending his own version of utilitarianism. One of Mill's main theoretical objectives was to reconcile the requirements of utility with the demands of liberty, justice and rights, to demonstrate their deeper compatibility.

Mill's strategy to effect this reconciliation was not to argue directly against the anti-utilitarian theories of rights and justice, but to absorb them by representing them as distorted versions of the doctrine of utility. Kant, and Kantian theories of rights in particular, were interpreted as justifications of individual rights ultimately rooted in instrumental conceptions of the social good. The central thrust of the Kantian approach was a *non*-instrumental attitude to human rights, which are recognised in Kant's famous maxim that individuals are always to be treated as ends in them-

selves, never solely as a means. From Mill's point of view, the only thing that can be treated as an end in itself is utility, or the general happiness. On his interpretation of Kant, which attempts to neutralise his influence on moral and legal theory, the justification of treating individuals as ends lies ultimately in the value of this kind of policy for society.

This is a projection of Mill's own solution to the problem of rights and utility, on to Kant and other respect-centred theories of rights derived from him. The justification in these theories really does end with the individual rights-holder, which is held to be the value in itself. Rights are respected for their own sake. Mill's solution, as outlined in his celebrated defence of liberty (Mill 1972a), was to argue that the cultivation of respect for individual rights and liberty, as exemplified by the right to freedom of speech, freedom of worship, the right to pursue one's own lifestyle and so on, has a strengthening rather than a weakening effect on the health of society, and the repression of individual difference and creativity has a devitalising effect that will ultimately lead to its destruction. What he is arguing is that legal and moral respect for individual rights and liberty is ultimately utilitarian, that such respect does serve the interests of society as a whole.

As a matter of historical fact, this claim may or may not be true. But can respect for individual rights be supported by this kind of appeal to utility? One reason this is not a popular theory of rights a century later is that it has become increasingly obvious that short-term utility is more persuasive than the long term. In the short term, the suppression of individual rights makes government more effective; the uncomfortable truth is that democratic freedoms do not always coincide with the interests of the majority, or with raising the aggregate welfare of society. It is much more conducive to efficiency to suppress dissent. The interests of utility, it seems, do conflict with a general respect for individual rights. Mill's is one of the more serious utilitarian attempts to accommodate a theory of rights, but ultimately, in making rights contingent upon utility, it does not essentially differ from Bentham's negative view of rights. With Mill's assumption that rights and utility are compatible and complementary, there is no room for the defence of rights for their own sake, in cases where they are contrary to the dictates of utility.

Dworkin's theory of rights

In modern thinking in philosophy of law, there is agreement between most utilitarians and their critics that there is no deep compatibility between the doctrine of utility and the concept of a right. From the utilitarian point of view, it seems that the unacceptable price of conceding reality to any kind of prelegal moral right is the acceptance of it as an absolute, as an unconditional barrier to social welfare or public policy.

Dworkin's rights thesis offers a perspective that avoids this dilemma. As we saw in an earlier chapter, Dworkin argues that the law consists of a combination

of rules, principles and policies, all of which are and should be employed by judges in reaching decisions. They are all genuine components of the law, rather than external moral standards that can be made use of in an *ad hoc* manner to resolve particular hard cases. Along with the established rules of law and the principles or maxims of common law, then, we find an established practice of applying policies as determined by experience of the social consequences of various types of judicial decision. It is against this utilitarian background that Dworkin's defence of the rights thesis is unfolded.

The presence of rights that are both moral and legal in Dworkin's broad sense can, he insists, be deduced from the general sweep of judicial decisions on complex cases, the only explanation for which is often the supposition of the existence of various kinds of rights implicitly recognised by the law, and embodied in common law principles. Finding the right decision – the just and equitable one – is a matter of weighing these moral-legal principles against considerations of good social policy, neither of which automatically prevails against the other. It is in his metaphor of 'rights as trumps' that Dworkin's non-absolutist alternative to utilitarianism becomes apparent. A right, properly understood, is like a trump card that defeats competing considerations. 'Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole' (Dworkin 1977b). To say that such a goal is 'trumped' by a right does not mean that any right is absolute, that it can never be defeated. It will always be possible that there will be cards of a higher value to be played. A right can be outweighed by other rights, or by particularly pressing considerations of policy.

The right to free speech, for example, should in most circumstances be protected, even when it is not conducive to the general welfare. This does not make the right unconditional or absolute. It does not mean that the freedom of speech is unlimited. The basic condition is that, in order for a right to have any effect as a right, it must have some real power to override consideration of the goals of the community; it must have some power to cause inconvenience. As a trump card, this right can itself be defeated. It can be outweighed or overridden by another competing right. The right to free speech is sometimes opposed by the right to the protection of one's reputation, which is supported by the laws of libel and slander. But this competing right is itself a trump card to be played against the general good. When the general good is cited as a reason for overriding a right, it must be determined whether or not a competing right is involved. If the right to freedom of expression runs to making inflammatory speeches, the protection of the right is removed because it is trumped by the rights of the individuals or groups who are threatened by this abuse of free speech. What the rights thesis does mean is that there is a strong presumption in favour of the right prevailing. This, for Dworkin, is what it means to take rights seriously.

Criticisms of Dworkin's theory of rights are too numerous and diverse to explain here. The most obvious line of criticism comes from the utilitarian

and openly rights-sceptical perspectives at which it is aimed. The most serious and persistent criticism, however, is that Dworkin's thinking is itself confined within the narrow space of utilitarian calculation, to such an extent that his 'rights' are no more real as obstacles to the tyranny of the collective than Bentham's equality of interests. The main thrust of this criticism is the suggestion that, in the first place, the mere presumption in favour of rights is not strong enough to establish the kind of firm protection needed, and, second, this failure is due to the lack of grounding of his rights in a source independent of utility. In short, it is just too close to utilitarianism for comfort. While there is certainly some truth in these criticisms, given that Dworkin's rights are always defended within the context of acceptable policy, against which they are weighed, it is quite false to claim that the only alternative to absolute rights is no rights at all. The problem of establishing the threshold at which pre-existing rights can be outweighed by arguments from public policy is a much larger one than that faced by Dworkin. Second, the rights defended by Dworkin are rooted in the standards of justice established by common law, which are usually understood to have been implemented despite the demands of utility, not because of it.

The Human Rights Act (1998) and the case of the conjoined twins

The Human Rights Act UK (1998) (HRA), which came into force in 2000, has in its first few years already made an enormous practical impact upon English law. It has been woven into case law in such detail that it is now becoming a fundamental point of reference. Described by many as a constitutional landmark, the HRA is applied every day not only in such areas as family law and mental health law, but has also featured prominently in campaigns for legal reform, such as the attempt to legalise assisted suicide, and now places principles of human rights at the centre of the process of judicial review, through which the decisions of public officials and bodies can be scrutinised and challenged. This enactment was the outcome of the decision in 1997 by the British Government to incorporate the 1950 European Convention into English law. This in turn had been strongly influenced by the United Nations Declaration of Human Rights (UNDHR) in 1948. The result of incorporation is an Act that protects 'basic' human rights and liberties such as the rights to life, liberty and security, the right not to be subjected to torture or degrading treatment, the right to a fair trial and to freedom of thought and expression.

While it obviously does not settle any of the philosophical questions about the status of human rights as moral phenomena, the application of the HRA does add force to the Dworkinian argument that rights that are less than absolute can be defended against rights-scepticism. Predictions by its critics and opponents in the 1990s that it would open a floodgate of trivial and dubious litigation have been confounded. This is largely because of the unwarranted assumption that individual rights and liberties would be

treated by the courts as absolutes, automatically endorsing them and overriding wider group interests. This has manifestly not happened and is unlikely to in the foreseeable future. One of the reasons that it will not is that the Act is rooted in the internationalism of the late 1940s, when the drafting of the UNDHR drew as much upon Eastern communitarian values as those of Western individualism. The principles embodied in the HRA are open to continuous interpretation. The only article to have been authoritatively declared 'absolute' is the one prohibiting torture and degrading treatment. This is absolute in the sense that no exceptions will be made and no excuses heard. All verified instances of it will be declared unlawful. For each of the other articles, it seems, the rights can be balanced against factors relating to the public good.

One striking example of the problem of absolutes in relation to the HRA is provided by the first case that was heard after it came into force, the case of the conjoined twins, Jodie and Mary (*Re A (Children) Conjoined Twins: Medical Treatment (No.1)*, 2000). The case concerned two baby girls who were joined at birth in such a way that an operation to separate them would give Jodie an estimated 70 per cent chance of survival, with a serious chance of severe disability, but at the same time certainly kill Mary. Given that Mary's brain was not fully developed, that her vital organs had failed soon after birth and that she had thus become entirely dependent upon her stronger sister's heart and lungs, the only one who had any prospect of continued life was Jodie. The crucial point was that without surgical intervention both would certainly die within six months.

When the Court of Appeal was called upon to rule in advance on whether the operation would be lawful, the judges were facing several complex questions of family and criminal law. The important points in this context were that, first, the best interests of each child had to be taken into account, second, that the killing of one to save another had never been admissible as a defence under English law, and, third, that under the HRA each child had the right to life. The judges were not unanimous on the reasoning behind the judgement, but they were unanimous in declaring the operation lawful and in the ruling given by Lord Justice Ward he declared that, although the killing of Mary would in law be 'intentional', given the certain consequences of the act, the interests of Mary had to be balanced against those of Jodie, and that although each equally had the right to life and the comparative quality of their lives was irrelevant, neither had the right to live at the expense of another. The crucial point was that while the Court recognised the universal human right to life, regardless of the quality of such life, it did not accept that this right was absolute. In a case such as this, the right of one has to give way to that of another.

The subsequent outcome of the operation was entirely successful. Mary died immediately, but Jodie lived and flourished, without any disability. It is important to note that this outcome does not vindicate the morality of the decision, but those who criticised it on the assumption that it had exposed

the hollowness of the HRA almost as soon as it had come into force misunderstood the status of these rights. The claim that the right to life can in extreme circumstances be overridden does not imply that there is no right to life at all. On the contrary, it requires circumstances as extreme as these to be overridden. If Jodie's life had not been in imminent danger, the operation would not have been lawful. As we will see in Chapter 10, this ruling has potentially far-reaching implications for criminal law.

Conclusion

Despite the shift in recent decades in favour of recognising legal and moral universal rights in so many areas, there is no sign of a consensus emerging. In the current debates, the twin issues of the rights–utility conflict and the assertion or denial of absolute or basic rights remain central. These are still linked to the fundamental question of whether it is meaningful to speak of rights at all. The sceptical challenge, although it is often obscured by disputes between realists, is still prominent in philosophical and political debate. The more radical versions of rights-scepticism will be dealt with in a later chapter. For now, it is enough to note that the contemporary analysis and comparison of substantive theories of rights and justice constructed and developed by Rawls, Dworkin, Nozick and others, which differ radically in their respective emphasis on the types of rights to be regarded as genuine and fundamental, need to proceed from an understanding of how they offer distinctive responses to the sceptical challenge.

Study questions

General question: What is a right? What does it mean to claim that you have a right to something?

Further study questions: How does a legal right differ from a moral right? What does it mean to say that there is no such thing as a right? Does this apply equally to moral rights and legal rights? Critically examine the claim that a right is nothing more than the legal power to enforce one's interests. How might rights-scepticism be refuted? Are there any absolute rights? Do absolute rights have to be exceptionless? Is the recognition of rights compatible with utilitarianism? Does Dworkin's rights thesis resolve the conflict between rights and utility?

Suggestions for further reading

The classic texts for the major contemporary theories of rights are Rawls (1972), Dworkin (1977b) and Nozick (1974). Anthologies of critical essays have been edited by Daniels (1975) on Rawls, Cohen (1984) on Dworkin,

and Paul (1981) on Nozick. For critical discussion of Dworkin's rights thesis, see especially MacCormick (1982: ch. 7).

Waldron (1984) contains a collection of key articles by leading rights theorists, including Dworkin, Raz, Hart, Gewirth, Lyons and Scanlon. Stewart (1983) is another valuable collection, with notable contributions from MacCormick, Alan White and others. Among the general introductions to legal and moral rights, the most accessible are Jones (1994), Simmonds (1986), Stoljar (1984), Perry (1998) and Brenda Almond's article in Singer (1991: ch. 22). There are useful chapters in Oderberg (2000: ch. 2), Harris (1980: ch. 14) and Riddall (1991: ch. 8). More advanced studies are found in Finnis (1980), Thomson (1990), MacCormick (1982), Raz (1994: ch. 12) and Halpin (1997).

On rights-scepticism, Waldron (1987) contains the relevant text of Bentham, with a critical reply. Other key texts are Holmes (1897), Olivecrona (1971) and Hagerstrom (1953). On rights and utility, the most useful is Frey's (1985) collection of essays. See also Lyons's 'Utility and Rights', in Waldron (1984). For commentaries on Hohfeld, see Halpin (1997: ch. 2), Thomson (1990: ch. 1) and Harris (1980: ch. 7).