

MORAL RIGHTS AND POSITIVE LAW

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No jurist or legal philosopher will, I trust, expect me to address *the* theory of natural law. Natural law theories are many and diverse. One such theory holds that natural law is a model of the ideal system of positive law and that any deviation from this higher law renders legislation or judicial decision defective in legal validity because deficient in moral justice. I shall here ignore the relationship, if any, between moral justice and legal validity and shall focus instead upon the other main thesis of this theory, that positive law ought to recognize and thus duplicate natural law in every detail. Among other things, the natural law confers upon individuals, and perhaps corporate bodies also, certain moral rights. Fundamental moral rights are familiar from the traditional natural rights documents and more recent declarations and conventions concerning human rights. From such basic rights, many more specific moral rights can be derived. Is it true that every moral right of the individual ought to be somehow incorporated into the legal system of every country?

An illuminating way to approach this question is through a critical examination of arguments of the form “since individuals do have a moral right to x, they ought to have a legal right to x.” Are such arguments, when their tacit premises have been filled in, ever logically sound? Does the existence of a moral right, for example the right to some specific welfare benefit, somehow imply that there ought to be a corresponding legal welfare right? To answer this question we must assess the more plausible forms of this sort of reasoning. Three versions of this argument come readily to mind.

First, there is one analysis of moral rights that would render this sort of argument valid by definition. Although Jeremy Bentham rejected the rhetoric of natural rights, especially of absolute natural rights, as nonsense, he did admit that there is one interpretation that could make sense of assertions of moral rights. Once it is recognized

that all rights are essentially institutional, one understands that assertions of natural rights cannot be taken literally. They can, and should, however, be interpreted as disguised prescriptions concerning social institutions. To assert that a specified moral right does exist means no more, and no less, than that a corresponding legal right ought to exist. Only in this way can the language of moral rights avoid lapsing into conceptual nonsense.

If Bentham's definition of a moral right is accepted, the argument from a moral right to a corresponding legal right becomes relatively unproblematic. It is easy enough to formulate a sample, at least schematically, as follows:

- (1) In our society, individuals have a moral right to old age assistance.
- (2) To say that someone has a moral right to something means that that person ought to have a legal right to it.

Therefore, in our society, individuals ought to have a legal right to old age assistance.

There are two respects in which this formulation is incomplete. It does not indicate which individuals have a moral right to old age assistance. Is it each and every citizen of the society or only those who have been productive workers in its economic system or only those who now find themselves without a livelihood through circumstances beyond their control? I shall ignore this question and insist only that the individuals referred to in the conclusion of the argument must be the same set as those referred to in the first premise. The formulation also does not indicate against whom the presupposed moral right to old age assistance holds. This is a more serious omission, and I shall return to it later. In any event, the logical validity of this argument is clear. What remains unclear is the acceptability of Bentham's analysis of moral rights.

Two lines of argument refute the view that to say that someone has a moral right to something simply means that that person ought to have a legal right to it. One of these points to instances of moral rights that ought not to be embodied in the law. There are several reasons why some moral rights ought not to be enacted into enforceable legal rights. Some moral rights are too trivial to be worth enforcing through the expensive legal machinery of the state. Even an unimportant promise confers upon the promisee a moral claim-right that the promisor do as he or she has promised, but the state would not be justified in giving me the legal power to sue a colleague in my department who now refuses to meet me for lunch at the faculty club as he had prom-

ised last week. Some moral rights might invite abuse if made into corresponding legal rights. Presumably a benefactor acquires some sort of moral right to reciprocation, if only to an expression of gratitude or to special consideration in the event that the beneficiary decides to act in some manner likely to affect the benefactor. But a corresponding legal right to reciprocation would place in the hands of potential benefactors a dangerous power of imposing legal obligations upon others against their will. The social institution of the potlatch among the Indians of the Pacific Northwest is revealing in this regard. In other cases, the legal enforcement of a moral right would inevitably invade the privacy of the rightholder, and others, in unjustifiable ways. I have a moral right that the members of my family not read my mail or listen in on my telephone calls without my permission. But it would be an even greater invasion of my privacy to have the police enforce my right to privacy by detecting and punishing those who violate it in the privacy of our home. Finally, since rights presuppose some possible confrontation between the first and second parties, the rightholder and the party against whom the right holds, the legal enactment and enforcement of a moral right is typically out of place when the two parties stand in a personal relationship that is, our ought to be, intimate and loving. Probably a husband has a moral right to the sexual fidelity of his wife and a wife has a moral right that her husband undertake his fair share of the homemaking tasks. But whatever might be thought about the justice of the corresponding legal rights, their existence would do much to destroy all that is most precious in the marital relation. I may, of course, be mistaken in asserting the existence of one or more of these alleged moral rights or in suggesting that their legal enforcement would be unjustified, but this does not seriously undermine my reasoning. If my examples make any sense at all, if they are even intelligible, then the Benthamite analysis of moral rights must be mistaken. For on that conception of a moral right, it would be sheer nonsense to assert that there might be a moral right that ought not to be a legal right.

A second refutation of Bentham's conception of moral rights points to the way in which it ignores or mislocates the moral implications of statements about rights. Since the moral right to old age assistance is a claim-right, it presumably implies some corresponding moral duty. At first glance, the proposed analysis includes or implies no correlative duty at all. "The individual has a moral right to old age assistance" is said to mean "the individual ought to have a legal right to old age assistance". But how can one translate the language of "ought to have" into statements about which parties "ought to do"

what sorts of actions? Does this conception of the moral right to old age assistance imply that the welfare agency ought to provide old age assistance to the elderly even if the agency is not legally authorized to do so? Does it imply that judges ought to recognize and enforce such a right in the absence of any statutory or Constitutional basis for this judicial action? Does it mean that legislators ought to enact legislation providing for old age assistance whether or not their constituents approve? Or does it imply that the citizens individually and collectively ought to work politically for the enactment of such legislation? Surely any adequate analysis of the language of moral claim-rights must make clear precisely what correlative duties are imposed by these rights. On a second and closer look, one can probably discern Bentham's implicit meaning. To say that the individual does have a moral right to old age assistance is to say that the individual ought to have a legal right to such assistance, and to say this is to say that the state ought to enact and enforce a legal right to old age assistance. Let us not worry unduly about who constitutes the state, about who it is that ought to do this enacting and enforcing; the crucial deficiency lies elsewhere. The logical correlative of the moral claim to be provided with old age assistance is the moral duty to provide such assistance not to enact or recognize or to enforce any legal right. To be sure, the latter might be an essential means toward the former. But then it is a means toward the performance of the correlative duty and not that duty itself. Bentham was driven to his analysis of the language of moral rights by his scepticism about natural rights. I do not believe that his scepticism was either necessary or justified. But if it was, then it would be better to abandon all talk about moral rights rather than to pretend to translate it into talk about what ought to be. If these are any genuine moral welfare rights, then they impose specific moral duties upon identifiable second parties and do not merely project some moral ideal of a legal system. Accordingly, the logical transition from the existence of a moral right to welfare to the obligation to enact or recognize and enforce a corresponding legal right cannot be justified by the mere linguistic analysis of the very concept of a moral right. If this sort of argument is to go through, we need to find some sort of normative replacement for Bentham's proposed analysis.

The obvious candidate is the assumption that the state ought not to violate the moral rights of the individual. If it could be shown that the existence of a legal right is somehow required in order to prevent the violation of the corresponding moral right, then it would be possible to prove that the legal right ought to exist

by appealing to the moral right. Let us formulate the argument something like this:

- (1) In our society, individuals have a moral right to old age assistance.
- (2) The state ought not to violate any moral right of the individual.
- (3) In our society, if there is not a legal right to old age assistance, then the state will violate the corresponding moral right of some individuals.

Therefore, in our society, individuals ought to have a legal right to old age assistance.

Although this argument is not in standard logical form, its validity hardly seems open to question. Nor is its second premise in serious doubt. If it is not morally wrong to violate a moral right, then what on earth is wrong and what could be the point of taking moral rights seriously at all? Presumably the very concept of violating a moral right carries with it the moral obligation, at least a *prima facie* obligation, not to do so.

Unfortunately, the next premise cannot be granted so readily. The argument assumes that the existence of a legal right to old age assistance is necessary to prevent the violation of the individual's moral right to such assistance. Why might this be so? Part of the answer lies in the nature of a moral right. Hart and others have emphasized the distributive nature of rights. Rights are had or possessed or "owned" by individuals, either natural persons or corporate bodies. This is why the existence of a moral right to old age assistance does more than impose upon the state the moral obligation of creating and funding an old age assistance program that will provide welfare payments to many, even almost all, of the needy elderly. Each individual has his or her own moral right to old age assistance, and each such moral right imposes a correlative moral duty upon the state to provide assistance to this individual and to no other. No matter how widely the state may have provided welfare benefits to others, if this individual is not provided with old age assistance, then the state is violating the moral right of this individual. This suggests why only a legal right, an essentially distributive legal institution, could effectively prevent the state from violating the moral welfare rights of some individuals.

The other part of the answer lies in factual information about our society. If the law does not impose upon the welfare agency a legal duty to provide old age assistance to each and every eligible individual, then the welfare workers will have discretion as to which applicants should receive welfare aid. Even granted wise and dedicated welfare

workers, they are bound to exercise their discretion mistakenly in some cases. Recognizing the inadequate training and excessive case loads of most case workers, one must recognize that any legal discretion would be exercised wrongly in considerable numbers of cases. In each and every case, however, the state will be violating the moral right to old age assistance of the individual denied aid. Moreover, there are strong political pressures operating in our society to reduce funding of very expensive welfare programs, such as old age assistance. These pressures, unless resisted by a legally enforceable right, will virtually force welfare agencies to violate the moral rights of some individuals to receive welfare payments. Finally, both individual prejudice and institutional discrimination against certain groups of welfare claimants, such as black or unmarried couples, will inevitably result in the violation of the moral rights of these individuals unless each eligible individual has the legal power to claim old age assistance by taking legal action in the courts.

Admittedly, this argument needs to be filled out in much more detail. The distributive nature of rights must be explained with care and precision. Factual information about various factors that lead to and prevent the violation of the moral rights of various individuals must be scientifically established and critically used. But enough has been said to indicate one kind of an argument that could be advanced to justify a legal welfare right by appeal to a corresponding moral welfare right. The soundness of each individual argument will depend upon the reality of the moral right to which one appeals and the social facts regarding the ways in which this right is or is not respected by other members of the society. But granted the premises the argument seems valid enough, and I can see no reason in principle to deny that this sort of argument can sometimes be sound.

There is, however, another way of bridging the gap between moral and legal rights that I also wish to explore. This reasoning rests upon the assumption that the state ought to do more than merely refrain from violating the moral rights of the individual; it ought to protect or secure these moral rights as well. Let us formulate the bare bones of the argument this way:

- (1) In our society, individuals have a moral right to old age assistance.
 - (2) The state ought to protect the moral rights of the individual.
 - (3) A legal right is necessary to protect a corresponding moral right.
- Therefore, in our society, individuals ought to have a legal right to old age assistance.

Although the logic of this argument is clear enough, the acceptability of its two new premises requires careful scrutiny.

The argument assumes that (2) the state ought to protect the moral rights of the individual. Why go this second mile? Why hold that the state has an obligation, not only to refrain from violating the moral rights of the individual, but also to protect them? One might, I suppose, defend this premise by pointing out that the rights to be protected are moral rights and adding that the state ought to enforce morality. There are those who believe that this is a legitimate and proper, even morally required, function of any good government. Without pretending to add anything to the debate to which Devlin and Hart have contributed so much, let me merely confess that it seems to me that there are several important areas of personal choice and moral action that are properly private and into which legal enforcement ought not to intrude. Still, even if not all of morality ought to be enforced, there might be reason to hold that there is something especially appropriate to the legal enforcement of that portion of morality concerning the rights of the individual. Philosophers as far apart as Kant and Mill agree on this.

What is it about moral rights that suggests the appropriateness of state protection? Several moral and legal philosophers seem to take social protection as a logically essential feature of moral rights. In a series of recent papers, Rex Martin has argued that any right not secured to its possessor by social protection is "infirm" or "deficient" *as a right*. His conclusion is that protection is intrinsic to the very concept of a right. Although his conclusion is plausible, I do not find his argument convincing. Even granted that an unprotected right is somehow infirm, it does not follow that it is any less of a right *per se*. Many patients are very infirm, some even terminally ill and almost totally disabled, but still possessed of their mental faculties. No doubt they are deficient in some important sense, but they are no less patients or human beings than someone in perfect health. Something like Martin's argument may well be sound for institutional rights. Legal rights and the rights of conventional morality depend for their existence upon social recognition, and one might argue that "recognition" without social protection is not genuine recognition at all; at best it is a misleading pretense of recognition. But the existence of moral rights depends, not upon social recognition, but upon those reasons on which they are grounded. I doubt, then, that the analysis of the concept of a moral right can establish the thesis that the state ought to protect the moral rights of the individual.

More promising is some sort of argument to prove that social en-

forcement is appropriate to and called for by the nature or grounds of a moral right. John Stuart Mill advances such an argument when he claims that the violation of a moral right necessarily involves a serious harm to the right-holder and a threat to the security essential to any society. Hart argues that the social protection of moral rights is necessarily appropriate because rights concern that special part of morality dealing with the proper distribution of freedom and, therefore, with morally justified coercion. My own suggestion is rather different. The very language of rights presupposes a context in which the will of the right-holder might conflict with the will of some second party; every right necessarily belongs to one party and holds against another party. Thus, moral rights concern which of two wills ought to prevail in some possible confrontation. If one grants that it is a proper and even urgent function of the state to settle disputes between its members and to maintain the public peace and domestic tranquility in a manner consistent with morality, then it seems to follow that the state ought to protect the moral rights of the individuals subject to its jurisdiction. My suggestion is somewhat tentative and somewhat less than fully developed. What concerns me at present, however, is merely to show that there are plausible lines of reasoning that might well establish the truth of the assumption that the state ought to protect the moral rights of the individual.

Can the same be said for the assumption that (3) a legal rights is necessary to protect a corresponding moral right? It might appear that other forms of protection would be entirely possible and even equally effective. Recall that the moral right at stake in my example is the moral claim-right of the individual against the state to be provided with old age assistance. This claim-right of the individual implies a correlative moral duty of the state welfare agency to provide old age assistance to the individual claimant. Now this moral duty could in principle be adequately enforced simply by enacting and enforcing a legal duty of the state welfare agency to provide old age assistance to all eligible individuals. Why would anything more be necessary?

If all that were required were preventing the state from violating the individual's moral claim-right, then perhaps nothing more would be necessary. But the present argument assumes that the state ought to do more, that it ought to *protect* the moral rights of the individual. Now a moral right, even a claim-right, is not reducible to any correlative moral duty it may imply. Its core claim consists of that duty together with the ethical power to claim performance or remedy in the event of threatened or actual nonperformance of that duty. And around this core ethical claim are clustered a number of associated

ethical elements that, if respected, confer autonomy over the enjoyment of this claim upon its possessor. Only a legal claim, a legal duty together with a legal power of suing for performance or remedy, could be sufficient to protect a moral claim *as a claim*. Taking the argument one step further, only a legal right that confers some sort of autonomy concerning the enjoyment of the core claim upon its possessor could be sufficient to protect the individual's moral right *as a right*. Thus it is that the nature of a right implies that the state's obligation to provide legal protection for the moral rights of the individual can be fulfilled only by means of a corresponding legal right.

I have examined three quite different arguments of the form "since individuals do have a moral right to x, they ought to have a legal right to x." There may, of course, be other variations of this sort of reasoning, but I have not found them in the literature or hit upon them in my imagination. Hence, I shall proceed directly to draw some tentative conclusions about the philosophical adequacy of the ideal model theory of natural law, the theory that the natural law is a model that ought to be completely reflected in every system of positive law.

The first argument hinges upon the assumption that to assert that a moral right does exist simply means to say that a corresponding legal right ought to exist. If this Benthamite analysis of the language of moral rights were correct, then the ideal model theory of natural law would be analytically true, at least with respect to that portion of the natural law that confers natural rights upon individuals. I have shown, however, that Bentham's conception of moral rights is mistaken. Accordingly, the truth of the ideal model theory of natural law cannot be established by linguistic analysis alone. It must rest upon some sort of normative assumption, presumably a moral principle. Moreover, I have suggested that there are some moral rights that ought not to be legally recognized and enforced. If I am correct, then it follows that natural law ought not to be modeled in every detail in positive law.

The second argument for incorporating moral rights into the legal system of any society assumes that the state ought not to violate the moral rights of the individual. This is certainly true. A corollary of this moral principle would be that whenever the state is likely to violate a moral right, the state ought to restrain its state agencies, perhaps by conferring a corresponding legal right upon the holder of the moral right threatened with violation. But not all the moral rights conferred upon the individual by the natural law will in fact be threatened with violation by the state. For one thing, many moral

rights of the individual hold against parties other than the state. The elderly parent presumably has a moral right to old age assistance from the child he or she cared or and nurtured to adulthood. Since this moral right holds against the child, not the state, only the child is in a position to violate this right. Accordingly, with respect to this moral right, there is no reason for the state to restrain itself by the creation of a corresponding legal right. Also, it is very doubtful that the recognition and enforcement of a corresponding legal right is always the only, or even the best, way to prevent state agencies from violating a moral right of the individual. In some instances, simply imposing a legal duty upon the officials of the agency may be sufficient; in other instances, nonlegal changes in policy or social institutions might be a more effective way to prevent violations of a moral right by agents of the state. Precisely what the state ought to do to prevent itself from violating a moral right of the individual will depend upon many facts about the society. Hence, which moral rights will need to be incorporated into any legal system will vary from society to society. At least it is clear that to the extent that the state obligation to incorporate a moral right into its legal system depends upon its obligation not to violate that right, the natural law from which such moral rights spring is not a model to be copied in every detail in every legal system.

The third argument for incorporating moral rights into positive law is potentially much more powerful. Although its crucial assumption that the state ought to protect the moral rights of the individuals is far from self-evident and stands in need of proof, I have suggested how it might be defended. Once granted, this moral principle reaches to all of the moral rights of the individual, not merely those holding against the state. A corollary is that where necessary, the state ought to protect a moral right by recognizing and enforcing a corresponding legal right. Will it always be necessary? One might imagine that the moral rights of the individual stand in need of legal protection only when they are threatened with widespread violation or disrespect. But recalling the distributive nature of a right reminds us of the moral obligation to protect each individual in the exercise or enjoyment of his or her own right. And no doubt under any set of social conditions in this imperfect world, every moral right is threatened on at least a few occasions in any society. Also, recalling that a moral right is a system of normative elements that, if respected, confers autonomy upon the right-holder reminds us that only a legal right could possibly protect a moral right *as a right*. It might appear that the ideal model of natural law has been justified after all.

But this is not the case. The reason is that the obligation to protect moral rights is only one of many obligations of the state. When attempts to enforce a corresponding moral right would be a futile expenditure of scarce social resources or when such attempts would violate other moral rights, such as the right to privacy, the state ought not to incorporate any corresponding moral right into its legal system. What this shows is that the third argument, if acceptable, must presuppose only a prima facie obligation of the state to protect the moral rights of the individual. Since this prima facie obligation will be outweighed by contrary obligations in many cases, we return again to the same conclusion. Not every moral right of the individual ought to be incorporated into any system of positive law, and which moral rights ought to be recognized and enforced will vary from one legal system to another depending upon complex social facts. Thus, the ideal model theory of natural law is false. It is not true that positive law ought to reflect completely every moral principle, right and duty of the natural law.