THE AMERICAN LANGUAGE OF RIGHTS

RICHARD A. PRIMUS

CAMBRIDGE
UNIVERSITY PRESS

Contents

CHAPTER I

Rights theory and rights practice

When two people compete in a game of chess, they each try to win according to the same set of rules. The means of achieving victory are identical for both of them and known to both players in advance. They may find infinite ways of playing the game within the rules that set permissible moves and victory conditions, but those rules and conditions are prior to the game. Nothing that either player can do would suddenly increase the size of the board, or permit one player to move twice in a row, or let one player declare victory by, say, taking the other player's queen as opposed to the king. The rules of the game are static and defined outside the play of the game itself; playing the game consists in adhering to those rules rather than challenging or trying to reshape them.

Law and politics have their share of games or competitive situations like games. When a legislature or a court is going to decide a controversial issue, advocates for rival outcomes use power, rhetoric, argument, and whatever else they can muster to try to secure a favorable outcome. They compete with one another, trying to out-argue and outmaneuver their opponents, and the competition among them is a kind of game with certain patterns and restrictions that might be thought of as rules. There might be a rule specifying that nothing will be a law that does not receive the support of a majority of some legislature, or that one cannot secure someone's vote by promising to pay him or her millions of dollars, or that nobody may be convicted of treason without the testimony of two witnesses. One of the most important ways in which these games of law and politics differ from games like chess, however, concerns the relationship between the rules and the play of the game. In political and legal argument, part of the contest is over how the issue in dispute will be characterized and what kinds of arguments will count as valid or superior. When the same question could be presented as a

matter of free speech or a matter of community decency, it matters which presentation prevails; if something is agreed to be a matter of free speech, it matters what the decision-makers take "free speech" to mean. The struggle to define the grounds and terms of an argument is a struggle to set the rules of the game for a particular contest. As such, it is often the most important element of the contest, because setting the rules can go a long way toward determining the outcome. In legal and political discourse, then, shaping the rules is not something that happens before the game is played but is itself the subject of a contest, and attempts to shape the rules are not preliminaries to the game but moves within the game itself.

In one of the most important books of recent legal theory, *Law's Empire*, Ronald Dworkin offers an account of law that recognizes this interconnection between conducting legal arguments and arguing about what the rules of legal argument should be.[1] Dworkin argues that legal interpretation, the activity required of judges, consists in making the law and the legal system the best that they can be, and deciding which construction of the law makes the law the best that it can be involves choosing some theory of how the law in general should be understood. That choice is inescapably normative, and, once the choice is made, the normative theory chosen is supposed to set the rules for legal argument and interpretation. Nevertheless, the choice of theory should not be understood as occurring outside of or prior to legal argument itself. Theorizing about law, Dworkin knows, is part of legal argument; interpretive legal theories are not descriptions that stand outside the game but rather moves within the game. The descriptive and the prescriptive collapse on this model, as theories about the law are seen as attempts to construct law in one way rather than another. Definitions of legal concepts or canons of interpretation therefore must be seen as part of, rather than prior to, the contest that is legal argument.

It is therefore ironic that Dworkin's leading contribution to the theory of rights is a definition of rights as a legal concept and that Dworkin sometimes treats that definition as regulating substantive argument rather than being part of what legal and political argument contests. His definition is that a right is a metaphorical trump card, held by an individual, that can prevent the government or

[1] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

society at large from doing a certain thing, even if doing that thing would be in society's general interest.[2] Thus, if I have the right to free speech, I cannot legitimately be silenced even if my keeping quiet would be better for society. My right to speak trumps society's interest in my silence. Some things simply cannot be done or denied to individuals, Dworkin says, and we call the guarantees of those imperatives "rights."

Dworkin's definition holds a central place in contemporary rights theory, perhaps because it so powerfully captures two prevailing intuitions about rights. First, it ties rights to individualism. Liberals like Dworkin have placed protection of individuals against the will of the community at the center of their concerns for centuries; John Stuart Mill's argument that there is a circle around every individual that society may never invade and Immanuel Kant's images of individual dignity and the kingdom of ends are two easy examples. Accordingly, liberal theory has long associated rights with individualism. That view of rights remains dominant today, both among liberals like John Rawls and Joseph Raz who approve of rights frameworks and critics of liberalism like Michael Sandel and Mary Ann Glendon who take more skeptical views.[3] Dworkin's definition of rights as individualist trumps admirably articulates this widely shared idea about the nature of rights. Second, the metaphor of the trump card subtly acknowledges that rights can conflict with each other. A trump card, as the term is used in card games like bridge, is a card that wins any round of play if no higher trump card is played, and so Dworkin means to say that possession of a right defeats any non-rights-based considerations in a legal or political conflict. But there is more to the metaphor. Sometimes, in cards, more than one trump card is played in a single round. In those cases, the trump with the highest value prevails and the others, although trump cards, lose. Dworkin's definition thus incorporates the legal realist and critical legal studies criticism that rights can conflict with one another, but it does so while preserving the idea that rights provide a coherent framework for settling disputes.

[2] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977 [1991]), pp. 91–93, 189–191, 269; Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985), pp. 2–3.

[3] John Rawls, *A Theory of Justice* (Harvard University Press, 1971), pp. 3–4; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), p. 166; Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press, 1996), p. 33; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991), pp. 47–48.

When Dworkin applies his definition to concrete cases, however, he sometimes argues that the substance of rights must be or not be certain ways simply because those consequences follow from his definition, as if the definition were evidence of the nature of rights rather than an attempt to construct rights in one of several possible ways. In so doing, he winks at *Law's Empire*'s insight about definitions and interpretations and presents his definition of rights as trumps as prior to the contest of rights discourse rather than a move within the discourse itself. Consider the argument that Dworkin makes about individualism and a contested concept called "the right to know." The "right to know," of course, is something that journalists claim on behalf of society in support of their quest to discover and publish guarded information. It is related to but not coextensive with the right of free press. One who invokes the right to know claims that the public is entitled to have access to government documents or courtroom records or whatever else the right is applied to, and the argument for the right to know is customarily advanced in terms of empowering citizens to monitor the activities of government. Dworkin argues against the existence of such a right to know, and his argument follows syllogistically from his definition. Recall that on Dworkin's definition, rights are things that only individuals can have.[4] It follows that no non-individual can use the language of rights to protect its interests and that society itself, the very opposite of the individual, cannot have any rights. This stance is not a substantive claim, Dworkin might say, but merely an analytic necessity. Nothing that is in society's interests can be a right, because rights are by definition things that stand *against* the general interest of society. It is thus analytically senseless to speak of the rights of society; indeed, Dworkin says that predicating rights of society is "incoherent" and "bizarre." The right to know, however, is alleged to be a right of society at large, and its application is alleged to be grounded in the general interest, not in protecting individuals against the general interest. Dworkin therefore concludes that those who believe in the right to know are committing a category mistake.

[4] Dworkin does grant that "individual" should not be limited only to actual human individuals, saying that "legal persons," such as corporations, may have rights as well (*Taking Rights Seriously*, p. 91n.). Why he and other theorists like Joseph Raz make this concession is discussed further in chapter 3; as I argue there, it may be due to their preference, when confronted with data that their theories do not map well, to redefine the data rather than change their definitions. This nuance does not, however, affect the current argument.

Given that rights attach to individuals and not to society, Dworkin easily concludes that there cannot possibly be such a thing as the right to know.[5]

The proof is entirely formal; the conclusion that the public has no right to know is entailed within Dworkin's definition of rights. His argument against a public right to know need not and does not weigh the substantive questions of public access to information. Dworkin does not, for example, make an argument about the merits and demerits of allowing television cameras inside courtrooms. But by arguing that there is no public right to know, Dworkin promotes a particular answer to the question of whether trials should be televised. The answer he promotes is "No." Technically, it is still possible for Dworkin to take either side on the substantive question. He could claim that television cameras should not be permitted in courtrooms and that there is no right to know that such a ban would violate, or he could claim that television cameras should be permitted in courtrooms, though on grounds other than that of a right to know. It would, however, be a mistake to give too much weight to this last possibility. In the context of American rights discourse, to declare that there is no such thing as the right to know is, at least presumptively, to take sides against having cameras in courtrooms. At the very least, it is to weaken the argument for televising trials by denying its articulators the use of a powerful rhetorical tool: the language of rights.

It may be that Dworkin opposes the uses to which the putative "right to know" is put, in which case his argument against the right to know is convenient to his purpose. It may even be that some of those uses, such as televising trials, are pernicious and deserve our opposition. Nevertheless, Dworkin's case against the right to know is not a good way to make the point. Doing nothing more than tracing the logical entailments of a definition, it neatly dismisses the possibility of a right to know and, because we know that the right to know means certain things about cameras and reporters, encourages us to infer conclusions about televising trials and printing government records. Furthermore, it does so without showing that such publicity would be against the general welfare, or unjustifiably harmful to particular people, or unjustifiable on any other substantive grounds. Instead, a purely formal definition of rights fosters a substantive position on issues of public access to information.

[5] Dworkin, *A Matter of Principle*, pp. 387–388. When Dworkin and others use definitions of rights to "disprove" the existence of certain rights, they mean that those rights do not or cannot exist in a moral sense, prior to the law. Dworkin would not contest that a proposition codified into law as a right would be a right, e.g., that if a legislature enacted a "right to know statute," a right to know would then exist in that jurisdiction as provided in the law. None of the theorists I discuss denies that rights talk is sometimes simple legal positivism.

The formal definition, however, is not a rule that pre-exists the game of legal argument. It is a move within the game. As Dworkin's own theory of adjudication and interpretation explains, his "definition" of rights is not just descriptive or constitutive of some aspect of the game (like "the chessboard measures eight squares by eight squares") but an attempt to prescribe, as among multiple possibilities, how that aspect will function in the game. Dworkin's political commitments, including his commitment to individualism, are present in his definition of rights, as *Law's Empire* alerts us to expect. It would be ironic if Dworkin, when making his argument against the right to know, forgot that definitions and interpretations are moves within the game and always carry substantive commitments, such that it is dangerous to treat definitions of normative concepts as fixed truths – in a word, as definitive. It is more probable that Dworkin knows his definition to be a move within the game of legal discourse and that he does not bother to acknowledge it as such. He does not preface his argument by saying "This definition of rights is itself subject to challenge, because it is only my attempt to construct the category in the way that I, subjectively and normatively, believe makes rights the best that they can be." Instead, he simply offers his definition and winks at his theory of interpretation. He knows that what he presents as simply descriptive is actually normative, but he makes his move without calling our attention to the fact.

Insofar as Dworkin is a player in the game, concerned with establishing or refuting a specific right like the right to know, winking at the interpretive insights of *Law's Empire* and forging ahead with a definition of rights is an effective tactic. Because everyone agrees that rights have force, embedding political commitments within a definition of rights is an excellent way to tip arguments in their favor. If I argue that I should be permitted to do X, I may or may not win the argument and get to do X. If I argue that I should be permitted to do X and point out that I have a right to do X, my chances of winning the argument and getting to do X are greater than if I make the argument without reference to my rights. The same is true if I argue that respecting some other right Y

necessarily entails my being allowed to do X. As part of what it means to be a right, each political commitment within a definition of rights (e.g., the commitment that people should be allowed to do X) travels under a privileged banner. Extra weight is given to the argument because it is an argument not just about X but about rights.

At the same time, however, something should give us pause about Dworkin's using his definition of rights as he does when he dismisses the right to know. Given his presumed awareness that definitions and interpretations of legal concepts contain normative judgments, it does not seem entirely right for Dworkin to argue from a definition that he presents as no more than descriptive. We might expect him instead to use the case of the right to know to test his definition, perhaps by asking whether dismissing the right to know makes the law the best that it can be. If it did, then both his definition and his argument about the right to know would be strengthened. That kind of analysis would require Dworkin to engage substantive questions such as whose interests are served and harmed by placing television cameras in courtrooms or prohibiting photographers from snooping on celebrities. Instead, however, Dworkin bypasses all such questions and rests his argument on the definition of rights alone. In so doing, he relieves himself of having to defend a set of normative commitments by cloaking them in the banner of rights, a category he has appropriated for the purpose. But it does not make sense to let the banner do the persuasive work if the commitments it contains could not do the same work on their own. Similarly, if certain propositions do not travel under the banner of rights, and if their not traveling under that banner is due only to the way that rights have been defined, then we have no reason to suppose that those propositions are less compelling than the commitments included within the going definition of rights.

Appropriating rights language for a particular set of substantive political commitments is a widespread feature of rights discourse, political as well as academic. Consider the rival approaches to rights found in "will theories" and "interest theories," each of which builds a distinct set of normative choices into its conception of rights and then argues for its positions based partly on the strength of definitions.[6] "Will theories" of rights, which are sometimes called "option

[6] For the early history of the rivalry between these two ways of seeing rights, see Richard Tuck, *Natural Rights Theories* (Cambridge University Press, 1979).

theories" or "choice theories," have roots in Hobbes and are expressed in the writings of Wesley Hohfeld and H. L. A. Hart.[7] Roughly, will theories define having a right as having an opportunity to make a choice. Interest theories of rights, which are sometimes called "welfare theories" or "benefit theories," promote a different definition, according to which one has a right if a condition of one's well-being is sufficiently important to place someone under a duty. Joseph Raz, Joel Feinberg, and Neil MacCormick are interest theorists.[8] Will theories elevate the value of autonomy, and interest theories elevate other aspects of well-being.

Sometimes, a theorist of one of these schools will attack the other by showing that some desirable right is not possible on its terms. For example, MacCormick attacks the will theory by arguing that children should be provided with basic care and nutrition for reasons having nothing to do with anyone's choices or autonomy, including that of the children. Because the imperative to care for a child does not derive from the child's autonomous choices, a theory that equated rights with opportunities for making autonomous choices would not include a right of children to basic care. MacCormick continues: "Either we abstain from ascribing to children a right to care and nurture, or we abandon the will theory. For my part, I have no inhibitions about abandoning the latter."[9] Even if this argument successfully shows that the will theory cannot account for all rights, the conclusion that the interest theory is thereby established is based on a false choice. There is no reason why all rights must be grounded only in autonomy or only in welfare; some rights can derive from respect for human choices, and others can derive from other kinds of needs. To define the ground of rights exclusively in either criterion is to load later arguments in favor of a set of substantive political commitments, either those prizing autonomy or those prizing other conditions of human well-being.[10]

[7] Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Greenwood Press, 1978); H. L. A. Hart, "Are There Any Natural Rights?" in Jeremy Waldron, *Theories of Rights* (Oxford University Press, 1984), pp. 77–90. See also Michael Freeden, *Rights* (Open University Press, 1991), pp. 43–49.

[8] Raz, *The Morality of Freedom*, p. 166; Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton University Press, 1980), p. 209; Neil MacCormick, *Legal Right and Social Democracy* (Clarendon Press, 1982), pp. 143–160.

[9] MacCormick, *Legal Right*, p. 158.

[10] For an argument that is the mirror image of MacCormick's, presenting a dichotomous choice between will theories and interest theories and preferring the former, see Hillel Steiner, *An Essay on Rights* (Blackwell, 1994), pp. 62–73. Steiner applies his theory to the

Just as rights theorists sometimes attack one conception of rights in the attempt to establish another, theorists critical of rights in general sometimes try to attack the entire concept of rights by criticizing a single conception of rights and presenting the shortcomings of the conception attacked as if they were problems with rights as a general category.[11] The conception of rights most commonly targeted in this kind of attack is probably the strong individualist-based notion of rights that Dworkin's theory exemplifies. That conception is dominant in contemporary rights thinking, and it is often easy to pass that dominant conception off as the concept of rights itself rather than one version only. Attacking rights by attacking that conception of rights is a staple among some communitarian theorists. Being skeptical of individualism to begin with, they identify rights with excessive individualism and condemn rights accordingly.

Consider, for example, Michael Sandel's stance toward Dworkinian rights. In *Democracy's Discontent*, Sandel routinely merges "rights" with individual rights, discussing rights in American history as if rights had always and only been imagined in Dworkin's fashion, that is, as attaching only to individuals.[12] As a matter of history, that presentation is lacking: as I discuss in the coming chapters, American rights discourse has often predicated rights of entities other than individuals. Sandel's collapsing of all rights into individual rights, however, helps explain his hostility to rights as an outgrowth of his views on liberal individualism. Indeed, Sandel's attack on rights prominently features a self-conscious attack on the Dworkinian view. The idea that rights are trumps is the theme, Sandel charges, of one of the most infamous court decisions in American history: *Lochner v. New York*, the 1905 case in which the Supreme Court struck down a maximum-hours law for bakers on the ground that it violated every

question of children's rights, reaching conclusions directly opposite MacCormick's, at pp. 245f.

[11] A word is in order here on the difference, as I am using the terms, between concepts and conceptions. Following Dworkin and Hart, I use "concept" to refer to broad categories in political and legal thought generally, such as the concept of rights, or of equality, or of democracy. The meanings of those concepts, however, are contested by politicians and theorists; what rights or equality or democracy means to adherents of one political party or philosophy may differ from what it means to others. The rival meanings or interpretations of those concepts are what I refer to with the term "conceptions." Particular conceptions impart more specific meanings to capacious concepts. For example, we could say that equality is a concept of which liberals and Marxists hold different conceptions.

[12] Sandel, *Democracy's Discontent*, e.g., p. 33.

individual's right to freedom of contract.[13] The decision consigned bakers and untold numbers of other laborers to work seventy or eighty hours a week in unhealthy conditions, unable to seek regulation and relief through the political process. In the grand narrative of American constitutional development, *Lochner* symbolizes the law gone bad. For more than sixty years, lawyers and judges have known that "Lochnerizing" is a conceptual sin of the first order. When Sandel associates rights as trumps with *Lochner* – rather than with widely approved decisions on issues like free speech or privacy – he tars Dworkin's theory with a very large brush. And because he has merged rights as trumps with rights in general, his attack on Dworkin-style individual rights appears as an attack on rights as a whole.

It does not follow from Sandel's substantive views that he must attack rights as he does. Rather than confining rights to an individualist conception of which he disapproves and then denigrating the concept wholesale, he might have chosen to advance a different conception of rights, one that would incorporate normative commitments that he preferred. Sandel knows that theories of rights always embody some set of normative commitments, or, as he puts it, some vision of the good.[14] Republicans interpret rights according to republican principles, he correctly notes, and liberals interpret rights according to liberal principles. It is not clear, therefore, why Sandel seems not to think that he can interpret rights in light of his own conception of the good. Surely, it cannot be a good argumentative strategy to attack a popular idea like "rights" when one has the option of appropriating it instead. Nevertheless, Sandel declines that opportunity. He, like many other theorists, seizes on one strain in rights theory and treats it as rights theory in general, the only difference being that he does so not in order to establish that theory but to condemn rights as a whole.

FEINBERG, RAZ, AND THE RIGHTS OF HUMAN VEGETABLES

What Sandel sees correctly about rights, however, is that claims of rights are inescapably normative, because rights are always interpreted according to some vision of the good or set of substantive political commitments. Some theorists of rights refuse to see this

[13] Ibid., p. 42. [14] Ibid., p. 321.

aspect of rights discourse, arguing as if the existence of rights could in some cases be a purely descriptive matter. Consider Joel Feinberg, who holds an "interest theory" of rights. Feinberg's theory reasons from formal definitions to substantive conclusions in a way similar to Dworkin's theory, but it shows a different face of that technique. "To have a right," says Feinberg, "is to have a claim *to* something and *against* someone."[15] Feinberg argues that claims are bound up with interests and further proposes that "only beings who have interests are conceptually suitable subjects for the attribution of rights."[16] Rocks, for example, cannot have rights, because rocks do not have interests. Animals, Feinberg says, do have interests and do have rights. The argument works like this: animals prefer to be treated some ways and not others, and their preferences are tantamount to interests. Given that animals have interests, they are "conceptually suitable" to be rights bearers. It is true that animals cannot assert claims in support of their interests, but that is just because they cannot speak. What they lack is the ability to assert, not the capacity for having claims in a moral sense. Feinberg therefore concludes that animals, as suitable rights bearers who have claims, have rights.[17]

In contrast, Feinberg argues that human vegetables have no rights at all. If assumed to be incurable, he says, human vegetables cannot be said to have interests. Under his definition, that makes them conceptually unsuitable to be rights bearers, so Feinberg concludes that they cannot have rights, but he balks at the normative implications of that conclusion.[18] He contends that the fact that human vegetables cannot and do not have rights is not a license to treat them in any malevolent or destructive way one might choose. He knows that people might interpret him as saying that human vegetables may be legitimately killed, warehoused, or who knows what else, and he is morally uncomfortable with that implication. He therefore explicitly denies that his arguments about rights-bearing have any kind of moral impact. According to Feinberg, whether human vegetables "are the kind of beings that can have rights [is] a conceptual, not a moral question, amenable only to what is called 'logical analysis,' and irrelevant to moral judgment."[19]

The claim that rights analysis is "conceptual" and not "moral" is quite comprehensible within the framework of analytic inquiry.

[15] Feinberg, *Rights*, p. 159. Emphasis in original.
[16] Ibid., p. 209.
[17] Ibid., pp. 159–267.
[18] Ibid., pp. 176–177.
[19] Ibid., pp. 180, 213.

Feinberg is claiming to do no more than show what consequences follow from a set of definitions. In a way, he is urging us not to reason from his formal definitions of rights to substantive conclusions about political morality, because that would confuse the conceptual with the moral. When he argues that animals have rights and human vegetables do not, Feinberg says, he is not telling us what to do when confronted with political or moral decisions. But in that case, it is hard to understand what the argument is about. If animals' having or not having rights entails no consequences for action or appraisal of action, whether or not they have rights is of little importance. Indeed, if the definitions Feinberg develops and analyzes bear no connection to the world of normative decisions, it is not clear why we should be interested in his arguments at all.

These last implications do not really need to be addressed, because Feinberg's arguments are, despite his protestation to the contrary, inescapably normative. Saying that some class of beings (animals, human vegetables, fetuses, "the public") can or cannot have rights is a political and a moral act, not just an analytic one. The concept of rights is one of the constituent concepts of politics in Feinberg's society, and proposals to prefer one or another understanding of such constitutive concepts are necessarily political acts.[20] On Dworkin's model, such proposals are about interpreting the constitutive concepts and therefore must be normative, because they involve deciding which understanding makes the constitutive concept the best that it can be. In a similar vein, Quentin Skinner has argued that a dispute over the applicability of an appraisive term cannot be only a linguistic or a semantic dispute. It is a political or moral dispute as well.[21] In America, "rights" is an appraisive term, among the most appraisive of all. To say that X has a right to Y is to make a normative statement about the relationship between X and Y, and only if the term could be divested of its normative meanings could its employment be non-normative. That divestment is probably not possible, and if theorists really could divest the term "rights" of its normative meaning, it is doubtful that we would discuss their use of the term at all. Other than to express normative

[20] On the political nature of contesting concepts, see William Connolly, *The Terms of Political Discourse* (Basil Blackwell, 3rd edn., 1993), pp. 39–40, 180.
[21] Quentin Skinner, "Language and Political Change," in Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge University Press, 1989), pp. 6–23.

views of the kind that "X has the right to Y" expresses, we have little use for the term "a right." It is unlikely, then, that Feinberg is actually interested in divesting "rights" of normative meaning. What he is interested in, I suspect, is finding a way to mitigate the unpleasant conclusion that human vegetables do not have rights, a conclusion which seems to open the way to deliberate slaughter. Rather than defend that position, he ducks by denying the argument's relevance to morality.

It is here interesting to compare Feinberg's view of rights with that of Joseph Raz. Raz, like Feinberg, is an interest-based rights theorist, and their definitions of rights are almost the same. Raz argues that X has a right if some aspect of X's well-being, alternately formulated as X's interest, is a sufficient reason for holding someone else to be under a duty, and Feinberg defines rights as claims to something and against someone. Both definitions hold that rights are based on interests and that interests give rise to rights when they are important enough to justify imposing a duty on some other party. One key difference between them, however, is that where Feinberg says that only beings with interests can have rights, Raz says that a being can have rights if its well-being is of ultimate value.[22] This provision would let Raz argue that, contrary to Feinberg's conclusion, human vegetables can have rights. All he would have to say is that the well-being of humans is of ultimate value, which he certainly believes, and that human vegetables are human. It seems likely that Raz would be more comfortable with that conclusion than Feinberg is with his, because Raz could conclude that human vegetables do have rights and thereby avoid the implication that it is legitimate to kill or warehouse them. Raz can reach this preferred conclusion because he loaded his "formal" definition of rights and rights-bearing with more of his important substantive moral commitments than Feinberg embedded in his.

The problem that provokes Feinberg's unsuccessful attempt to escape from the normative implications of his argument is similar to the problem with Dworkin's argument against the right to know. In each case, a rights theorist analyzes possible rights by comparing them to a formal definition. In each case, the rights in question are incompatible with the definition and accordingly pronounced nonexistent. Dworkin's argument reaches a desired conclusion by

[22] Raz, *The Morality of Freedom*, pp. 166–180.

building it into his premises, and Feinberg's pushes him into a conclusion that he would not have chosen. Both problems stem from the same source: the tendency to infer conclusions about the substance of rights from definitions of their form.

THREE KINDS OF DEFINITION

I suggest that these problems are unnecessary. They occur only if we believe that formal definitions of rights regulate particular rights, and that belief seems unwarranted more often than not. Consider that a political theorist who offers a definition of "rights" might be doing any of three different things. First, he might be asserting that there exists an ontological category of moral imperatives called "rights" and that the definition offered specifies the properties that all members of that category possess. This approach to definition is characteristic of Platonism. As a second alternative, he might be generalizing from a set of desirable normative abstractions, trying to identify principles that would support a worthy set of rights if adopted as definitive of the category. He could reason back and forth between the particular desirable norms and the general principles until he found a set of norms and principles that fit well with each other. This approach to definition resembles the notion of "reflective equilibrium" as pioneered by Nelson Goodman and made famous in the work of John Rawls.[23] A third possibility is that he is trying to explain how the language and the concept of rights functions in some political discourse, that is, what it means within some set of linguistic practices to call something a right. This approach is characteristic of the later work of Ludwig Wittgenstein.

A formal definition of rights that purported to regulate the possible content of particular rights would have to be a definition of the first or second kind. A definition of the first, ontological kind would regulate rights in the simplest possible way, stating unwavering criteria for all rights. A definition offered in reflective equilibrium would regulate the category of rights less rigidly, because it would leave open the possibility that the definition could itself be revised, but the definition would still purport to define the category as nearly as possible and would be more successful the more it was

[23] Rawls, *A Theory of Justice*, pp. 48–50; Nelson Goodman, *Fact, Fiction, and Forecast* (Harvard University Press, 1955), pp. 65–68.

able confidently to deem propositions "rights" or "not rights." In contrast, a definition of the third kind could not exclude certain things from the category of "rights" on the basis of content, because the third kind of definition is attendant on actual uses of the term "rights." Whether definitions like Dworkin's and Feinberg's are of the first or second kind is not always clear. Feinberg sometimes gestures toward the ontological mode, as when he asserts that at the core of human dignity lies a set of "*facts* about the possession of rights,"[24] and both Feinberg and Dworkin treat their definitions as if they were ontological in their arguments about human vegetables and the right to know described above. Nevertheless, reflective equilibrium is perhaps the favorite mode of thought among sophisticated modern theorists, and it may be reasonable to presume that Dworkin and Feinberg mean their definitions to be so understood. If it is not clear whether their definitions are ontological or reflective, however, it is clear that they are one or the other, because their arguments reason from definitions to the conclusion that a certain kind of thing cannot be a right, even though people talk about it as if it were a right. I suggest that neither of those approaches to definition offers the best way to understand the nature of rights and rights claims. As I will discuss below, the first approach is conceptually problematic and the second systematically misses important aspects of rights discourse. In explicating rights in the context of American politics, I make use of the third approach.

Let us consider the ontological approach first. Moral and political theorists who view rights this way try to identify the formal attributes of all rights irrespective of the normative content of particular rights. "Rights," on this understanding, is the name of a pre-existing category of moral imperatives, and the quest to identify the properties of rights is the attempt to identify the criteria for inclusion in the category. That project presumes not only that certain moral imperatives exist *a priori* but also that they necessarily exist as "rights." Here the project becomes problematic. Perhaps some moral imperatives do exist *a priori*, but the categories with which we organize moral imperatives tend to be linguistically constructed. Indeed, it is a central insight of pragmatist philosophers from William James to W. V. O. Quine and Donald Davidson as well as social scientists like Max Weber that human construction rather than natural ordering

[24] Feinberg, *Rights*, p. 151. Emphasis in original.

underlies most of the categories with which we organize objects and abstractions.[25] Rights, I suggest, is such a category. In that case, moral imperatives cannot reside *a priori* in a category called "rights," because the category of "rights" is not an *a priori* feature of the conceptual universe. Whether or not a given moral imperative that we recognize as a right exists *a priori*, it does not exist *as a right* until we apply that categorization.

If, as this reading argues, the features of the category "rights" are not inherent, it does not make sense to try to determine which things the category inherently includes. Formal rights inquiry consists of arguments for different ways to construct the category, not better and worse attempts at discovering the ontological form of rights. This is an aspect of interpretation that Dworkin recognizes in his arguments about the normative decisions involved in making some concept the best it can be, and Sandel specifically recognizes the application of that idea to rights when he notes that rights are always defined in light of some moral or political conception of the good. An argument over the formal definition of rights, being an attempt to construct the category in a particular way, is an argument about which moral or political imperatives to endow with the status of "rights." The link between definition and status within the defined category is obvious; it is largely in order to declare particular propositions "rights" or "not rights" that theorists formulate formal definitions in the first place. But unless a formal definition has a better claim to authority than some other formal definition, the substantive inferences it supports have no more force than opposing inferences drawn from other definitions. If the category of "rights" is linguistically constructed, no definition can claim authority by virtue of its accordance with the *a priori* nature of rights.

Under the second kind of definition, as abstraction in reflective equilibrium rather than ontology, rights theorists could claim that their definitions deserved acceptance not because of their *a priori* truth but because they articulated a plausible principle that supported a desirable set of rights. If we believe that A, B, and C should be rights, and some principled definition D accommodates A, B, and

[25] William James, *Pragmatism* (Hackett, 1981), pp. 113–114; W. V. O. Quine, *From a Logical Point of View* (Harvard University Press, 2nd edn., 1980), pp. 61, 103; Donald Davidson, "On the Very Idea of a Conceptual Scheme," in his *Inquiries into Truth and Interpretation* (Oxford University Press, 1984), p. 189; Max Weber, *The Methodology of the Social Sciences* (The Free Press, 1949), pp. 104–112.

C, D might be a good definition. If D implies some other right E that seems like it should not be a right, perhaps D should be adjusted or perhaps our thinking about E should be revised. A great deal of modern political and legal theory works this way, and repeated reasonings back and forth between tentative definitions and sets of results that the definitions would entail often assists greatly in elucidating concepts and clarifying debates.

As a way of conducting political debate or examining rights discourse, however, reflective equilibrium also has limitations. First, in arguments about particular rights, definitions based in reflective equilibrium run the risk of circularity. In the illustration above, someone who disagreed about the value of A, B, and C as rights would have no reason to accept D. Let us give content to that example. If I endorsed rights to practice contraception, to have abortions, and to refuse life support, I might infer that rights protect individual choices on questions of one's own bodily processes. Confronted with someone who believed that individuals should not have the right to refuse life support, I could try to support my position with that inference. But my opponent could easily reject the inference by rejecting one or more of the specific rights from which it was inferred. If he denied rights to practice contraception and have abortions, an argument from individual choice on questions of bodily processes would not persuade him of a right to refuse life support. To try to persuade him with that argument would be to use an inference with rejected premises to try to establish one of those premises. Second, reflective equilibrium, like ontology, carries the idea that rights can be identified according to some common criteria of content or normative principle, and that idea should be questioned: the commonalities among rights, I suggest, have more to do with functional patterns of how people use the term "rights" than with elements of form or content. Reflective equilibrium and ontological definition do not pay attention to the role that the discourse of rights plays in the formation of normative opinions and legal and political truths. They therefore ignore some of the most important aspects of rights in American law and politics.

If we look to rights discourse as a social practice in American politics, we discover that whether a proposition is deemed a right has important consequences for whether it is honored and upheld. In other words, a need, interest, or conception of well-being has a

better chance of being fulfilled if it is considered a right. This point is another on which rights theorists and rights critics agree, though in different tones of voice.[26] To deny the status of "right" to some substantive proposition on purely formal grounds is thus not only an analytically dubious move but also, if the proposition is morally or socially beneficial, a harmful move as well. I suggest, therefore, that we should not look to formal definitions for the reasons why certain propositions are regarded as rights. It makes little sense to settle questions about whether to televise trials or how to treat human vegetables by consulting the form of rights themselves, because no such inherent form exists. Rights are bound up with needs, interests, and well-being, the subject matter of political morality generally, and what propositions achieve recognition as rights grows largely from our opinions about which of those propositions are the most substantively deserving of the privileged status that the label "rights" bestows.

Furthermore, needs and interests and conceptions of well-being are not static. They change through time. Because rights are bound up with those changing concerns, the content of rights must also change as time passes and circumstances change. As I discuss throughout the next four chapters, a process of concrete negation of past evils is a leading dynamic of change in the content of rights. Many of the propositions we accept as rights today, or that have been accepted in the past, have been classified as rights because recent events convinced people of their substantive importance. If it is also true, as I think it is, that the most important aspect of classifying something as a right is precisely to guarantee its recognition as important and protected, that pattern of change in the set of rights people accept is a fitting one. I am, therefore, arguing against two mistakes in the analysis of rights. The first is the tendency to argue questions of rights as matters of form, abstracted from the needs, interests, and so on that give rights their content. The second is the practice of tying questions of rights to parameters inherited from earlier times when concepts of well-being, need, and so on were different.

[26] Compare Dworkin, e.g., *Taking Rights Seriously*, p. 191, and Feinberg, *Rights*, p. 151, with Glendon, *Rights Talk*, p. 31.

RIGHTS TALK AS SOCIAL PRACTICE

The notion that we need not abandon "rights talk" but that we should mute our interest in the formal properties of rights implies that we should reevaluate what kind of formal consistency rights possess. I do not claim that the conceptual category of "rights" has no formal consistency whatsoever; in that case, "rights" would not be a conceptual category at all. But the consistency among rights does not reside in a set of analytic properties that all rights share. To be sure, someone could produce a theory of rights that reasoned entirely from first principles and in which every right shared a given analytic trait. Such a theory, however, would be less illuminating of our political world than a different kind of theory, a theory that located the consistency among rights not in a set of analytic properties but in the way that the concept is used in a social practice.

I use the idea of a social practice in the sense described by Charles Taylor, who points out that some realities exist in a society whether or not there are vocabularies to describe them and that other realities rely upon particular vocabularies for their existence. The vocabulary-dependent realities are the ones for which he adopts the term "practice," or "social practice." Voting is a practice. Someone lacking the vocabulary and concept of voting could observe a room full of people and notice that half of them raised their hands at a given time, after which they put their hands down and the other half raised their hands. But to understand these movements as voting requires knowledge of a practice.[27]

The simplest practices are defined by constitutive rules, and John Searle has illustrated this kind of practice with examples from games. Kicking a ball into a net is not a practice, but scoring a goal is. Goals, in this sense, are scored because of certain rules that govern the meaning of certain actions in certain contexts; they do not exist independent of the vocabulary of the game. One who kicks a thousand balls into a thousand nets on some remote island where soccer is unknown scores no goals. Similarly, moving a piece of wood from one spot to another is not a practice, but moving a chess bishop is. Outside the practices of chess, I could move the same piece of wood diagonally or vertically. I cannot, however, move a chess

[27] Charles Taylor, "Interpretation and the Sciences of Man," in his *Philosophy and the Human Sciences, Philosophical Papers* (Cambridge University Press, 1985), vol. II, pp. 32–33.

bishop vertically, because a bishop is only a bishop by virtue of a practice according to which bishops only move diagonally. To take the piece of wood that chess players call "bishop" and move it vertically is not to move a bishop at all. In other words, the rules of chess are constitutive of the bishop *qua* bishop, and what it means to be a bishop is given by the way that the rules of chess permit the bishop to be used.[28]

Rights, like bishops and goals, are creatures of a practice. If I stood outside the town hall and castigated the mayor in a loud voice, any observer could understand that I was shouting and, assuming basic comprehension of English, that I was criticizing a government official. But those observers familiar with a certain practice could say something more: "He is exercising his right to free speech." I could shout the same words in the same place with or without the practice, but the existence of the practice gives a different aspect to what I am doing. That I exercise a right to free speech is a fact, as surely as it is a fact that I move a bishop or score a goal. Of course, identifying rights is more difficult than identifying bishops, because the constitutive-rules model is inadequate to explain practices outside of specially crafted situations like chess. In debates about political morality, where the practice of rights identification might obtain, the possible moves are not as strictly predetermined or rule-governed as the possible moves in a chess game. As Alisdair MacIntyre puts it, "The problem about real life is that moving one's knight to QB3 may always be replied to with a lob across the net."[29] Nevertheless, the range of possible moves even in real-life practices is not without limit. Speaking English is a practice, and the moves that an English speaker might make at a given point in conversation are virtually infinite, but not every utterance will count as a move within the practice, because some will simply not be English speech. When someone does speak English, someone who understands the English-speaking practice can understand what the speaker is doing, even though the rules of the practice are loose and the number of moves the speaker might make is very large. The same is true of real-life practices generally. To the extent that we understand a practice, we

[28] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969), pp. 33–42. See also Stanley Cavell, *Must We Mean What We Say?* (Cambridge University Press, 1976), pp. 25–29.

[29] Alisdair MacIntyre, *After Virtue* (University of Notre Dame Press, 1981), p. 98.

can describe the meanings of its constituent actions, even if the practice is not one strictly governed by *a priori* rules.

Let us compare the identification of two practice-dependent phenomena, one born of a strictly rule-bound context and the other not. The two phenomena I have in mind are checkmates and rights. Within the game of chess, a checkmate is a game-ending situation, and the rules of chess specify exactly what shall be a checkmate. Someone who did not know the rules of chess would see chessboards and not grasp that the arrangement of pieces constituted a checkmate. Someone familiar with the practice could look at any conceivable arrangement of chess pieces and announce, factually, whether or not a checkmate was present. The concept of checkmate, however, sometimes transcends the game of chess and appears elsewhere. If the hero of a film, backed by the police, corners the fleeing villain and says "checkmate," we do not frantically search the screen for a chessboard. We know that the hero is using "checkmate" to mean "You have no escape, and the game is over." The hero has not, of course, achieved a checkmate within the game of chess, but the statement of "checkmate" is not false. We understand how it is being used, and its use seems appropriate. We could, of course, imagine other situations in which "checkmate" might be stretched beyond recognition or propriety. To hand three apples to a sales clerk in a fruit shop and say "checkmate" is not comprehensible.[30] If we were to try to determine the point at which alleged checkmates passed from the credible to the incredible, we could refer to the rules of chess and make arguments about whether a given situation sufficiently resembled a chess checkmate to warrant application of the checkmate concept.

The rules of the practice governing rights are far less clear than the rules of the practice governing checkmates. People familiar with the practice can call things "rights" and generally understand one another. But when they try to determine the point at which alleged rights are not credible, they are at a disadvantage relative to anyone trying to make the same determination about checkmates. They do not have an originating context to refer to, a context in which the meaning of "right" is fully given by constitutive rules. The possibility of such constitutive rules is what I opposed earlier when I argued

[30] I assume that other extraordinary circumstances that might make it comprehensible do not obtain (e.g., that the sales clerk is a secret agent and that "checkmate" is a coded instruction).

that rights, as a category of moral imperatives, is not susceptible of a single privileged definition based on form. And yet, people who speak English and are familiar with the practice of rights identification can use the concept of rights to convey meanings comprehensible to other such people.

Following a methodological tradition that derives from the later Wittgenstein, I suggest that the way those who participate in the practice use the concept of "rights" shows what it means for something to be a right. Rather than regarding "rights" as an *a priori* category with a formal essence, we can examine the relevant practice to see how rights discourse actually functions. If we can discover what people are doing when they say things like "X has a right to Y," we will understand what such utterances mean.[31] From that point, we should be able to determine when, in a particular context, it is appropriate to use the language of rights. What differentiates such determinations from definitions of rights like Dworkin's and Feinberg's is that the rules of use it will yield will be constantly open to revision. They are attendant on, not prior to, actual uses of language. They aim not to exclude uses of the term that fall outside given parameters but rather to explain many different uses of the term as part of a coherent practice.

Analyzing rights discourse as a social practice is a hermeneutic undertaking, by which I mean that the project tries to interpret an unclear, seemingly self-contradictory object of study, in this case American rights discourse, in such a way that underlying coherences come to light. To attempt a hermeneutic understanding of rights discourse presumes, as Taylor has pointed out about hermeneutics in general, that meaning and expression must admit of a distinction within the practice studied.[32] If meaning and expression were identical, no interpretation would be necessary. The full meaning of the object would already be explicit, leaving nothing for an inter-

[31] Wittgenstein put it this way: "When philosophers use a word – 'knowledge,' 'being,' 'object,' 'I,' 'proposition,' 'name' – and try to grasp the *essence* of the thing, one must always ask oneself: is the word ever actually used in this way in the language-game which is its original home?" (Ludwig Wittgenstein, *Philosophical Investigations* [Blackwell, English edition, 1958], p. 48.) The language-game with which I am concerned is the American argument about rights, and I will try to show how "rights" is actually used in that language-game.

[32] Taylor, "Interpretation," pp. 15–16. Paul Ricoeur makes a similar point, saying that understanding an object of hermeneutic study is the same as understanding a metaphor: that which is to be interpreted "says" one thing to "mean" another, and the task of the interpreter is to make this apparent contradiction intelligible. Ricoeur, *Hermeneutics and the Human Sciences* (Cambridge University Press, 1981), p. 175.

preter to do. In much of American rights discourse, it is certainly the case that meaning and expression are distinct. Indeed, the many unsuccessful attempts to define and elucidate the meaning of rights testify to the degree to which meaning in rights discourse is not readily apparent and stands in need of interpretation.

THE LIMITS OF THE PRACTICE

Analyzing rights discourse as a linguistic practice requires having some way of knowing what uses of language count as part of the practice and what uses of language do not. In line with the methods described above, the practice must be understood to include actual uses of the word "right" rather than only those uses which accord with some formal definition. It would be easy to say that I will consider all uses of the word "right" equally, but it would also be terribly misguided. Some uses of the word "right," such as by a geometer discussing a right angle, have nothing to do with the current topic.[33] We want to explore not just a word but a concept. Additionally, some attempts to employ the concept of rights may be incoherent, like the utterance of "checkmate" to the clerk at the fruit shop. We need some criteria to determine what uses of the term and the concept "rights" are part of the practice we are investigating. These criteria should tell us not the formal or objective essence of the concept but rather when we are seeing the concept at work.

In choosing the necessary criteria, I rely upon the patterns of use to which the term "rights" has been put throughout American history. The writings of Wesley Hohfeld provide an excellent framework for examining the ways in which Americans speak about rights, and, as discussed below, I draw upon his work partly for his analysis and partly for what his methods reveal about uses of rights language. I also rely upon historical patterns in rights language as presented in chapters 3, 4, and 5. The patterns present in Hohfeld's study and the patterns I explicate in the coming chapters match each other well, providing mutual support for the proposition that those patterns

[33] Richard Dagger has illustrated the range of uses of "right" as follows: "We may turn to the *right*, for instance, even when that is not the *right* way to turn; the Pythagorean theorem deals with *right*-angled triangles; governments sometimes shift to the *right*; straightforward people come *right* to the point when they seek to *right* matters; and we occasionally find that what someone is doing is not *right*, morally speaking, even though she has the *right* to do it." Richard Dagger, "Rights," in Ball, Farr, and Hanson, *Political Innovation*, p. 293. Emphases in the original.

really do typify the practice. Thus, the criteria that I have chosen as representative of the practice are conclusions I draw from the history of American rights discourse. Patterns in the use of the term suggest rules of the practice. This method bears some resemblance to reflective equilibrium, reasoning back and forth between a set of data and a set of criteria for what data to include. What keeps the reasoning from being circular is that not every use of the term is admitted as a legitimate use of the practice. Decisions about which uses are legitimate are contestable, of course, but they need not be arbitrary.

In determining the limits of the practice, I have used a hermeneutic principle adapted from W. V. O. Quine and William James and which I shall call "nonviolence." Given a system of actions, statements, or beliefs, the nonviolence principle directs an interpreter to "disturb the system as little as possible" in rendering it coherent.[34] In other words, unlike the limiting definitions of Dworkin, Feinberg, and similar rights theorists, the criteria I use for identifying instances of rights discourse should accommodate as many ostensible uses of the concept as it can. Criteria which explained more ostensible uses would be superior to criteria which explained fewer of the instances in which people claimed to be discussing "rights," assuming no disproportionate sacrifice of conceptual coherence. There is a point beyond which accounting for ostensible discussion of rights destroys coherent conceptual meaning, as for example if a single interpretation of "right" were proffered for "right angle" and "right away." But the choice of criteria should seek to encompass as many instances of seeming rights discussion as can be accommodated before coherence breaks down.

The sense of "right" relevant to this discussion, of course, is not that of "right angle" but that of "X has a right." It is not yet clear,

[34] W. V. O. Quine, "Two Dogmas of Empiricism," in Quine, *From a Logical Point of View*, pp. 42–44; and *Word and Object* (MIT Press, 1960), pp. 58–59. See also James, *Pragmatism*, p. 31.

[35] The issue here is not the meaning of the individual word "right" within "X has a right" but of the whole statement "X has a right," and even that only within a larger set of statements. H. L. A. Hart, following Bentham's *A Fragment on Government*, insisted on the first half of this point with respect to legal words in general and the word "right" in particular, writing "we should not, as does the traditional method of definition, abstract words like 'right' ... from the sentences in which alone their full function can be seen, and then demand of them so abstracted their genus and differentia." (H. L. A. Hart, "Definition and Theory in Jurisprudence," in his *Essays in Jurisprudence and Philosophy* [Oxford University Press, 1983], p. 31.) This recommendation is good so far as it goes, but it needs to be extended. Just as we

however, that that use of "right" has only one meaning.[35] If "X has a right" is ambiguous, then perhaps we should not include all uses of "X has a right" in the practice we study any more than we include the use of "right" in "right angle." Hohfeld made such an argument more than seventy years ago, and his analysis was precise and influential. According to Hohfeld, "X has a right" as generally used admits of four different conceptual meanings, only one of which properly involves the concept of rights. Hohfeld's view of rights proper is too restrictive, but his scheme of possible meanings for "X has a right" admirably articulates the meanings of "right" that fall within the practice I want to study.

HOHFELD'S TAXONOMY

Hohfeld argued that what Anglo-American political and legal discourse calls "rights" is actually divisible into four categories: rights, privileges, powers, and immunities.[36] A "right" in Hohfeld's stricter sense might also be called an "entitlement" and is defined as having a correlative duty.[37] Thus, X has a right to Y if there is some agent Z who has a duty to provide Y to X. Note that this definition of rights excludes certain things that Americans include among their most prominent rights, such as the freedoms of speech and religion. Hohfeld would classify those as "privileges," where a "privilege" is defined as the absence of a duty to do or abstain from doing a given thing.[38] Thus, a person who has no duty to speak or to refrain from speaking has a privilege (not a right) of free speech. For Hohfeld, the closest synonyms for "privilege" were "freedom" and "liberty."[39] The third category, "powers," encompasses abilities to change legal relationships. For example, a person may have the power to execute

should consider words with reference to the sentences in which they occur, we should consider sentences with reference to the larger discourses in which they occur. To try to determine the meaning of a single word or a single sentence in isolation is to practice a linguistic reductionism that Quine has shown to be untenable (Quine, "Two Dogmas," esp. p. 41; *Word and Object*, pp. 5–17).

[36] Hohfeld, *Fundamental Legal Conceptions*, p. 36.

[37] Ibid., pp. 36–37, 39, 71.

[38] Ibid., pp. 38–39. Given that rights are defined as the correlatives of duties, and that having a privilege is defined as not being under a duty, some agent X has a privilege if no other agent has a relevant right against X. Thus Hohfeld: "A right is an affirmative claim against another, and a privilege is one's freedom from the right or claim of another" (ibid., p. 60).

[39] Ibid., pp. 42, 47.

[40] Ibid., pp. 50–60. Compare Hart's discussion of "enabling laws" in *The Concept of Law* (Oxford University Press, 2nd edn., 1994), e.g., pp. 26–28.

a will, or to vote, or to make contracts.[40] Finally, to have an "immunity" is to be free of another's legal power. Immunities stand to powers as privileges stand to rights: if Jones has an immunity (or a privilege) with respect to Smith, then Smith lacks a power over (or right against) Jones.[41] A Hohfeldian analysis of the American Bill of Rights would show that an American accused of a crime has a *right* to legal counsel, a *privilege* against self-incrimination, a *power* to obtain witnesses in his favor, and an *immunity* against being tried twice for the same offense.

One of Hohfeld's main aims in offering this taxonomy was to prevent people from using a single term, "rights," to denote several analytically distinct relationships, thereby forfeiting precision of thought.[42] If his argument were correct, it would be a mistake to include instances of privileges, powers, and immunities in a study of rights, even if the parties discussing those relationships mistakenly used the word "rights" to describe them. There are, however, at least two problems with Hohfeld's argument. First, his four categories frequently overlap, suggesting that rights, privileges, powers, and immunities are not always inherently different from one another after all. Whether a particular relationship involves rights or powers, privileges or immunities, often depends only on how it is described. For example, the freedom of speech is a privilege if construed as the liberty to speak or refrain from speaking but an immunity if construed as the absence of a governmental power of censorship. The same ambiguity obtains with respect to the free exercise of religion, the freedom to travel, and so on. These challenges to the defined boundaries of Hohfeld's categories stem from the same problem with arranging normative abstractions into formal categories that I discussed at the beginning of this chapter, namely, that moral imperatives do not come into the world neatly labeled as "rights," or, for that matter, as "privileges," "powers," or "immunities." People group imperatives into such categories in different ways depending upon the linguistic apparatuses they bring to bear and, since none of the groupings captures an *a priori* scheme, whether a given abstraction is a member of one category or another depends largely upon how it is described.

The second problem with Hohfeld's argument is that it completely ignores the normative and performative features of American rights

[41] Hohfeld, *Fundamental Legal Conceptions*, p. 60.

[42] Ibid., p. 38.

discourse. Calling something a right endows it with a sacred status, deeming it important and worthy of special protection. Many things that Hohfeld would call privileges, powers, or immunities, such as freedom of speech, have valid claims to that status, and the labels "privilege," "power," and "immunity" cannot confer that status in the way that the label "right" does. Like Dworkin and Feinberg three generations later, Hohfeld would limit the scope of "rights" on purely analytic grounds. He would say that American citizens do not have a right to vote or a right of free speech. Under his definitions, the former is a power, and the latter is a privilege. But these implications are seriously problematic when seen in light of the way that Americans, including politicians and judges, speak about rights. Any definition of rights in the American context must be dubious if it does not include free speech, free press, liberty of conscience, and participation in the franchise, because the overwhelming preponderance of informed Americans considers those items paradigmatic rights. A public official who announced that free speech was not actually a right would do so at great peril, because such an announcement would be interpreted as making a substantive political claim denigrating the value and protected status of free speech. It could hardly be argued that free speech is a privilege and just as sacred and secure as if it were a right, because "privilege" does not carry the same connotations as "right." A privilege sounds weaker than a right, as if it were granted on sufferance and could be revoked. Our Hohfeldian public official would attract less opprobrium by using one of Hohfeld's suggested synonyms for "privilege" and calling freedom of speech a "liberty," but would still be ill-advised to claim that freedom of speech is a liberty and not a right.

Hohfeld's central insight is correct: several analytically different concepts travel under the name "rights." His mistake is in the conclusion he draws from that insight. Hohfeld assumes that "rights" can exist in only one kind of relationship between parties, formally defined. Having distinguished four different relationships in which "right" is used, Hohfeld concludes that three of the uses must be incorrect and reserves "right" for the fourth. Keeping the nonviolence principle in mind, I suggest a different conclusion. The fact that people, including trained legal professionals, frequently see "rights" as applicable in several analytically distinguishable situations suggests that rights can obtain in more than one kind of relationship. It is not necessarily wrong to distinguish among the

four different relationships that Hohfeld describes. From the standpoint of political discourse, however, it is problematic to limit the status of "rights" to only one of the four categories, because to do so is to devalue the other three.

Despite these problems, Hohfeld's analysis provides a framework for determining whether a question of political morality is a question of rights. It does not do so in the place where Hohfeld argued it would, in the definition of the first of the four categories, but rather with the totality of the four categories combined. In the process of explaining rights, privileges, powers, and immunities, Hohfeld catalogs numerous judicial uses of the term "rights" and classifies each use as falling within one of his four categories. What Hohfeld's catalog demonstrates, in spite of Hohfeld's own interpretation, is that "rights" is used to cover all four of the concepts he seeks to distinguish, a conclusion that the historical exploration of rights discourse in chapters 3, 4, and 5 readily confirms. In keeping with my methodological decision to regard use as meaning (assuming that some coherence of use can be identified), any question of Hohfeldian rights, privileges, powers, or immunities can be seen as a question of rights. After all, Hohfeld's encyclopedic catalog of uses of rights language demonstrates that "rights" is regularly used in all four ways. Taken together, Hohfeld's four categories encompass all of the major American rights that an adequate definition of rights must include. The typology requires some modification, of course, because "rights" cannot be used within the same argument to mean the first category exclusively and all four categories inclusively. I will therefore gloss Hohfeld's typology as follows: what he calls "rights," I will call "entitlements." What he calls "privileges," I will call "liberties." I adopt the terms "power" and "immunity" without change. Thus, when studying American rights discourse, I will consider any use of the term "rights" to fall within the practice studied if it pertains to entitlements, liberties, powers, or immunities.

This framework serves only to choose what data is analyzable as rights discourse, not to perform the analysis that aims to interpret the data. Accordingly, its work in the rest of this book will be largely invisible; its role is to filter out potential objects of analysis that actually do not belong, so the analysis I present takes place mostly after the Hohfeldian screen has done its work. It is also worth noting that this framework determines only whether a given argument is part of the practice of rights conversation, not whether any particular

claim of rights within that conversation is normatively valid. The question of normative validity, of whether something that is conceptually suited to being a right actually is a right, is separate from, and follows after, the question of whether something is the kind of thing that could be a right. The normative question is not part of this project, and the present concern is only to delimit the scope of the linguistic practice within which people make the normative arguments. The scope of that practice, as suggested by Hohfeld's catalog of the uses of rights language, includes all uses of the term "rights" that involve entitlements, liberties, powers, or immunities.

FEATURES OF THE CONVERSATION: COHERENCE OF USE

The last point above could be expressed as follows: it is a (provisionally) constitutive rule of the practice of rights discourse that only entitlements, liberties, powers, and immunities can be rights. A second rule of the practice is that claims of rights are used to prioritize and protect whatever specific content is at issue. To claim "X has a right to Y" is, within American political and legal discourse, to make a special kind of prescriptive claim. Consider a hypothetical suffragette who in 1910, before the extension of the franchise to women, declared, "Women have the right to vote." Her statement should not be understood to mean that women were able or permitted to vote. She was not offering a false description of society but making a prescriptive statement about the way in which society should operate. If told that no such right existed in American law, she would respond that American law was in moral error. This kind of rights assertion flows from a view of rights as discovered rather than invented; in its simplest form, it makes a descriptive, ontological claim about the way rights are, independent of society's attitudes. In a more refined version, it might claim that the existing legal code of rights does not correctly instantiate the real values of society and that the law must be changed to incorporate a right which those social values imply. In either case, the suffragette is making a claim about the way rights truly are, irrespective of positive law. Women have the right to vote; the right of women to vote exists, and regulations preventing them from exercising that right are unjust. Of course, the 1910 suffragette could also have taken a different tack. Instead of "Women have the right to vote," she might have said "Women should have the right to vote." That formulation

depicts the existence of a right as dependent upon the attitudes and enactments of society.[43] "Women should have the right to vote" is alternately rendered "Society should establish/create/institute a right of women to vote." Where this approach uses "establish," "create," or "institute," the approach that declared "Women have the right to vote" would use "recognize" or "guarantee." The right itself already exists, even if unrecognized, and society can only change its stance toward that right. It cannot change the right itself.

In actual political argument, the two kinds of rights claims – that the right exists and that the right should exist – are used side by side. The first kind has greater rhetorical force, because it appeals to a moral order that pre-exists and binds the polity that is being urged to change its ways. It is, or pretends to be, a descriptive claim about rights that requires no more from its audience than recognition of the true state of things. The second kind, by contrast, is explicitly a prescriptive claim about how things should be. But this difference is illusory. Both statements are prescriptive, because rights themselves are normative (i.e., prescriptive). Thus, the 1910 suffragette's statement "Women have the right to vote" is prescriptive, because what the statement does is express a normative view and attempt to get someone to do something.[44]

But to understand more fully how claims of rights operate in political debate, it is necessary to move beyond classifying statements as "descriptive" or "prescriptive." Rights claims do many things in politics which those terms do not capture. I want to suggest three general kinds of work for which political actors deploy claims of rights, whether consciously or unconsciously. People use rights claims (1) to claim general authority for specific propositions, (2) to attempt to entrench politically precarious practices, and (3) to declare particular practices or propositions to be of special importance.

[43] Bentham held this view and accordingly considered claims of non-positive rights to be underhanded renditions of prescriptive claims about what positive rights should exist. Thus, he would have interpreted the suffragette's statement "Women have the right to vote" as a less-than-honest way of saying "Women should have the right to vote."

[44] A more significant difference between the two kinds of rights claims occurs at a different level, namely, at the level of what they tell us about the people who make them. One who makes the ostensibly "descriptive" claim – "Women have the right to vote" – invokes a pre-existing structure of rights and endorses discovery. One who makes the other claim – "Women should have the right to vote" – may believe in discovery and pre-existing rights, but she does not make them relevant to women's right to vote.

THREE ASPECTS OF CLAIMING A RIGHT

The three aspects of claiming a right are elements of what a person *does* when saying "There is (or should be) a right to X." Let us return to the suffragette who says "Women (should) have the right to vote." Given the general patterns of American rights discourse that will be illustrated in chapters 3, 4, and 5, we can say that the speaker is implicitly arguing at least three different things beyond the simple proposition that women should be permitted or enabled to vote. She may not be intending all these aspects as functions of her claim, but all of them are present nevertheless.

First, she implies that the specific proposition that women should be permitted or enabled to vote is supported by some general normative authority. "Women have the right to vote" will be heard to mean that some morally binding force mandates the right claimed, even if that force is not specified. Indeed, the claim derives much of its strength from this implicit invocation, because it seems to give a reason why women's voting should be sanctioned: because it is a right. It is assumed that the right-claiming suffragette, if challenged, would argue that the right she claimed was conferred by, or inherent in, the Constitution or the values of society or natural law or some other entity with moral jurisdiction. This aspect of the claim has two varieties, one in which the speaker aims at instantiating a general principle and therefore argues for a specific application and another in which the speaker aims at establishing the specific application and therefore invokes a general principle. Formal rights theory sometimes implies that proper rights argument is only of the first kind, proceeding from a principle of rights to a specific right. Actual argument about rights, however, is more complicated: rights claims frequently originate when people wish to argue for specific outcomes in specific cases and seek principles that support those outcomes. Much sophisticated thinking about rights deals with general principles and specific applications in reflective equilibrium with one another, but there are times when a particular outcome is the *sine qua non* of an acceptable theory. Consider, for example, the current disagreement among pro-choice activists about whether the right to have an abortion is grounded in a right to privacy or a right to equality of the sexes. Both sides wish to establish a specific application of rights (i.e., the right to abortion), and the dispute over which principle grounds that right is a dispute about

how best to legitimate that desired outcome. As chapters 3, 4, and 5 illustrate, that outcome-driven kind of argument has long been typical of American rights discourse.

Second, our suffragette is arguing that the question of whether women will vote should not be left to normal decision-making processes of politics such as popular voting and legislative bargaining. It should be entrenched, removed from politics, placed beyond the power of a hostile majority to undo. "I have a right to vote" means, among other things, "I should be able/permitted to vote whether other people want me to or not." Dworkin's metaphor of the individual's trump card against the will of the majority is an expression of this aspect of rights claims. This aspect is especially important when the right in question aims to protect something that is or could become politically unpopular. We claim the status of "right" for something that we wish to defend against that danger: as Mary Ann Glendon has written, "When we want to protect something, we try to get it characterized as a right."[45] That women have a right to vote is more important in a society in which the predominant sentiment among enfranchised persons is that women should not vote, and women's voting is therefore endangered, than in one where everyone believes that women should vote and there is no danger of disfranchisement. Part of the function of a right is to protect something against the threats of its opponents. One who claims a right argues that the practice protected by the right should not, even in a democratic system, be subject to the obstruction of a hostile majority. It is this aspect of rights claims that puts them in tension with majoritarianism and all other forms of democracy that see the popular will as the final arbiter of legitimacy.

Third, the suffragette declares that women's voting carries an importance that social and political practices that are not matters of rights do not share.[46] Given the moral authority that rights command in American political discourse, to claim rights status for some practice is to argue that that practice should command assent, if not reverence. To argue for a right of women to vote is to argue that women's voting is not only desirable or necessary but somehow untouchable. Far from being a contested point, or even an unfortunate circumstance over which one might grumble, women's voting, if

[45] Glendon, *Rights Talk*, p. 31.
[46] See Freeden, *Rights*, on the assignation of priority (e.g., p. 7).

it is a right, should be a secure point. Claiming the status of "right" thus implies that the associated practice or proposition inhabits the higher realms of normative significance. Conversely, if something is sufficiently important, it is likely to be discussed as a right no matter what its substance.

Claims of rights articulated persuasively can bring about, or make more secure, whatever the rights claimed are designed to protect. The claim "Women have the right to vote," in the context of political argument in the early twentieth century, helped to create the conditions under which the statement became true in the simple descriptive sense. In 1910, American society did not recognize a right of adult women to vote. In 1930, it did. Part of the change was due to the pressure brought by people who made relevant rights claims, including those who claimed that women should have the right to vote as well as those who claimed that the right was already in existence. As more people became persuaded by the rights claims of the suffragettes, the right that the suffragettes claimed approached establishment or recognition. Thus, when rights claims are made in political debate, statements which purport to describe a state of affairs sometimes function as causal forces helping to call that state of affairs into existence.

SUMMARY

Many rights theorists conduct their arguments either as if some formal category of rights existed ontologically prior to our discussions about rights or, more sophisticatedly and perhaps more commonly, as if it were the role of definitions of rights, even definitions offered in reflective equilibrium, to restrict the scope of propositions that could be called "rights" on the basis of form or content. These arguments have many different permutations. Sometimes theorists infer substantive positions about rights from the definitions they propose; others attack theories of rights by showing that some normatively desirable conclusion cannot be reached on their definitions; theorists hostile to the concept of rights in general sometimes identify and attack particular conceptions of rights as if those conceptions were definitive of the concept as a whole. Each of these forms of argument presumes that what rights have in common is a set of formal or content-based characteristics. I suggest, however, that the fundamental commonalities among rights are neither of

form nor of content but of function, having to do with how claims of rights are used and understood within the discourses of law and politics. Whether or not any of the normative propositions that Americans call "rights" are *a priori* moral truths, the category "rights" itself is a linguistic construct whose coherence has little to do with an analytic similarity among the propositions it includes. Calling moral imperatives rights is a practice, in the sense described by Taylor and by Searle, whereby people declare those imperatives to be important and deserving of special protection. The boundaries of the practice are given by long historical usage and captured in Hohfeld's four categories, which I have glossed as entitlements, liberties, powers, and immunities; any question involving one or more of those concepts can be a question of rights. When people discuss such a question and invoke the concept of rights to do so, they are participating in the practice of rights discourse, and that practice is, in principle, available for the use of a very wide range of political agendas.

To call something a right within that practice is not to give a reason why it is important or deserving of special protection but simply to make those claims on its behalf.[47] Giving reasons would entail a different kind of argument, an argument about the desirability or importance of the proposition claimed to be a right. The question of whether the proposition is a right is often a surrogate for that substantive argument. Moreover, the relationship between people's substantive positions on the desirability of certain rights and their use of rights language works in both directions. Those who have strong incentives to establish and protect particular propositions are more likely to produce theories that describe those propositions as rights, and, at the same time, those who can be persuaded that the concept of rights encompasses a set of propositions are more likely to afford those propositions substantial respect. Indeed, it is precisely the power of rights language to win special status for a proposition that makes it an attractive language for those who would enthrone those propositions in the first place.

Sometimes, the interplay between "rights" as a functional discursive label and the substantive arguments in which rights are invoked obfuscates important questions or misleads the participants.

[47] Hart characterizes Bentham as having held that people often speak of rights "when they wish to get their way without having to argue for it" (*Essays in Jurisprudence*, p. 186).

Someone who took Dworkin's argument about the right to know at face value, for example, might be persuaded not to allow certain kinds of reporting activities without ever having considered the content of the issue. Sometimes, it does make sense to avoid trying to settle normative questions by asking whether the propositions debated have the formal properties of rights, preferring to discuss the substance directly. If we conclude that some entitlement, liberty, power, or immunity is indeed important and deserving of special protection, we may call it a right – and in doing so announce our attitude toward it, not some inherent property within it that makes it worthy of our respect and protection.

It would be a mistake, however, to believe that the elimination of rights language in favor of some truer ground of political morality could solve the problem once and for all. Rights are not final grounds for normative arguments, because conceptions of rights must rest on other normative theories, theories that articulate conceptions of goodness or justice or some other binding vision. But if rights stand on other normative theories, those theories also need something to stand on. Arguments about rights are waystations and placeholders, and clarity of argument requires us to remember that they are not final resting places. If, however, they are waystations on the way only to other waystations, resting on rights is not inherently worse than resting on the next turtle down.

CHAPTER 2

History and the development of rights

A generation ago, in an essay on how history can serve political theory, Samuel Beer distinguished between history as past behavior and history as development. Political theorists can use history as past behavior to expand their scope of knowledge, to have a larger range of human experience available when they generalize about politics and morality. That the behavior studied occurred in the past is not relevant to the theorist who uses history strictly in this way; it is simply more data. When a theorist uses history as development, however, the temporal element is crucial. History as development tries to explain some state of affairs as having grown out of some previous state of affairs, under the influence of whatever forces might be relevant.[1]

To examine the American practice of rights discourse, I use history both as past behavior and as development. Using history as past behavior, I draw on many uses of rights discourse in order to infer the rules and patterns of the practice. My aim with this use of history is to show that rights language in American politics is often a placeholder for substantive moral argument. It asserts that something is important and should be protected, but it does not give reasons why. Beyond showing this pattern, however, I aim also to show that Americans regularly use rights language to express their opposition to concrete problems or crises. Because different times pose different problems and crises, this process of concrete negation repeatedly alters American conceptions of rights. To show how this concrete negation has changed the corpus of American rights through time, I use history as development, illustrating how each

[1] Samuel Beer, in Melvin Richter, ed., *Essays in Theory and History* (Harvard University Press, 1970), pp. 58–73.