What is a Legal Right?

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We ordinarily distinguish between moral and legal rights by considering the latter to be a parallel or special case of the former. The general strategy is to start from moral rights and then adjust the theory in order to accommodate the features of the law. The will and interest theories are thus both theories of moral rights and of legal rights. Yet, all such adjustment creates serious challenges for legal theory. What kind of moral content is implied in the idea of a legal right? Does the adjustment of the moral right into legal right maintain its necessary moral features? Most contemporary legal theorists resist this conclusion. They do so in order to remain consistent with their legal positivism, for which there are no necessary features of legal rules. In most cases, although not all, legal positivists adopt what I will term a ‘deflationary’ account of legal rights. This account is deflationary in the sense that it denies that a legal right carries the same moral character it has as a moral right. The term ‘right’ then plays a different role. It names and brings together a collection of legal relations that is brought together on grounds that are not necessarily related to the moral meaning of rights. Legal rights thus understood lack the normative edge of moral rights.

Joseph Raz outlines a theory of rights that proceeds from the moral to the legal case in a moderately ‘deflationary’ sense. Raz denies that, legal rights have the same (or any) moral content as moral rights. They are official opinions about moral content, not valid reasons with moral content. Raz takes moral rights in general

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[Note to JDG: this is a shorter version of a chapter from my forthcoming book, Legal Rights. I have cut several paragraphs and the penultimate section in order to make it self-standing, as far as possible. Nevertheless, the book is a single argument and the chapter is right in the middle of it, hence many points will remain here obscure. I apologise in advance.]
to be practical reasons of a particular kind: they are interests that are sufficient to ground duties. But a legal right is only the shadow of a moral 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’.\(^1\) The legal right is only a shadow because the law cannot make the practical connection true. The interest justifies the duty only if it truly justifies it. And all considerations of moral justification are excluded by the sources thesis according to which the truth of legal right-statements ‘can be established without using moral argument’.\(^2\) So a legal right exists if the law ‘holds the interest to be sufficient ground’. Here we must rely on the supposed *intention* or motivation of the legislator: ‘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’.\(^3\) Hence, legal rights do not ground legal duties in the way moral rights ground moral duties. Legal rights exist in the actual or imputed moral imagination of the law-giver, not in the deployment and operation of practical reason.

This is not a view unique to Raz. A similarly minimalist account of legal rights is endorsed by Jeremy Waldron, for whom legal rights are not a special form of rights but more or less a homonym: a word with the same sound and spelling but a different meaning. Waldron opens his discussion of the problem of ‘the right to do wrong’ by saying that there is ‘no paradox in the suggestion that someone may have a legal right to do an act that is morally wrong’.\(^4\) He implies that legal rights lack the relevant moral content and for that reason the puzzle involved in the moral right to do what is morally wrong does not arise in law.

What is the resulting view of a legal right? If rights in the law are not what they are in morality why do we use the same word?

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\(^1\) *EPD* 268.
\(^2\) *EPD* 266.
\(^3\) *EPD* 268.
Neither Raz nor Waldron give us a detailed answer but many other legal positivists have offered detailed accounts of the deflationary view. I will discuss a number of such attempts in the pages that follow. The main theme of such views is that rights are not practical reasons but are instances of law grouped together by some non-moral criterion. For the view of legal rights as ‘entitlements’ the criterion is economic and has to do with allocating conflicting interests on prudential grounds. For the theory offered by Jules Coleman legal rights are bundles of instances of law brought together by any number of justificatory theories. My argument will be that all such attempts fail. By insulating legal rights form practical reason, these arguments fail to show how legal rights guide action. The way in which legal rights work – both as general peremptory reasons for action or as lower level directives to particular decisions - remains for them mysterious.

THE ENTITLEMENT THEORY

General theories of legal rights must make sense of the complex role of legal rights in legal doctrine and legal reasoning. Some rights such as human rights or the basic rights to property and contract are central general principles of public and private law. Rights to property and bodily integrity and the liberty of contract, for example, are central parts of various areas of legal doctrine. Whenever specified by appropriate statutes and cases, such rights are general premises in doctrinal argument. They are reasons for winning a case. But rights are also particular specifications of what we may or ought to do here and now. In English law we lose our rights if we fail to claim them within the time limits provided for by the Limitation Act 1980. In such a case the general right and its doctrinal specification are true and they support my position, but its vindication in a court of law is excluded. I have lost my legal right, even though I have a valid legal right under a true general legal right. It is evident that the term legal right is here used in three different ways: the general statement, the doctrinal specification and the judicial recognition. How do we accommodate these three senses? Are all of them true examples of a legal right?

A well-known theory of private law put forward by Calabresi and Melamed addresses these issues in the following
way. It rejects the classic will and interest theories (theories primarily of moral rights) in favour of a simpler analysis of legal rights as entitlements. Inspired by the economic analysis of law this theory sees legal rights as instruments of policy. The policy is the resolution of conflicts of interests. Such resolution does not require that rights are practical reasons of any kind. Rights are ‘entitlements’ to resources, not reasons for action. They are closer to the remedial edge of the law rather than its deliberative core.

The theory has a simple structure. There are two stages of actual legal regulation. At the first stage law creates titles to things and resources. At the second it determines the particular kind of protection that the title-holder should enjoy. There exists a variety of available legal tools of protection. Calabresi and Melamed proposed a now famous typology of property rules, liability rules and inalienability rules as possible protections and rules of transfer available to title-holders. For Calabresi and Melamed the first stage in the process, the allocation of titles and protection where rights play a part, is the more basic because it achieves the resolution of conflicts of interest:

The first issue that must be faced by any legal system is one we call the problem of ‘entitlement’. Whenever a state is presented with the conflicting interests of two or more people, it must decide which side to favor. Absent such a decision, access to goods, services and life itself will be decided on the basis of ‘might makes right’ - whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail. The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them - these are the first order of legal decisions.6

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6 Calabresi and Melamed, 1090 (footnote omitted).
Entitlements decide who wins a conflict of interests. Entitlements arise as a response to conflicts of interests regarding goods, services, and life itself.

The allocation of entitlements is followed by the stage of 'enforcement':

The state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected and to whether an individual is allowed to sell or trade the entitlement. In any given dispute, for example, the state must decide not only which side wins but also the kind of protection to grant.7

This is where the allocation of resources becomes complex. Although entitlements are simple in that they match persons and resources, their protection is varied. Protection is constituted by ‘property rules’, ‘liability rules’ and ‘inalienability rules’. Property rules protect an entitlement to the extent that ‘someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller’.8 Liability rules allow one to ‘destroy the initial entitlement, if he is willing to pay [the holder] an objectively determined value for it’.9 Finally, inalienability rules do not permit the transfer of the entitlement between a willing buyer and a willing seller.10 This framework applies to private law in general, although particular areas of private law attach different remedies to various entitlements.11

This account of rights gives us a unified theory of legal rights. The practical aim is economic and institutional: it is to resolve conflicts of interests in existing resources on the basis of some adjudicatory institutions. The theory of rights is grounded on a presupposition of conflicts and institutions. If such conflicts

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7 Calabresi and Melamed, 1092.
8 Calabresi and Melamed, 1092.
9 Calabresi and Melamed, 1092.
10 Calabresi and Melamed, 1092-3.
11 They illustrate the point by discussing cases of pollution and nuisance. Calabresi & Melamed, 1115-1127.
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and such institutions were absent, legal rights would be redundant. Because such conflicts occur and legal institutions are set up to resolve them, we have legal rights as entitlements.

Nevertheless, it is not clear how the idea of entitlement succeeds in its work. If legal rights are to help institutions resolve conflict, they must guide action in some way. It is not clear how entitlements do this. The legal title, Calabresi and Melamed say, is the primary resolution of a conflict of interests. Yet no entitlement can achieve this aim. The interests that pose the problem that entitlements are supposed to solve are not about access. Such access may co-exist in separate agents at the same time. They may all be entitled to the access to a resource, in the way that all of us have access to parks and city squares. In such cases of co-ownership or joint use conflicts still occur. For example, there will be conflicts of interests when several teams arrive trying to play a ball game on the same patch of the park, or rival protesters seek to occupy the same section of Parliament Square. Joint access does not resolve the conflict, since we cannot both play at the same time or march at the same time. Conflicts over resources arise because what really matters to us is not just gaining access to a resource but also and at the same time excluding all others. Conflicts over resources are really about exclusion, not access. This means that the vindication of one party requires the exclusion of others. We cannot have winners without losers.

The problem with the idea of entitlement is that it specifies the winners but not the losers. It gives access without specifying who is excluded and how. Of course, Calabresi and Melamed and other economic theorists of law have a sophisticated theory of exclusion. Ronald Coase, for example, in ‘The Problem of Social Cost’ explained this aspect of the conflict of interests with great clarity. Coase observed that the resolution of a conflict of interests entailed that one of the parties (or both parties, in cases of a compromise) will not be satisfied and that his or her interests will be harmed. The question is not whether A will be allowed to harm B, as is often claimed by those who begin by assuming that one party already has the entitlement. Rather, because the interests in question are mutually exclusive, the choice

is who will be allowed to harm the other. Because of scarce resources and competing desires, some harm is inevitable. The question therefore is: ‘should A be allowed to harm B or should B be allowed to harm A?’

Calabresi and Melamed’s general account of private law, when seen as a whole, provides for both winners and losers and is consistent with Coase’s observation. The problem lies with the apparent distinction between the two stages: the stages of recognising the entitlement and specifying its protection. The distinction is false. And if it is false, the simplicity of entitlement is also false. Winners and losers must be defined at the same time. If exclusion is left to the stage of remedial enforcement, then the first stage has not resolved anything at all. If so, the allocation of entitlements at that stage is an empty and useless process. So if legal rights are to be standards whose general rationale is to resolve conflicts of interests they must guide the action of all sides.

On two occasions Calabresi and Melamed unwittingly accept that the distinction between the two stages is false. When they introduce an exposition of protective regimes they state that ‘this section will consider the circumstances in which society will employ these three rules to solve situations of conflict.’ The distinction between resolution of the dispute by entitlement and the stage of protection is here abandoned, since it is the protective rule that resolves the conflict and not the entitlement itself. It is the correct position but it is inconsistent with the distinction between two stages. A few lines later, they take the view that an entitlement amounts really to a property rule. They ask: ‘Why cannot a society simply decide on the basis of the already mentioned criteria who should receive any given entitlement, and then let its transfer occur only through a voluntary negotiation? Why, in other words, cannot society limit itself to the property rule?’

By putting the question this way they again implicitly conflate entitlement with property rule. But if the entitlement is really a property rule, then the distinction between allocating entitlements and selecting protection makes no sense. There are no two stages.

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14 Calabresi & Melamed, 1106 (emphasis added).
15 Calabresi & Melamed, 1106.
Entitlements are already in the second stage: they are property rules that may or may not co-exist with other protective rules.\textsuperscript{16}

We have to reject the idea of rights as entitlements. The dimension of exclusion must be incorporated in the very idea of a legal right. But this means that all we are left with are just Hohfeld’s instances of legal relations and no way of organising them into legal rights.

\textbf{RIGHTS AS INSTANCES OF LAW}

The entitlement theory tried to give an account of rights that avoided the moral commitments inherent in the will and interest theories of moral rights. It was a ‘deflationary’ theory to the extent that it sought to replace the practical content of rights with the simpler notion of an entitlement to a resource. Can the same aim be achieved by an alternative theory? Some legal theorists believe so. Jules Coleman and Jody Kraus, have offered a well-known revision of the entitlement model along such lines.\textsuperscript{17} Coleman and Kraus oppose what they see as the ‘liberal’ theory of rights according to which all rights were freedoms of some kind and the more inclusive welfarist approach according to which rights can be any kind of interest. They propose instead a theory according to which ‘property, liability and inalienability rules are best understood as devices for generating or specifying the content or meaning of such rights’, not their enforcement or protection.\textsuperscript{18} This proposal solves the problem of the incoherence of the two

\textsuperscript{16} My argument does not mean that we cannot draw any distinction between ‘recognition’ and ‘enforcement’ (or a similar one between rights and remedies). Recognition and enforcement are separate stages of legal regulation. Exclusion, however, is present at both stages.

\textsuperscript{17} Jules Coleman and Jody Kraus, ‘Rethinking the Theory of Legal Rights’ 95 \textit{Yale L. J.} (1986) 1335; reprinted in Jules Coleman, \textit{Markets, Morals and the Law} (Cambridge: Cambridge University Press, 1988) 28. All references here are to the latter version. Coleman and Kraus argue that a theory of legal rights is a matter of analytical truth. They say (p. 34) that: ‘A theory of the logical form of rights seeks to specify the necessary features or properties of rights. These properties hold of rights analytically; that is, all institutional rights possess them necessarily. Further, these properties, whatever they are, remain constant across foundation theories’. I shall not return to these claims to analytic truth. As I argued in the first three chapters, I believe it is false. But it is not clear that it plays a part in the argument, so I will not discuss it further.

\textsuperscript{18} Coleman, 35.
stages in Calabresi and Melamed’s argument, that of entitlement and protection.

The new theory suggests that rights are only preliminary and incomplete markers for allocation and protection: ‘As a matter of logic or necessity, legal rights are neither protected domains of autonomy nor levels of protected welfare. Their content is a contingent matter depending on the foundational theory’.¹⁹ So rights are neutral between moral rationales. A ‘foundational theory’, not the right itself is to provide a ‘normative basis’.²⁰ A foundational theory has the double role of determining the content of the right and the mode of its institutional regulation and enforcement, but in doing so it does not affect the nature of the right. Such a theory may be liberty-based or welfare-based. Legal rights are thus open-ended and to that extent neutral and independent of the moral ought. There are rights even if their content is flawed according to a flawed foundational theory. Coleman and Kraus explain, thus, the view of Raz and Waldron that legal rights lack the moral edge of moral rights.

Legal rights are therefore practically and analytically prior to any Hohfeldian instances, but it is not yet clear how. For Coleman and Kraus there are four stages in the formulation and protection of a right. First, we recognise that a right ‘exists’. Second, we establish valid claims that follow from the ‘foundational theory’ of choice appropriate to this right. Third, we create a ‘transaction structure’ that determines the conditions of transfer of the right. Fourth, we specify ‘appropriate institutions for enforcing the claims these rights create’.²¹ Rights are therefore ‘best understood as ‘conceptual markers’, or ‘place holders’, used to designate a subset of legitimate interest or liberties to be accorded special protection by law. Once chosen, the relevant interest or liberty enjoys a privileged status by being labelled a right or entitlement.²² Claims follow from rights so that ‘each

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¹⁹ Coleman, 56.
²⁰ Coleman, 33.
²¹ Coleman, 35-6.
²² Coleman, 35 (footnote omitted). There is a great deal in common between Coleman and Kraus' view of rights and Matthew Kramer's views. See Kramer, 'Rights Without Trimmings' in Matthew H. Kramer, N. E. Simmonds and Hillel Steiner, A Debate Over Rights: Philosophical Enquiries (Oxford: Clarendon Press, 1998) 7, at 79: ‘Questions concerning who should hold which
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legitimate interest … that is marked as a right is necessarily associated with, and in fact entails, some legitimate claims’. The general tenor of the theory is given in the following passage: ‘The goal of every theory of institutional rights is to specify a set of rights which will create claims, which, when respected, will best promote the goals set forth by the foundational theory. We can understand the process of designing a system of institutional rights by imagining a temporal progression beginning with the endorsement of a foundational theory. Once our foundational theory is established, ‘we begin by designing a set of legitimate interests as rights, which at this level of analysis just means ‘conceptually marking’ them’. What does it mean that rights mark interests? Coleman and Kraus write that: ‘When interests or liberties are marked as rights, it is only as if an asterisk is placed by them. The right which secures them is as yet (analytically) content-free. The content is to be given in terms of claims’. The content of any legal right depends, for Coleman and Kraus, on the substantive foundational theory and the particular circumstances. If so, rights do not really entail anything. They play no part in reasoning. They just signify the application of a foundation theory to the particular question at hand by saying that the winner of a conflict is the right-holder. But the winner is a winner because they have the claims and protective framework that they desired, not because they have a right. But then, rights are empty categories. They are not reasons of any kind, legal or moral. They are just a name we use to describe a bundle of Hohfeldian instances enjoyed by a winner, the deployment of which has been determined by a

entitlements are questions not for analytical jurisprudence but for political philosophy and for ordinary political discourse. When the Interest theory contends that rights are modes of protection for interests that are treated as worthy of such protection, it is setting forward a thesis about the general nature or structure of rights. It is not advancing any criterion or set of criteria for what should count as the ‘worthiness’ of an interest. Kramer offers a similar account of the stages in the determination of rights (pp. 45-48) and defends what he takes to be Bentham’s view of legal rights as protected interests irrespective of the intentions of the law-giver (p. 85).

23 Coleman, 35.
24 Coleman, 36.
25 Coleman, 36
26 Coleman, note 11, p 347.
foundational theory, whatever that may be. We may call this view a ‘nominalist’ view of legal rights. A legal right is the set of instances of law that we choose to name so.

This picture of rights is close to an old and intriguing argument for the irrelevance of legal rights made by Alfr Ross. In a famous essay Ross argued that legal rights and duties were, just like the term ‘Tû Tû’ used by a tribe of pacific islanders, a term of ‘primitive magic’ in that we employ to link what really matters, i.e. ‘juristic fact’ and ‘legal consequent’. For Ross, rights have no ‘semantic reference’ and mean nothing other than what the legal consequences that some laws entail. Nevertheless, the general and abstract terms ‘rights’, ‘ownership’ and the like were useful in law as summaries or ‘tools of presentation’ that help us present complex areas of the law. What does the work in law is the ‘conditioning fact’ and the ‘conditioned legal consequence’. Similarly for Coleman and Kraus the term rights is a tool of presentation, an empty vessel that when filled by the background normative theories it then takes us to the legal consequences that matter, the Hohfeldian instances.

They share this feature with other austere theories of legal ought. These are theories that believe that law is only concerned with remedies or sanctions. Hans Kelsen believed that law should only focus on the directions it gives for the imposition of sanctions. Accordingly, a legal offence for Kelsen is defined by the presence of a sanction and not the other way round. He wrote that: ‘an individual is legally obligated to the behaviour the opposite of which is the condition of a sanction directed against

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27 Jeremy Waldron reads the theory offered by Coleman and Kraus differently. He sees it as a modified version of the Interest Theory offered by Raz, MacCormick and himself. Nevertheless, for the Interest Theory of rights offered by Raz and MacCormick, rights are reasons for duties, something which applies to moral rights but not (for Raz and Waldron) to legal rights. It seems to me Coleman and Kraus are distancing themselves from the interest theory by saying that legal rights are not reasons but only ‘conceptual markers’ (a point which brings them closer to Kramer’s version of the interest theory). See Jeremy Waldron, ‘Criticizing the Economic Analysis of Law’ 99 Yale Law Journal (1990) 1441, at 1444-1449.

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Similarly ‘human behaviour can be considered a delict only if a positive legal norm attaches a sanction as a consequence to this behaviour as a condition’. So Kelsen’s view was that the proper domain of legal ought was a set of instructions to officials as to how and when to administer sanctions. What makes conduct an offence is the creation of sanctions and not the other way round. Such sanction theories of duties are now widely discredited. Hart’s arguments against Austin have shown that legal ought creates duties on the persons whose conduct it seeks to guide, not just on officials. But the argument for the neutrality of rights made by Coleman and Kraus makes effectively Kelsen’s point: legal ought matters to the extent it has an impact on persons, irrespective of the rationales that guide it. Coleman and Kraus do not see it this way, of course yet it seems to me that their argument is the same as Ross’s and very close to Kelsen’s. Legal rights have no use as general rights or doctrinal categories. Without this element, rights are just random collections of Hohfeldian instances.

Like all deflationary theories of legal rights, the view of rights promoted by Coleman and Kraus tells us nothing about the way in which rights operate as reasons. They say nothing as to how rights may occasionally operate as pre-emptive reasons of some kind. All they say is that rights organise Hohfeldian instances of law into bundles. But what brings such bundles together remains mysterious. Kramer suggests, in his most recent formulation, that a weakened sense of ‘sufficient interest’ might do the organising work and he suggests that ‘a necessary though insufficient condition for the holding of a legal right by some potential right-holder R is that the right, when actual, protects some aspect of R’s situation that is normally in interest of a human being or collectivity or non-human animal.’


30 Kelsen, General Theory 53.

a peremptory practical constraint is entirely lost. Rights can be
wrongs.

Can legal rights conceived in this way still be rights? Judith
Jarvis Thomson has questioned this view in a strikingly powerful
argument. Let us imagine, writes Thomson, that a legal system
creates a legal liberty to murder Jews and a duty not to prevent
the murder of Jews. 32 The liberty entails a no-right on the part of
the authorities and others whereas the duty creates a claim on the
part of the potential murderers. Is this a right? On Coleman and
Kraus the answer must be yes. For Kramer the answer must also
be yes. The foundational theory is unfortunate, but the legal right
is defined in terms of appropriate Hohfeldian instances or in
terms of some interest of the right-holder (i.e. the Nazi murderer).
But Thomson rejects this way of thinking. She argues that we
cannot speak of that claim to murder as a right, even if we qualify
it with the specification ‘legal’. We cannot change entirely the
sense of the term. In the case of this rule that makes it a right to
kill innocents, we must say that even if it is the law, it is not a
right at all because it offends the moral status of persons, which is
what rights are all about. For Thomson, rights have a meaning
that a legislator cannot change. So Thomson reminds us that
rights have a peremptory role in reasoning, irrespective of the
legislator’s intentions or the legal system’s failure. Coleman and
Kraus and the entitlement theory give us the opposite answer: a
legal right is only a tool of presentation organising the various
enforcements awarded by the legal system for whatever reason
chosen by the legislator. It is not a moral judgement, peremptory
or otherwise. The deflationary theories of legal rights say nothing
about the role of rights in reasoning and to that extent they reject
the role of rights as peremptory reasons. 33 But in doing so – and

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32 Judith Jarvis Thomson, The Realm of Rights (Cambridge, Mass.: Harvard
33 The criticism may appear to be misplaced, in the context of Coleman and
Kraus’ argument. The essay was only meant to be a contribution to the
literature of private law, within which it made perfect sense to say (against
certain dominant theories) that general rights to property, contract and the like
were complex and varied and led to a number of different transaction
structures. The point was just that private law rights did not entail the liberal
theory. This may have been true and well argued (and in my view suggests that
Coleman and Kraus really endorse the interest theory, allowing that liberty is
one interest among many). Nevertheless, the argument of ‘Rethinking the
Theory of Legal Rights’ is presented in broad terms as a general analysis of
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by trying to keep rights neutral between moral ideals - they are saying something quite radical. They are saying that the idea of a right is something entirely different in law and in morality. Legal rights are not even a special case of rights: a right turns into a wrong. This is what Thomson finds implausible.

Perhaps Thomson is mistaken about legal rights. What if we do not need to say anything about such a peremptory role in legal reasoning? What if rights in law are about a practical aim that falls short of the moral judgment envisaged by Thomson? Some theories of law suggest that the practical purpose of law does indeed fall short of any moral aim. They say that legal rights are non-moral reasons, which explains their lack of the moral peremptory character. Sociological theories of law offer such an argument for the priority of prudential reasons over moral reasons. A leading figure within this intellectual current, Roscoe Pound, argued that law secures the general interest over particular interests by establishing institutions that aim at reaching ‘a practicable system of compromises of conflicting human desires here and now, by means of a mental picture of giving effect to as much as we can, without believing that we have a perfect solution for all time and for every place’. What we seek is nothing more than a ‘practicable’ system. Henry Hart and Albert Sacks in *The Legal Process* elaborated on this minimalist account of the legal ought. They started from the general observation that ‘in the satisfaction of all their wants, people are continuously and inescapably dependent upon one another.’ This means that societies devise a system of procedures that settle disputes generated by our mutual dependence on one another:

Implicit in every such system of procedures is the central idea of law – an idea which can be described as ‘the principle of institutional settlement’. The principle builds upon the basic and inescapable facts of social living which have been stated: namely, the fact that human societies are

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made up of human beings striving to satisfy their respective wants under conditions of interdependence, and the fact that this common enterprise inevitably generates questions of common concern which have to be settled, one way or another, if the enterprise is to maintain itself and to continue to serve the purposes which it exists to serve.37

The emphasis here is on the requirement that the legal system somehow resolve the conflict of individual interests in order to ‘maintain itself’ and serves the purposes of the ‘common enterprise’. The answer is what they call institutional settlement. This settlement never aims to be the endorsement of a moral order. It is at most prudential in character. Hence, legal ought is different from moral ought. It is an accommodation for the sake of living together. This must explain why legal rights are not supposed to have the peremptory force of moral rights. Legal rights have a very different role from moral rights. And this is perhaps what the entitlement theory was trying to say all along.

Can the principle of institutional settlement account for the force of rights? But this view also fails to explain what rights are. It only explains the role and function of Hohfeldian instances of law. The conflicts among persons are resolved through the allocation of claims, duties, liberties, no rights and the like according to the circumstances of each case. The purpose of such instances is to resolve the disputes among the parties. But nothing in the principle of institutional settlement requires that we organise such instances systematically in rules or principles or even in a coherent order of reasons. The clusters of Hohfeldian relations can be anything (mutually inconsistent, internally incoherent, retrospective, secret) as long as they effectively serve the purpose of the institutional settlement of disputes. They satisfy the function of institutional settlement as long as they are obeyed. Under such an argument, the ordinary role of rights as general and systematic legal concepts disappears. There is no use for them other than as summaries of instances of law.

It is enough for the aim of institutional settlement that there be institutions with adjudicative and law-making functions and that the directives of such institutions be followed. There

is no requirement that the particular solutions fit a general scheme of ideas or indeed that they avoid contradicting each other. It is effectively a Hobbesian argument. The principle of institutional settlement produces only a procedure in the same way that Hobbes’s theory of the state establishes the sovereign. The sociological theory issues in imperatives or commands. This is not a theory of rights but a theory of legal instances, whatever they may turn out to be according to the arrangements of the day. So the sociological argument is a sceptical argument that leaves no special place for rights in law. For all such arguments legal rights and moral rights are entirely different things. Moral rights may have a practical content. Legal rights do not: they are the name we choose to give to some bundles of legal relations according to the theory of the day. But this invites confusion. Legal rights are not just names or ‘tools of presentation’ but also parallel, in name at least, to the practical discourse of rights created by Locke, Mill and other liberal philosophers. Using this name invites a new mystification of the law. But how can that be? Such a theory turns legal rights into a true mystery.

MILL’S ARGUMENT

The economic and sociological theories determine legal rights without reference to specific moral aims. These theories suggest ways in which rights are Hohfeldian instances without any particular peremptory force. They are collected instances of law that have no special justificatory dimension. This is why the argument is a ‘deflationary’ account of legal rights, another version of Alf Ross’s view of rights as ‘tools of presentation’. But this turns legal rights into a mystery: they are rights, but have none of the features of moral rights. They just as well can be obvious wrongs.

One way of defending the deflationary theory is perhaps to link it with a version of the interest theory that somehow accommodates the all-inclusiveness advocated by Coleman and Kraus. We may simply define interests as any appreciable ‘detriment’ and allow for any such interest to be a ‘necessary but insufficient condition for the holding of a right’. Any such

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38 Kramer, ‘Rights Without Trimmings’ 81.
theory reduces legal rights to protections of prudential considerations of their holders. In this sense, legal rights are perhaps codifications of these established interests. But there is an immediate problem with this avenue. Prudential calculations work only for a single agent, the agent whose interests they consider. They can be reasons for him but cannot be transferred to another. A’s interests are not in any sense rational interests for B, unless B has an independent reason for making them so. One’s prudential calculations do not have effects for others. So this theory of legal rights cannot explain how legal rights can have a role in legal deliberation. Even if we say that a community was a person that had its own interests that were represented by legal institutions and officials, its prudential interests would not be a reason for action for anyone else. So if the principle of institutional settlement is taken to be distinct from morality, it offers no reasons to those to whom it is directed. Legal rights fail to be reasons. Once again, the problem facing this deflationary theory of legal rights is its neglect of the evident similarity between legal and moral rights.

We need to take seriously the similarity between law and morality indicated by Thomson’s example. Whatever their differences, law and morality both result in an active engagement with other persons. This active engagement with others creates a special responsibility, which burdens moral and legal institutions alike and creates the similarity in their vocabulary. This is why rights and wrongs in law follow the similar ideas of rights and wrongs in morality. This similarity between moral and legal ought was discovered by John Stuart Mill and it became a central part of his argument on rights. Mill noticed that both legal and moral obligation have an external, second-personal dimension. They both require that we take action against wrongdoing:

For the truth is that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if

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not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience.\(^{41}\)

Mill’s argument is that a social reaction follows all moral wrongdoing. In case of mere moral obligation the reaction is blame, reproaching or punishing. As the wrongdoing becomes more severe, so does the reaction. In the worst cases the reaction is penal and it becomes a matter of the law. But in all cases we have a reaction against wrongdoers. Moral and legal ought both require an active engagement with wrongdoing. A similar thought governs Mill’s view of rights:

When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it.\(^{42}\)

So a right entails or is equivalent to something that others ought to do.\(^{43}\) Rights constrain the actions of others in some way, so they entail or are equivalent to obligations. In serious cases it is society that ought to act in response to a violation of a right. Mill says that ‘to have a right, then, is, I conceive, to have something which society ought to defend me in the possession of’.\(^{44}\)

Rights in both law and morality are requirements of action on others. What can be the reasons justifying rights? Mill is very clear that the only such reason is general utility. But the utility involved here is of an ‘extraordinarily important and impressive kind’ as it deals with the most important human interests such as security and the ‘very groundwork of our existence’.

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\(^{42}\) Mill, ‘Utilitarianism’, chapter V, paragraph 24, 326.

\(^{43}\) I have called this Mill’s argument, but it is also an argument explored at length by Judith Thomson – who, nevertheless does not make the connection with Mill. For Thomson (RR, 77) ‘a claim is not merely equivalent to a constraint, but is a constraint’. It is also made by Kant in the Metaphysics of Morals.

Mill’s efforts to explain how justice and rights are compatible with the principle of utility are well known and well discussed. Whether they succeed or fail is a matter of disagreement, but such questions do not affect the separate idea that our moral concepts have a double feature of active engagement with persons: they constrain action and invite a remedy. They call for our active engagement against wrongdoing – and they do so for a moral reason. The converse side of this finding is the fact that duty ‘is a thing which may be exacted from a person, as one exacts a debt’. The duty is exacted, morally or legally, on account of this reason and in accordance with its content.

This leads to a number of conclusions. First there is a very strong requirement of justification or legitimacy. There must be a justificatory account of the second-person active engagement that takes place in the name of rights. We need a theory of moral reasons or rationales for the kinds of constraints that rights are or entail. Mill insists this is general utility, but this is not the only possibility. There are other moral, not prudential, reasons that do not derive from the consideration of consequences. Second, we need an account of the content of what is or is not allowed by law and rights and a corresponding account of wrongdoing – perhaps a distinction between infringing a right and violating it. Rights constrain the action of others toward their holders in some way. Such an account may be given through Hohfeldian instances, i.e. sets of claims, liberties, duties and no-rights. Part of this consideration is the fact that we must fix the precise identity of the persons involved: the holder of the right, the various duty-bearers and certainly those who can bring about the active engagement against wrongdoers. Third, we need an account of the sanctions or other remedies justified in case of wrongdoing. The sanction or remedy may of course be outlined in terms of the same Hohfeldian instances, perhaps powers, liberties and claims defining wrongdoing. Not every remedial action is allowed and not everyone is allowed to take it. It is evident that our account of

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legal rights cannot be entirely different from our account of legal duties.\(^{47}\)

Rights for Mill combine three elements. Rights are reasons for some action directed to others, they are authoritative and they entail coercive enforcement. These are the elements of a theory of rights which for Mill are common to both legal and moral rights:

(i) **Rights are Peremptory Reasons.** Rights are reasons for action that guide the law-giver or law-maker with peremptory force for legitimate reasons.

(ii) **Rights are Authoritative.** Rights determine right and wrong conduct, i.e. they are primary behavioural constraints to right-holders and duty-bearers alike.

(iii) **Rights have coercive implications.** Rights entail and determine remedies of some kind, i.e. they provide for remedial coercive action against wrongdoers under certain conditions. Such remedial action may be purely social, e.g. apportioning blame, or legal and violent, e.g. extracting compensation or punishment or enforcing particular conduct or restitution.

These distinctions show that rights are based on values, but are not exactly the consideration of a value. The value is served by the institutional specification of the right in law. When a general right satisfies the conditions of (i), it transforms the protection of a particular value (e.g. autonomy, privacy, free association) into a peremptory reason. In order to do so the legal right ought to formulate some guidance to the action of citizens and officials alike. This idea is echoed by Rawls, when he writes: ‘the basic liberties are specified by institutional rights and duties that entitle citizens to do various things, if they wish, and that forbid others to interfere’ and that ‘the basic liberties are a framework of legally protected paths and opportunities’.\(^{48}\) In this sense legal rights

\(^{47}\) And to the extent that Raz’s account of legal rights is entirely distinct from his account of legal duties (in that legal duties are practical reasons whereas legal rights are not), his general account faces an obvious challenge.

\(^{48}\) *PL*, 325.
combine moral force with legal determinacy and are both peremptory under (i) and authoritative under (ii).

The justificatory rationale of rights as legitimate reasons defines the content but also identifies the seriousness of the consequences under (iii). The social protection offered to the holder of the right at the third stage is dependent on the seriousness of wrongdoing involved in violating the right as defined in (ii). A right to bodily integrity is always more serious than a right to a theatre ticket and so will the reaction to its infringement. Social action in defence of a right is required only if justified and to the extent that it is so justified. But it is evident that the content of the right is fixed by both the behavioural constraints imposed by the primary duty and the secondary remedy. And because legal ought entails behavioural constraints, its justification cannot be prudential.

This argument takes us clearly away from the deflationary view of legal rights. It is evident that if follow Mill’s argument we ought to say that legal rights are aimed at guiding action and are determined by a practical rationale. So we must reject Coleman and Kraus’ as well as Ross, Kelsen and Kramer’s arguments for the peculiar neutrality of legal rights. Instead, following Judith Thomson and along with Joseph Raz we may say that ‘a rule is identified as a right-conferring one by the reasons for its adoption’ so that rule conferring a right has to be motivated by the right reason. In the case of the interest theory, for example, 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. This means that legal rights cannot be just tools of presentation or enforcement of some policy for the good of a person of the community as a whole. They are guides to conduct in that they are both reasons for action and institutionally specified standards determining right and wrong conduct for agents with consequences for remedies and sanctions. This explains how they are not simple entitlements to resources or random collections of remedial actions. Their authoritative and coercive role cannot be served unless we specify who is protected and who is excluded and in what way. A theory of legal rights requires a justificatory theory, such as that offered by Mill (on the

49 Joseph Raz, ‘Legal Rights’ in EPD 254 at 268. Whether this statement is consistent with Raz’s final view of legal rights I shall discuss in chapter 10.
basis of utility appropriate qualified) or Raz (on the basis of the interests of well-being).

This framework highlights the similarities between legal and moral rights but it also points to one crucial difference. In a modern state, moral blame has very different character from legal wrongdoing. The effects of moral blame are intangible and in some ways psychological. If I do something that others consider wrong but I consider right, their blame will have little effect on me. Unless they convince me that they are right and I am wrong, the effects will be intangible. With law it is different. Law’s guidance is both comprehensive and non-optional. Its effects are tangible. So legal disagreements, very much like political disagreements, affect how I act, not just how I feel. A political or legal decision will change my life in that it will rule out certain options open to my life, either by removing certain relations from my grasp or by creating sanctions that make the doing of something more costly for my ends. Law is coercive.

Moral and legal ought are therefore distinct kinds of social engagement. In law the single determination of what action to take and of secondary remedies in case of wrongdoing has real effects on the lives of those living under it. Moral rights, by contrast, are more fluid and are not coercive in this sense. They are not backed by a single expression of official authority. This is the special privilege of public agencies under the civil condition. Law tells agents how to act and warns them what happens to their ends if they do not. We have already relied on Rawls’ definition of the legal system: ‘A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation’.\(^5\) We now see the relevance of this definition for the theory of rights. Following Mill’s framework we say that rights in both law and morality involve the active engagement with persons. In morality the active engagement has the task of apportioning blame. In law the engagement is uniquely coercive in that it can justifiably allow or require state officials to deploy violence in enforcing a duty against wrongdoers. The institutions of the state are charged with applying, if necessary, remedial action against wrongdoers in order to respond to violations of the standing legal rules of conduct. Legal, but not moral rights, invite

\(^5\) TJ, 207.
this coercive apparatus of the state in their enforcement. So rights invite the exercise of public power. Legal rights raise questions of political responsibility as much as legal duties do. Rawls defines the legal system as follows: ‘What distinguishes a legal system is its comprehensive scope and its regulative powers with respect to other associations. The constitutional agencies that it defines generally have the exclusive legal right to at least the more extreme forms of coercion’. This feature applies to duties as much as to rights. The justification of legal rights must then be political: it has to do with the exercise of official power in the name of the state.

The fact of active guidance explains therefore in a more appropriate way a shared insight of the economic and realist or sociological theories. In both cases legal institutions were seen as instrumental in enforcing practical solutions on private parties with through the protection of entitlements or through institutional settlement of disputes. This suggestion was correct. Yet the fact of this guidance generates moral consequences that need to be addressed by the theory of legal rights at a higher level. The issue of responsibility cannot be brushed aside by supposedly analytical distinctions. It will not do to classify rights as neutral tools in the service of the law, irrespective of the moral or other considerations they raise. If law is a form of active guidance, a form of action, it then occasions moral responsibility. It must be legitimate. And because the theory of legal rights outlines an ideal theory for law as an institution, the responsibility burdens the theory of legal rights as well.

CONCLUSION: LEGAL RIGHTS AS PUBLIC RULES

Mill’s argument shows that legal and moral rights are not simply deliberative strategies for a single agent, but public standards that guide the exercise of public power. Legal rights are a form of active guidance occasioned by law-givers and law-appliers according to the political institutions of the civil condition. The deflationary theories did not exactly ignore these features of legal rights. They chose, however, to focus instead on describing legal rights by means of non-practical generalisations. Hence, Coleman

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51 *TJ*, 207.
and Kraus say that rights are some kind of neutral ‘place-holder’. Kramer tells us that some interest of the holder is necessary but not sufficient for the existence of a legal right. This is the legacy of descriptivism, of the misguided effort to turn jurisprudence into a project of theoretical rationality. For descriptivism is related to the deflationary theories. These theories fail to capture the sense in which legal rights are public rules that aim to guide the conduct of persons. They fail because they do not seek to do so. It is enough for such theories to say that, generally speaking, some preconceived values guide the deployment of the term ‘right’ in a legal system, without specifying which or in what way. Yet, without fixing the way in which rights are linked to values, the public deployment of the terminology of rights in law is bound to be confusing and misleading. Rights and wrongs merge.

We found a better and more familiar explanation of the role of rights in law in an argument focusing on the moral character of legal rights made by Mill. The argument – which we find also in Thomson and Kant - was that moral and legal rights both amount to a kind of active engagement with persons. Such engagement is the result of some reaction against wrongdoing. In law the active engagement entailed by rights was political, because the enforcement of legal ought was by means of coercive structures practised by legal officials. Nevertheless rights entail both enforcement and direct guidance towards those who are to live under the law. Law’s distinct moral aim is that it seeks to create or strengthen, where it already exists, a public order of rules that enables the formation and pursuit of ends. If rights are to work as public rules, they must be publicly related to with some practical content as reasons. Otherwise, the various remedial solutions of the law are disconnected and entirely opaque. The law ceases to be a systematic order of rules. By eliminating the dimension of law as a practical guide to persons, the deflationary theories of rights turn law into an incomprehensible list of particular solutions. To avoid that, a general theory of rights must turn to a justificatory theory, such as the will and interest theories offered by earlier legal and political philosophers. Although we have not yet offered an argument choosing between these justificatory theories, some such argument is essential if we are to understand the very idea of a legal right.

This argument rests on the feature of all legal systems that Timothy Endicott has called ‘resolution’. The feature was noted
by Aristotle as follows: ‘Where it seems that the law cannot draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which it leaves undetermined, as rightly as they can’. So part of the function of the rule of law is that officials, people, should have the duty to give resolution. So the rule of law is also partly the rule of men. But such men act not out of self-interest, but guided by the law as a public order of rules. They have the power to resolve the ambiguities and inconsistencies of the law not just for particular cases, but also for agents that ought to be guided by the rule of law. This creates the need for public rules, and for a theory of law that explains the function of legal rules as public rules. We can now turn to the definition of a legal system endorsed by Rawls:

A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just, they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled.

The key word here is public rules. Legal rights and other legal rules and standards must therefore be organised and offered in such a way as to be intelligible and clear as rules of conduct. Respecting the rule of law, Rawls tells us, is an essential condition for freedom and therefore justice. All offices of the state work under the burden of that responsibility. Judges and legislators must use tools and ideas that enable the law to work as a public order of rules. Neither virtue nor justice can be achieved in a society whose legal ought is not at least capable of successfully guiding persons and making expectations certain in compliance with the law. This is the special virtue of the legal ought, the value of

52 *Politics* III.16.
54 *TJ* 207.
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which is capable of making legitimate its active and conclusive engagement with our ends.