Introduction

This book addresses a perennial question in the philosophy of rights. If we have any moral rights at all how do we acquire them? The reader may wonder why we should care about this question. Well, the short answer is that we should care because considerable normative weight is placed on having rights and because the prevailing response to how we come to have them is overvalued. It will become clear why I think that these two concerns are related as the argument of this book unfolds. Suffice it to say for now that the prevailing conception of how we acquire moral rights is overvalued largely because too much normative weight has been placed on having them. I substantiate this charge in large part by attending to the legacy of such rights as instruments of racial subordination, particularly in the United States of America prior to the abolition of black chattel slavery. Specifically, I argue that we have reason to diminish the normative weight assigned to moral rights—as they are understood according to the prevailing philosophical view—and that this paves the way for grounding moral rights not in facts pertaining to how subjects are constituted but in facts pertaining to whether subjects have been afforded a certain kind of social recognition. Hence the main claim defended here is that taking the legacy of race and racial subordination into account gives us good reasons for taking moral rights to be acquired by virtue of some form of social recognition.

I believe that there are no rights that exist prior to and independent of social recognition of ways of acting and being treated. So insofar as natural rights, human rights, and presocial moral rights are understood in this manner, my thesis is that there simply are no such rights. All rights including moral ones are products of social recognition. To be sure, many readers may find this thesis shocking and some may even find it morally pernicious. But once we appreciate the shortcomings of the prevailing view, and see that grounding rights in recognition has more to recommend to it than meets the eye and does not leave us morally

impoverished, as some critics charge, this thesis will not only be less shocking but will appear more sensible and attractive as well. Of course, some critics may still insist that the thesis is false even though they cannot prove the point in any satisfactory way. But rendering it less shocking and more sensible and attractive will constitute a substantial victory nonetheless. Therefore, I shall leave the eminently more difficult task of establishing the "truth" of my thesis to a more skilled philosopher, or perhaps to one that has unfettered epistemological access to the Platonic form of Truth.

What I accomplish in this book, somewhat more modestly though no less importantly, will suffice to inspire us to rethink the central role that we have assigned to rights in moral, political, and legal theory as well as in our everyday normative practices of guiding, justifying, and criticizing individual and collective conduct. Furthermore, it will make us more amenable to the suggestion that giving up the idea of unrecognized rights may ultimately result in a more ideal democracy, which would certainly be ironic given that the United States, hailed by many as the greatest democracy in history, was founded on natural rights.[1] And most importantly the book will yield a philosophical conception of what having rights amounts to that takes a wider view of the historical facts regarding the infamous legacy of black chattel slavery and black subordination in the United States by taking the perspective of the racially oppressed as a point of departure for philosophical reflection.

Obviously this is not the only perspective from which we might theorize about what having rights amounts to, and we certainly need not presume that the perspective of the racially oppressed is monolithic. Yet there is ample cause to develop a philosophical conception of the source and value of rights from a perspective that is as widely shared and as well represented as the one considered here. A defining aspect of this perspective is that it rejects the conventional wisdom of asserting that individuals have rights of any kind—moral or otherwise—in the absence of being able to reckon on acting in certain ways with impunity or to reckon on certain kinds of treatment. So whether it be engaging in nonviolent civil disobedience protesting an unjust law or whether it

[1] For an engaging discussion of the impact of rights on deliberative democracy, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991). And for an illuminating perspective of the role of natural rights in the establishment of the American Republic, see Michael P. Zuckert, *The Natural Rights Republic* (University of Notre Dame Press, 1996).

be taking a seat on the front of a public bus in the once racially segregated Jim Crow south, to have a moral right to do these things, while certainly distinct from having a mere legal right to do them, nevertheless also demands, at least in part, that one can actually act in these ways or count on these ways of acting being reliably and systematically maintained and enforced by recognized authorities when resistance is encountered. Admittedly, embracing this position rules out arguing that individuals can have a presocial moral right to act in these ways but I will argue that we can manage just fine without such arguments. That is, we can manage just fine from the moral point of view even if we cannot suppose that blacks had a presocial moral or natural right to sit in a designated whites only seat of a racially segregated bus in the US south during the Jim Crow era.

The utility of rights discourse in normative theory and debate is undeniable. A particularly influential book in contemporary political philosophy opens with the observation that "individuals have rights and there are things no person or group may do to them (without violating their rights)."[2] And from this seemingly unassailable normative bedrock the book argues for a libertarian minimal state. Another influential legal and political philosopher characterizes rights as "political trumps" and observes that politicians appeal to the rights of people to justify a great part of what they want to do (whether this be to use less or more state power or public resources to deliver what citizens are owed).[3] And in describing the uncompromising character of rights, another prominent rights theorist implores us to view rights as staking out chunks of moral turf that others are forewarned not to trespass on and with which they must comply.[4] Countless other works, philosophical and otherwise, routinely observe or assume that rights protect their bearers and are of great value to them in many other respects. Although the details concerning the alleged value of rights vary, all of these ruminations on rights invite the same general conclusion—that having rights matters a great deal. Indeed, given the considerable normative weight typically assigned to having rights in everyday moral and political discourse as well as in some of the most sophisticated and influential work in moral and political philosophy—particularly in the United States where fondness for rights is perhaps greater than anywhere else in the world—it is plausible to

[2] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. ix.
[3] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), pp. xi and 184.
[4] Loren E. Lomasky, *Persons, Rights, and the Moral Community* (Oxford University Press, 1987), p. 5.

claim that being a rightholder is arguably one of the most valuable normative statuses that something can possess.[5]

The purported value of having rights undoubtedly accounts for the proliferation of rights and rightholders in moral and political discourse. Many intensely debated issues such as abortion, capital punishment, gay marriage, affirmative action, the basis of our obligations to animals, to the environment, to future generations, and to poor and embattled nations are routinely framed and debated using the language of rights. Furthermore these and other debates illustrate that moral rights are attributed not exclusively to human beings in full possession of their rational capacities and capable of acting morally and pursuing projects but also to human beings capable of considerably less, such as the severely mentally disabled, infants, psychopaths, the unborn, and even the dead. What is more, they are also commonly attributed to many subjects that are anything but human such as nonhuman animals, trees, ecosystems, future generations, corporations, cultural minorities and other groups, and even to works of art.

Of course any of these attributions can be—and most are—contested. Many people have been critical of appeals to rights in general precisely because of this phenomenon of overusing them and thereby devaluing the currency of rights discourse. But be that as it may, ascribing or refraining from ascribing rights to things is intensely debated precisely because the status of being a rightholder is assigned such considerable normative importance. To establish something's status as a rightholder is to establish that we should think seriously about how we should or should not act toward it. To be sure, failing to establish a subject's status as a rightholder does not entail that it gets no consideration at all, as rights are not the

[5] The great fondness for rights in the United States notwithstanding, one could plausibly say that being a rightholder may well be one of the most valuable statuses that citizens of the world can possess. To the extent that US foreign policy is purportedly driven not merely by national security interests but by promoting and protecting human rights around the globe, and that the exercise of state power and influence is often deployed in the name of doing these things, then one could take this to be evidence for saying that the value of having certain rights extends far beyond the territorial borders of the United States. But if this is the case, then US citizens are not the only ones who should take a keen interest in a philosophical accounting of how we come to acquire rights. Other citizens of the world may have their lives impacted in concrete ways either by US action or inaction that pertains to presumptions about the existence (or non-existence) of certain presocial or prepolitical rights. For example, US imposed economic sanctions against another country or military aggression may be justified in the name of such rights, or, in contrast, failures to provide various forms of humanitarian assistance to citizens of some nations may be justified by denying that human needs for medicine, food, and minimal standards of health have the status of presocial or prepolitical rights and thus do not have the same kind of primacy.

whole of moral discourse; however, it certainly gets considerably less consideration than full-fledged rightholders, according to the prevailing view. Hoping to preserve the integrity of rights discourse in the face of so much jockeying to exploit the value of rights for various purposes, some of the best recent work in the theory of rights has aimed to distinguish real rightholders from alleged rightholders.[6]

Although this strategy is not without difficulties, we certainly can distinguish different kinds of rightholders, and it is important to do so for present purposes. In particular, we can distinguish between legal rightholders and nonlegal ones, a distinction that sheds a peculiar light on the above debates. In view of this distinction it might be held that these debates merely amount to debates over whether certain things have been afforded special legal consideration, in which case we can determine how we should or should not act toward them legally. Admittedly many of these debates have been framed in precisely these terms. But many of them have also been framed in other terms. For example, in many instances it is claimed that various subjects possess certain nonlegal rights, that is, certain rights that they possess prior to and independent of whether they have been recognized by law or by existing nonlegal yet social conventional rule systems. And, in the most general terms, the reason why being this kind of rightholder is taken to afford subjects considerably greater normative status than possessing mere legal or conventional rights is because we can point to something's status as a bearer of nonlegal or nonconventional rights to criticize existing legal and social practices and institutions.

To take a rather vivid example, consider the case of legally sanctioned chattel slavery as it was practiced in the antebellum United States. Enslaved blacks were without many legal rights of free blacks and whites and this permitted certain ways of treating and acting toward them. But to the extent that enslaved blacks were held to possess certain nonlegal or more generally certain nonconventional rights, and this normative status trumped their legal status, then this status could be cited to condemn black enslavement and to argue for abolishing existing legal and social practices that licensed ways of treating and acting toward blacks which were taken to be incompatible with their status as nonconventional rightholders. A similar observation has been made in describing the situation of blacks in South Africa prior to the abolition of apartheid: "We say that

[6] Carl P. Wellman, *Real Rights* (Oxford University Press, 1995).

black South Africans have the moral right to full representation even though this right has not been accorded legal recognition, and in saying this we mean to point to the right as a moral reason for changing the legal system so as to accord it recognition."[7]

By the same token, when we consider some of the hotly contested debates mentioned above we observe a similar strategy of ascribing these nonconventional rights to certain subjects to both condemn and argue for abolishing existing legal and social practices. We see, for example, anti-abortion advocates claiming that the unborn have such rights either at conception or at some later stage of development to argue for abolishing laws that permit women to have abortions, or at least to restrict lawful abortions to very limited cases such as rape. On the other side we see abortion advocates arguing that the unborn have no such rights but that women do and that these rights outweigh any considerations that might be brought to bear in calling for the abolition of abortion or for too narrowly restricting when women can have an abortion. Given the entrenchment of rights in the abortion debate, it is certainly plausible to think that "it requires an act of imaginative dexterity to conceive how the abortion issue might be recast in language that avoids all invocation of rights."[8] But perhaps the same can be said of many other familiar debates. This heavy reliance on rights discourse in general, and moral rights discourse in particular, clearly accounts for why some philosophers insist that "moral rights are not some esoteric construction of otherworldly philosophers, but common parts of the conceptual apparatus of most if not all of us when we make moral and political judgments."[9]

To be sure, one need not invoke something's status as a nonconventional rightholder with an eye toward arguing for or against existing legal or conventional practices. For example, someone might concede that homosexuals have a nonlegal right to marry the person of their choosing yet insist that current legal practices need not make this a legal possibility. In this case, one might believe that other considerations outweighed legally sanctioning this right to marry. On the other hand, one can deny that homosexuals have a nonlegal right to marry yet still argue that they ought to be afforded a legal right to do so on the basis of other normative considerations. This observation notwithstanding, some advocates of

[7] L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), p. 13.
[8] Lomasky, *Persons, Rights, and the Moral Community*, p. 4.
[9] Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton University Press, 1992), p. 199.

these nonconventional rights will demur that even though we can arrive at these conclusions on the basis of other normative considerations, e.g. consequentialist ones, the conclusions will not be as weighty as if we had appealed to nonconventional rights. It will be objected that these other normative considerations do not take individuals seriously enough.

Hence the main case for positing the existence of nonconventional rights can be summarized as follows. We need ways to guide, justify, and criticize individual conduct and conventional practices and institutions that are reliable and serviceable across cultures and national borders. Insofar as the status of mere legal rightholder does not afford this possibility we need a status that transcends existing legal and conventional practices. And we get this by positing the existence of certain nonconventional rights. Yet for this normative status to yield a reliable and universal critical standard that is serviceable across cultures and national borders it must be acquired or possessed by virtue of something that makes a subject's status as a rightholder secure and not subject to the contingencies of legal or other conventional practices. I take this to be the main rationale for positing the existence of rights secured prior to and independently of any and all forms of social recognition.

To get to the bottom of why such rights are taken to matter so much—not only more than mere legal or conventional rights but more than other kinds of normative considerations such as duty and utility—we would need to undertake a genealogy of rights. We could proceed by first determining the historical origins of rights discourse beginning perhaps with a debate about whether the ancient Greeks had any, or with whether rights originated much later during the middle ages, or even later still during the age of European Enlightenment.[10] Although I certainly cannot undertake this project here, I suspect that wherever we locate their origins we shall find that rights were introduced for some normative purpose or other and that there will be a connection between this purpose and conceptions of how subjects come to acquire rights. In the next two chapters I will shed some additional light on why nonconventional rights are taken to matter so much nowadays by elaborating on why many people doubt that we can manage without them. In the meantime I simply want to emphasize that for many people rights matter a great deal.

[10] For a good place to start on the question of whether the ancient philosophers had a conception of rights, see Fred D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford University Press, 1995). And for a defense of the claim that natural rights originated in medieval Europe, see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press, 1979).

Because so much has been taken to turn on whether something is or is not a rightholder, philosophers have devoted significant attention to accounting for how rights are acquired. In other words, because the demands on rights for normative service have been so plentiful and widespread, philosophers have been compelled to address the full range of theoretical and normative questions to which they give rise, including but not limited to the following questions. What are rights? How do we come to have them? What rights do we have? Who or what can have rights? What is the value of having rights? What is the relationship between rights and other normative concepts? And at least in some cases these questions are addressed with the hope that the currency of rights can be redeemed from the devaluation that has accompanied the proliferation of both rights and rightholders. Some have addressed these questions with the hope of clarifying certain normative matters pertaining to how we ought to act, what kind of people we ought to be, what is or is not morally permissible, or what our flourishing consists in. And still others have done so for a variety of other reasons. While I certainly think that this philosophical attention to rights has been merited, I also think that the prevailing philosophical conception of how we come to acquire moral rights is unsatisfactory. The task of this book is to explain why this is and to defend a different conception of how subjects come to acquire moral rights.

Consequently, this book has both a critical and constructive dimension. But a particularly striking aspect of my case is that in relying on the legacy of black enslavement and black subordination both to cast doubt on the prevailing view and to motivate my alternative I am using this legacy in a way that is completely contrary to the way it is typically used, which is to invoke it in arguing for some version of the rights without recognition thesis and to cast doubt on grounding moral rights in social recognition. My reasons for this will become readily apparent in chapter 4 after taking a closer look at the dual legacy of natural rights discourse to defend as well as to attack black enslavement and black subordination.

Some philosophers may wonder what kind of philosophical project this book engages in. To the extent that rights can be claimed or asserted in ethical discourse pertaining to what ought or ought not be done—a distinctively normative project—and that we can also raise meta-questions about rights and ethical discourse generally—a distinctively metaethical project—the reader may wonder what kind of project is being undertaken here. Is it a normative or a metaethical project? Although I am not entirely happy with the tacit presumption that we can neatly distinguish these two projects, I suppose that there is no harm in saying that this book aims to

make a distinctive philosophical contribution to "the grounding theory on which first-order rights claims are ultimately based."[11] It aims, in other words, to offer and defend a way of answering a particular foundational question in the theory of rights, one that can be raised given our practices of claiming or asserting rights. Why do we have rights? In this regard, it is clearly a metaethical or second-order project. Accordingly, I do not aim to claim or assert or even presume that subjects have certain rights and then go on to spell out the normative implications of having them. Instead I develop a view about how subjects come to have certain rights. Of course, this is compatible with concluding that subjects do not have any rights at all, if we become convinced of my conception of what having them amounts to, and we believe that the conditions for rights possession articulated by this conception do not obtain. But this is neither surprising nor worrisome since it is true of any conception of what having rights amounts to.

As for my unease with detaching the normative from the metaethical project, what concerns me most is that this may obscure the fact that the two projects can and should inform one another, which is certainly the case in this book. More specifically, my grounding conception of what having rights amounts to is informed in part by attending to the legacy of first-order rights discourses involving the claiming of rights and the denial of rights claims in the historical context of chattel slavery in the United States, where the classification of individuals by race factored into both the claiming of rights and the denial of rights claims. I believe that attending to these normative practices can and should inform the shape of our grounding conception of what having rights amounts to. And in the other direction—from the metaethical to the normative—I believe that we can test the adequacy of prevailing grounding theories of rights by considering how they strike us when certain first-order rights discourses are brought into sharper focus. Thus it is imperative to appreciate that I aim to make a contribution to the theory of rights that is partly critical, insofar as it challenges a prevailing theory, and partly constructive, in that it offers an alternative by attending to first-order rights discourses shaped by the legacy of slavery and racial discrimination.

The book will unfold as follows. In the second chapter I discuss the nature and shortcomings of the prevailing conception in greater detail, paying special attention to the two most popular ways of spelling out the "rights without recognition" thesis. The third chapter develops and defends

[11] Lomasky, *Persons, Rights, and the Moral Community*, p. vii.

my alternative conception. The fourth chapter further develops the case against the prevailing view and the motivation for my alternative by considering the connection between race and rights. Chapter 5 develops an argument that establishes the wrongness of slavery without relying on the idea of rights without recognition. And chapter 1, to which we now turn, offers a detailed overview of the plan and argument of the book. It proceeds by explaining in greater detail why many people will be loath to accept the claim that we can manage just fine without presocial moral or natural rights in our normative arsenal.