

THE AMERICAN LANGUAGE OF RIGHTS

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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 govern-

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.

ment 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.

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 Freedon, *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.

¹⁷ *Ibid.*, pp. 159–267.

¹⁸ *Ibid.*, pp. 176–177.

¹⁶ *Ibid.*, p. 209.

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 non-existent. 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.