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# Acknowledgements

Someone once said of a book by V. S. Naipaul that it was philosophical but smelled of the earth. I can think of no better description of the ideal I had in mind when I sat down to write this book (although Naipaul is a master and I am not). My aim is to provide a fresh perspective on some familiar debates about rights and to open up some new questions about their past and their future.

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# Introduction

The aim of this book is to explore different arguments about rights in the context of various rich languages of moral and political philosophy. Locating rights in the midst of moral and political *argument* is crucial. Rights are often appealed to as part of a vision of the individual as radically disengaged from thick ethical theories that bind her to particular social roles or hierarchies. The idea of rights as providing a boundary around the individual, or at least around certain crucial aspects of her freedom, has been an influential image in the history of political thought. The image is true and powerful, but the conceptions of freedom and obligation that shape it are themselves the product of a particular set of moral claims. Boundaries abound in our talk about rights. But boundaries are also often ambiguous: they include as they exclude; they rule in as much as they rule out; and they stake out relationships as much as they separate.

Lawyers and moral philosophers frequently argue over the ultimate parentage of the concept of rights. But in this book, I shall be trying a different tack. I shall be focusing instead on the unavoidable *political* character of rights: the way arguments about rights are characterized by disagreement and conflict and by *movement* between the moral and the legal, and the abstract and the practical. It is a mistake to think that rights are either primarily a moral or legal concept. They are both. It is also a mistake to think rights are, by definition, "anti-powers" (to borrow a phrase from Pettit 1996), or fundamentally radical (or conservative). As we shall see, they have been deployed on the "radical" side of various forms of political critique, as well as by absolutists and "conservatives". They

can be used to help create the conditions for the emergence of new kinds of political movements, as in many respects the language of human rights has proved (see Chapter 8). But they can also serve as conduits for new forms of power and regulation.

## Nowheresville

One way to begin to think about the nature of rights is to imagine a world without them. Joel Feinberg, an American legal philosopher, referred to such a place as "Nowheresville" (Feinberg 1980). The inhabitants of this world lacked the capacity to claim anything on their own behalf of anyone or any institution. For Feinberg, *claiming* is central to what it means to have a right in the first place, and to lack that capacity is to lack the means to self-respect. There may well be duties in such a world – deriving from principles or rules associated with customs or social norms – and people might have the capacity to complain about their or others' failure to discharge them. But they lack the special capacity, without rights, to complain about the harm to *them*; they lack the capacity to be the self-originating source of a moral claim.

Sadly, the idea of Nowheresville is not only a thought experiment. The prison camp of Guantanamo Bay, to which "illegal combatants" in the US-led "War on Terror" have been sent – as well as those subject to state-sponsored schemes of "special rendition" – make Feinberg's imaginary world all too real. Claiming might not be as central to rights as Feinberg thinks, but the idea of a world completely devoid of rights seems to be one in which something crucial is missing. Part of our uneasiness, and even outrage, about the use of special rendition, or the existence of Guantanamo Bay, is surely connected to the fact that we see people in those situations as living precisely in a kind of legal and moral Nowheresville: held indefinitely; not told of the charges against them; lacking any effective form of legal recourse; and often subject to physical and psychological abuse. They are cut off from a world in which rights matter (see Steyn 2004).

Another way to think about a world without rights is to think of cultures and societies in more distant times that seemed to lack the very concept of a right. This raises some complex philosophical questions. We often speak of rights in universal terms: that all human



beings, just because they are human, have rights. But if it turns out, as a matter of historical or anthropological fact, that some cultures did not (or do not) recognize those rights, then what does that show? It is certainly true that the practice and language of rights I shall be exploring below emerged out of a specific (yet complex) historical context. And we certainly will not find all of the various conceptual and normative tools of those languages in every tradition. Alasdair MacIntyre claims that if human rights, for example, really are universal then it would be a little odd that there is "no expression in any ancient or medieval language correctly translated by our expression 'a right' until near the close of the middle ages" (1984: 67).

This is an old theme. Benjamin Constant, in his famous 1817 lecture on the "Liberty of the Ancients Compared with that of the Moderns" (written in the aftermath of the French Revolution), argued that Greek city states failed to protect the individual sufficiently because they lacked, among other things, an adequate conception of rights. Repeating a charge made by his compatriot the Marquis de Condorcet, he claimed that the ancients "had no notion of individual rights. Men were ... merely machines, whose gears and cog-wheels were regulated by law" (Constant 1988: 312). The liberty of the ancients involved "the complete subjection of individual to the authority of the community ... No importance was given to individual independence, neither in relation to opinions, nor to labour, nor, above all, to religion" (*ibid.*: 311). The liberty of the moderns, on the other hand, involved:

> the right of everyone to express their opinions, choose a profession and practise it, to dispose of their property, and even to abuse it ... to associate with other individuals, either to discuss their interests, or to profess the religion which they and their associates prefer. (*Ibid.*: 310–11)

Now, Constant would ultimately call for the *combination* of these two freedoms, but the contrast he drew is clear enough. Later, Marx and Engels, in *The Holy Family* (1845), describe how the Jacobin leader Saint-Just, on the day of his execution:

> saw hanging in the hall of the Conciergerie the great tables of the Rights of Man, and with pride and self-esteem declared,

> "After all, it was I who did that". But those tables proclaimed the *rights* of a *man* who could no more be the man of ancient society, than his national-economic and industrial relationships could be those of antiquity.
> (quoted and discussed in Williams 1995b: 153)

Of course, the literal absence of the word "right", or of some close analogue, does not necessarily imply the lack of a related idea or *concept*. In fact, some scholars have argued that the Greeks *did* have a concept of rights close enough to what we understand by them today. Josiah Ober (2000), for example, has argued that Athenian democratic ideology of the fifth and fourth centuries BCE did distribute something like positive rights of participation, as well as negative liberties of protection, to both citizens and non-citizens of the wider Greek polis. Their understanding of these "rights" was very different from modern liberalism to be sure, but they are present to some extent, in some recognizable form (cf. Oswald 2004).

A stronger claim would be that rights exist wherever there is a morally valid argument for them. If all human beings have rights in virtue of valid morally justificatory reasons, then it does not matter whether or not the ancient Greeks had the phrase "human rights" or "political rights" in their lexicon. Nor do we need to search for some linguistic or historical analogue. Individuals in ancient Greece, in so far as they were human beings, were entitled to human rights, whether or not Greek philosophers formulated the appropriate arguments (Gewirth 1996). This argument really could only work at the most abstract level of analysis, if at all, since it is clear that many of the rights that most people associate with liberal societies presuppose specific institutions, material conditions and ways of life that have developed over time (e.g. freedom of the press, of information, the right to privacy, to education, etc.). These rights are justified not only according to beliefs about the nature of human agency and morality, but also by beliefs about the nature of society and its economic and social structure, among other things. Arguments about rights have to be anchored in *some* way to human practices and ways of life within which they must gain their meaning and resonance. We shall return to this point in Chapter 1.

In the end, all societies distribute the benefits and burdens of their ways of life along different lines. They all have rules and



norms that specify how certain actions can be performed by some but not others, or that regulate the relations between men and women, the weak and the powerful, adults and children, human and non-human beings. Whenever, precisely, the particular conceptions of rights with which we are most familiar today emerged, the basic concept is surely linked to reflection on and contestation of these kinds of norms and relations. In fact, as we shall see, rights – even in their most individualistic and modern form – are deeply connected to and shaped by social norms.

### The importance of rights

The emergence of rights, and especially individual rights, is thus often heralded as a crucial turning point in man's moral and social development. We shift from a time in which the individual is conceived mainly as embedded within a wider whole, and whose purposes and actions are ascribed in terms of the purposes of that larger body, to something radically different: society now exists as a means of furthering the intentions and purposes of individuals, and not vice versa. Whereas Aristotle defines man as a *zoon politikon* – a political animal – who can only fulfil his true purpose as a member of the polis (Aristotle, *Politics*, 1.1), the United States Declaration of Independence (1776) declares that governments are instituted in order to secure those "unalienable rights" of men to "life, liberty and the pursuit of happiness" endowed by their "Creator". Needless to say, rights have featured prominently in some of the most inspiring social and political movements of our time, including movements for social and racial equality, religious freedom and the protection of minorities.

On the other hand, rights are also linked to some of the most intractable problems we face today. They are frequently associated with the rampant individualism and consumerism of liberal democratic societies, the growth of political alienation, the overly litigious nature of public life (at least in North America), the degradation of the environment and the entrenchment of economic inequality. Many of these criticisms have been part of a wider critique of liberal political thought, but many liberals too have been concerned about the consequences of too much "rights-talk". An overemphasis on rights can telescope and harden people's positions in politics,

where often what is desperately required is a greater willingness for accommodation and flexibility. And it can encourage political solipsism; the focus is on the claimant and his needs and desires, and only to a lesser extent on the corresponding civic obligations and responsibilities they have in relations to the needs of others (see O'Neill 1996; Glendon 1991; Sandel 1996). As we shall see, some of these criticisms are essentially internal critiques. They accept the importance and value of rights, but seek to reform certain aspects of the practice. Others go much deeper. For these critics, rights manifest beliefs about the nature of persons or about society as a whole that must be overcome, not celebrated. Rights, it seems, are invested with equal amounts of hope and cynicism.

The aim of this book is to introduce different philosophical approaches to rights, and especially the political character of rights. As you will see, I take this to be a historical and theoretical task. One reason why is because it is helpful to get a sense of the way arguments about rights have emerged over time according to different circumstances and contexts. A historical survey of rights theories helps us to see the complexity and diversity of arguments about rights. This can help protect us against an overly reductive or simplistic approach that some critics and even defenders of rights often take. More importantly, it sheds light on the way conceptual change can occur in light of practical – and especially political – circumstances. Why is this important? It is almost impossible to see how any formal theory of rights – that is, an exhaustive conceptual elaboration of the nature of rights – could ever hope to settle disagreements about their fundamental value or the function they play in our society. These disagreements are normative through and through. Moreover, our beliefs about rights are shaped not only by moral arguments, but also by the historical, cultural and political contexts in which those arguments and beliefs are formed.

As I mentioned above, my aim is to take the political character of rights seriously. What does this mean? Political philosophy is importantly distinct from moral philosophy in at least this sense: although disagreement is endemic to both, in politics the persistence of disagreement – itself shaped by the passions and interests of the individuals and groups involved, along with the particular historical situation in which they live – must be reconciled with the need for the exercise of power.[1] Power is required, first of all, to create an order in which human cooperation becomes possible. But the exercise of power also creates demands for legitimization. A paradigm of injustice is a refusal to countenance the needs or interests of those over whom you exercise power. As Bernard Williams has put it, "'Might is not, in itself, right' is the first necessary truth, one of few, about the nature of right" (2005a: 23). But the move from this paradigm of injustice to the morality of a specific form of liberal rights does not dissolve the persistence of disagreement. There are many different ways of filling out that basic idea of injustice, none of which necessarily fit seamlessly together.



## The distinctiveness of rights

What distinguishes rights from other kinds of claims – such as claims about moral validity *per se* – is twofold: first, in denying someone a right you have wronged them in a very specific sense; and secondly, rights aspire towards institutional embodiment and enforceability. This is another important dimension of the political character of rights. We want rights to be enforceable moral claims, and that is only possible in some kind of political community. If I have a right to something, then I have an entitlement, and that entitlement imposes obligations on others. But to realize my entitlement, the claim has to be enforceable in some way. Even a negative right requires not only that others forbear from acting, for example, but that the state acts so as to ensure such forbearance (see Shue 1996; Holmes & Sunstein 1999). But on what *grounds* are rights enforceable? What is the object of the right? To what extent do rights oblige? And enforceable by whom exactly, and in what circumstances? Are rights worth talking about even if they are not immediately enforceable?

We shall be discussing these questions in more detail below. At this point, however, let me introduce some basic distinctions and trajectories for the discussions to come.

Consider first the difference between *objective* and *subjective* senses of the term "right". There is, in fact, a complicated historical story about the separation of these two senses, about which, not surprisingly, historians disagree (see e.g. Tuck 1981; Brett 1997; Tierney 1997). But the basic idea is this: it is one thing to say that "it is right that Smith won the prize", or that "it is right to help the poor", and another thing to say "I have a right to enter the com-

petition", or "I have a right to food". The use of right in the first instance is *objective* in the sense that the judgement is made not from the perspective of the individual agent making the claim, but from some more general perspective or viewpoint. I might think it is right to help the poor because it says so in the Bible, or because of some wider moral theory about what I ought to do, whether or not I assign any significance to any particular agent involved. In the second instance, the right is *subjective* in the sense that a particular person is seen as possessing or claiming a right. It starts from the perspective of the agent, and it refers to that agent in a particular way. It is this subjective sense of right, arguably, that is so distinctive about the *modern* discourse of rights, however much it might be the case that its origins can be traced back to medieval philosophy.

Now consider, briefly, two genealogies about the emergence of rights. The first is from Annette Baier. She summarizes the general conditions of the form of human justice in which rights come to play an important role in this way: the presence of moderate scarcity, limited generosity, vulnerability to the resentment of one's fellows and a limited willingness on the part of individuals to beg. "What we regard as ours by right", she suggests, "is what we are unwilling to beg for" (1995: 225–6). I would add another condition: an acute sense, drawn from historical experience, of the kind of *threats* that, in the absence of the kind of interests to which rights refer, are almost unavoidable. Rights emerge in response to specific threats, and they offer ways of dealing with them (see Scanlon 2003: 114–17).

The second genealogy is from Nietzsche. For him, instead of addressing inequality, justice only emerges when equality is actually manifest: "justice originates between parties of approximately equal power" (1996: 92; see also 1989a: II.2). Recall Nietzsche's conception of the "will to power", where power consists, fundamentally, in the expenditure of force or energy with which a given body is endowed (1989b: §36; 1989a: II.12). It offers itself as a psychological explanation of various kinds of human behaviour, which manifest through drives to self-preservation, self-overcoming and even self-destruction (e.g. Nietzsche 1989b: §13).[2] It applies also to explanations of justice and right. Partners act justly towards each other, suggests Nietzsche, only when they realize the parity of each other's strength, and continual aggression will only result in mutual attrition. So rights are not ascribed on the basis of some



prior, abstract moral equality, but according to degrees of power, both actual power and the sense or *feeling* of power:

> Where rights prevail, a certain condition and degree of power is being maintained, a diminution and increment warded off. The rights of others constitute a concession on the part of our sense of power to the sense of power of those others. If our power appears to be deeply shaken and broken, our rights cease to exist; conversely, if we have grown very much more powerful, the rights of others, as we have previously conceded them, cease to exist for us. (Nietzsche 1982: II, 112)[3]

Hence the just man – the man who wants to be fair – is in constant need of the "subtle tact of a balance; he must be able to assess degrees of powers and rights, which, given the transitory nature of human things, will never stay in equilibrium for very long" (*ibid.*: 67).

So Baier and Nietzsche provide two very different stories. In one, rights emerge as a manifestation of an increasing sense of individual worth and dignity, part of the rejection of socially and culturally embedded hierarchy, and a check on the exercise of arbitrary power. In the other, rights are instead the *product* of relations of power (broadly construed). They represent a kind of mutual non-aggression pact, or a form of mutual recognition, subject to variation according to the changing perceptions, beliefs, capacities and actions of those who claim them against each other.

In many ways, these two genealogies underlie the discussion of the rest of this book. And I want to argue that understanding the political character of our theories of rights, in particular, requires seeing the ways in which both of these genealogies are getting at something fundamentally true about the nature of rights. We need to understand the differences between them as well, and I shall spend considerable time laying out these differences. But the basic thought is this: rights have been a vital part of the emergence of more liberal and humane forms of politics, but they are also, and always have been, implicated in various relations of power. They have been used to promote new capacities and freedoms, but have also brought with them new forms of power that act on those very capacities and freedoms. Our best understanding of the practice of liberal rights should seek to capture both of these aspects.

Using the language of rights is meant to signal that something important is at stake; one of the main reasons for invoking rights in the first place is to draw special attention to the object of the claim, whether or not it is already present in the extant legal, social and political culture. And yet this way of talking and acting is itself the product of particular historical processes, emerging out of specific historical periods and contexts, and thus with particular social and political pre-conditions. So as much as we use rights to criticize our legal, political and social practices and institutions, and to promote or protect those interests we deem to be the most vital or urgent, rights are themselves a social practice with a history. They simultaneously presuppose and reinforce various kinds of social and political arrangements and modes of interaction, and yet help bring new ways of acting and new institutional forms into being. In a very broad sense then, rights are not only, as Rex Martin has put it, "*established* ways of acting or *established* ways of ... being treated" (1993: 41, emphasis added), but also a means for *establishing* various ways of acting or being treated. To mark some interest or claim in terms of a right is not merely to *describe* a particular jural relation, but also to perform it: to help bring it into being, to make a normative claim on its behalf. Thus, rights need to be analysed in terms not only of their logical structure, but also their normative and historical structures. Philosophers are often keen to keep these elements apart, so the conceptual (what rights are) is distinct from the justificatory (what they ought to be). But they are hard to keep apart for long. Even those who seek conceptual purity are usually motivated by deep moral and political concerns; their criticisms often take the form of the language of rights becoming "degraded" or "debased" by overextension and misuse.

### The dynamic character of rights

It is especially important, if we are concerned to capture the political character of rights, that we appreciate the fundamentally dynamic character of rights. Thus, when we say "D has a right to X", there are at least four aspects to this claim:[4]

- *Who* or *what* is the subject of the entitlement? (Individuals? Groups? Animals? Corporations?)



- What is the *substance* of the entitlement, or to what actions, states or objects does it refer? (To liberty? To free expression? To compensation? To self-determination?)
- What is the *basis* of the entitlement, or on what grounds does the claimant have the right(s) they say they do? (For moral reasons? Legal reasons? Political reasons?)
- What is the *purpose* of the entitlement? (To secure individual agency? Corporate agency? To promote well-being?)

To this basic quadratic structure we can add another layer of complexity (we shall turn to more concrete examples in the chapters below). The American legal theorist Wesley Hohfeld (1978) offered what has become a standard way of analysing the logical space of rights.[5] He tried to map the many different ways in which rights were used to cover an array of legal relationships, and to clarify exactly what kinds of jural relationships were at stake in each one. Hohfeld identified four key aspects to the family of legal relationships associated with rights:

- claim-rights;
- privileges (or permissions, or liberties);
- powers; and
- immunities.

Each then has a distinctive correlate: for claim-rights, it is duties; for privileges or permissions it is no-right (or no duty not to); for powers it is liabilities; and for immunities, it is disabilities. For Hohfeld, rights, in the strictest sense, are those claim-rights that are directly correlated to a duty. That is to say, if *D* has a *right* with respect to *H* to perform *X*, then *H* has a *duty* not to interfere with *D* in *X*-ing. The other relations work differently. If *D* has a *privilege* or *permission* to *X* with respect to *H*, then that means *H* has *no right* against *D* not to *X*. If *D* has a legal *power* with respect to *H*, then that means that some legal right or duty of *H*'s will be created, extinguished or altered by *D*'s exercise of that power, if he chooses to. Finally, since an immunity correlates with a disability, if D enjoys an *immunity* with respect to *H*, then *H* is *disabled* from changing or affecting *D*'s legal relations in some relevant way.

Hohfeld's analysis can be extended to moral and political contexts in interesting ways, although it becomes more controversial as

it moves away from the more settled domain of legal analysis (see Edmundson 2004: 96–102). The most important result I want to point to here, however, is how the analysis shows that rights usually involve a bundle of Hohfeldian elements. If I have a right to free speech, for example, on Hohfeld's analysis I actually possess a bundle of things: a claim-right against specific others who have correlative duty not to interfere with my speech, but also an immunity – that the legislature (and others) are disabled from altering my legal rights to speech in various ways. Property rights too, on this analysis, are a bundle of relations. Owning my portable media player means that I have a claim-right against interference from others in my possession of it, but also permissions (or liberties) to use it in various ways. I have the power to sell it, give it away or lend it out on various terms. And I have immunities against others trying to alter the content of any of these relations. Even if we want to say that the core of the rights that matter most in politics are claim-rights, then that core is surrounded by a periphery made up of a range of different things, including permissions, powers and immunities.[6] The elements present at any given moment in time will vary given the nature of the right at stake, as well as the context. The rights I acquire in contracting with others may generate a periphery of relations that are very different from those associated with my right not to be harmed or killed.

As we explore different historical and contemporary arguments about the nature of rights, it is useful to keep the basic quadratic structure outlined above and Hohfeld's analysis in mind. One interesting result of doing so is to notice how the basic structure of rights is fundamentally dynamic. Rights have to be "housed" in a system or structure of beliefs in order to be justified. But these beliefs (and accompanying attitudes and habits) can come apart in various ways. Beliefs about who or what the subject of rights is, for example, can alter the sense of what counts as the substance or basis of rights, as well as what constitutes its core and periphery. Change along one axis creates knock-on effects along others. Beliefs about the subject of rights and their purpose, for example, are often bundled up with other beliefs to do with specific identities, practices and institutions. Moral disagreement and cultural change can cause disjunctions between those claiming rights and their effective recognition by the powers that be. We shall discuss a fascinating example of



this kind of conceptual and historical change in Chapter 8, where we examine how attempts by indigenous peoples to claim rights to international recognition, as well as to land and self-government, raise fundamental questions about the nature of human rights.

Finally, the other general point I want to make about the fundamentally dynamic character of rights is the need to keep in mind how we see ourselves as both "authors" and simultaneously "addressees" of the law. That is to say, the laws and rules of a society are legitimate only if we are, in some sense – and it is a controversial point as to what extent we can be – self-governing. That means we have moral and legal claims to those rights that enable us to exercise self-government, for example, to political participation and collective action. But we are also, simultaneously, subjects of those very laws and rules, and that means we have another set of moral and legal claims to those rights that protect our non-public freedom. Jürgen Habermas (1996) has argued that this means there is, in fact, an internal relation (a "co-originality") between the rule of law and democracy, and thus between our "public" and "private" autonomy. We shall examine this particular claim in more detail in Chapters 4 and 8. But whether or not it is true, the perspective is valuable and useful to keep in mind. We are both the "artificers" and "matter" of the commonwealth, as Thomas Hobbes (*Leviathan*, "Introduction") put it. And that means that some of our most important political concepts, including that of rights, will be the object of constant collective construction and reconstruction, as well as frequent disagreement.

## The history and future of rights

As will become clear, I expend considerable effort discussing the history of rights theories, and I shall say more about why in Chapter 1. But one thing I want to emphasize here is that the most influential theories of rights we have today, at least in the Anglo-American and European traditions of political philosophy, emerged from particular historical circumstances. In addition to the great scientific and philosophical developments of the early-modern era that helped shape moral and political thought, there were important political and historical circumstances. These circumstances included terrible civil and international wars, often fuelled by religious and

ethnic zealotry and conflict, as well as the expansion of Europe into the "New World" and the geopolitics of competing imperial ambitions. And they included the emergence of the modern state and its distinctive conception of sovereignty, along with new forms of collective identities, especially in relation to the emergence of the nation-state.

We live in very different times, and yet the legacy of the nation-state and the civil, political and social rights that grew up around it is still a very powerful and important discourse in modern politics. Much has been written about globalization, and we shall explore some of its consequences below in our discussion of human rights. But what I want to mention here is that if our theories of rights have been deeply influenced over the past 250 years by the politics of the modern state as it emerged in Europe, the United Kingdom and the United States, then the next 250 years will present new challenges and hence new ways of understanding rights. Most states in the future will look more like Canada or Indonesia than the United Kingdom, Germany or the United States have in recent times.

What do I mean? Canada, for example, faces distinctive challenges to do with its history as a multinational and multiethnic state and the "deep diversity" that continues to characterize its politics.[7] As a condition of their continuing membership in the society, different founding groups have required recognition of their rights to language protection, education and, in some cases (e.g. indigenous peoples), to land and self-government. Migrants have sought protection from anti-discrimination provisions and the capacity to preserve some of their cultural practices. And we can see all of this reflected in Canada's constitutional structure, and in its distinctive rights culture more generally. The Canadian Charter of Rights and Freedoms, for example, which might look at first like a rather crass imposition from down south, is actually situated within a constitutional framework that recognizes a range of specific minority rights and distinctive constitutional norms. It contains protection for minority language rights and (limited) recognition of Aboriginal treaty rights. It contains a "notwithstanding clause" (Sec. 33), for example, which allows parliament, or a provincial legislature, to enable legislation that overrides sections of the Charter, albeit under strict conditions.[8] In 1998, the Supreme Court (Supreme Court of Canada 1998) issued a "Reference" that laid out constitutional norms and rules that would



apply in the case of a potential secession by Quebec: an interesting example of a country literally setting the ground rules for its own deconstruction! Central to the court's argument was an appeal to the notion of ongoing democratic deliberation over the forms of mutual recognition acceptable to each of the parties involved, and the way to proceed in the face of ongoing disagreement.

All of this adds up to a rights culture deeply informed by the dilemmas and complexities faced by multinational societies. The same kind of complexity and hybridity, albeit in very different contexts and with very different challenges, is currently faced by emerging liberal democracies in other parts of the world, including in Africa, South Asia and South-East Asia, as well as even more dramatically and grimly in the Middle East. We shall discuss some of the challenges these contexts raise in Chapter 8.

## The plan of the book

I have organized the book in such a way that I hope it can be read profitably by many different kinds of readers. The ideal, of course, is that you sit down and read it from front to back, taking in the full sweep of the argument. But I have also tried to structure the chapters so that they can be read on their own, or in different combinations, for those looking for a discussion of a particular set of arguments or debates. Each chapter can be read independently of the others, or as subsets, although they are all linked by a set of interweaving threads, the basis of which I try to lay out in Chapter 1. But I hope the book will also be of interest to those who are already well versed in some of these debates, but looking to refresh their views and find a new perspective on some familiar problems.

In Chapter 1 I try to provide the reader with some basic distinctions and methodological assumptions that will help them negotiate the various arguments about rights that are the subject of Chapters 2–8. But I also provide an account of my overall approach to rights, which I call a "naturalistic approach". The rest of the book does not depend on you accepting this view, and if you are not interested you can skip or skim that section, but it sets up the way I go about discussing the problems I present. My hope is that it will provide you with a distinctive way of engaging with the material discussed in the chapters that follow.

Chapters 2–6, then, go on to discuss five frameworks for justifying rights: natural law, property, dignity, mutual recognition and consequentialism. I explore the different ways these basic frameworks shape particular theories of rights, drawing on leading philosophers from the history of political thought and contemporary political theory to do so, including Grotius, Hobbes, Locke, Kant, Hegel, Bentham, Green, Rawls, Nozick, Foucault and Taylor (among others). Chapter 6 also uses some of the current debates over the threat of transnational terrorism to reflect on the nature of rights, especially those civil and political rights at the heart of liberal democracy.

In Chapters 7 and 8 the focus changes somewhat, as I turn to the idea of rights as "conduits" for relations of power more explicitly, and examine the challenge of justifying human rights today. In Chapter 7 I look at two distinctly critical approaches to rights, especially liberal rights: the Marxist critique of rights as a function of "bourgeois ideology"; and Michel Foucault's critique of social contract theory and "juridical" political thought in general. In Chapter 8 I turn to the question of what, exactly, we should want from a theory of human rights, and what role it should play in global politics. How can human rights be justified and enforced given deep disagreement about the foundations of rights, and the deep diversity of the global public sphere? Are we asking too much of human rights, or too little? What does the future hold for human rights?

# 1 A naturalistic approach

> A right, after all, is neither a gun, nor a one-man show. It is a relationship and a social practice, and in both of those essential aspects it is seemingly an expression of connectedness.
>
> (Michelman 1986: 91)

## Introduction

Before we begin to engage with the various substantive theories of rights on offer, I want to lay out my approach to these questions a bit more explicitly. Although the book is intended as an introduction, among other things, its structure and organization reflect my own substantive views about the subject. How could it not? There are three ways in which I am going to approach the question of rights and I want to introduce them here: first, we should think of rights as representing a *complex social practice*; secondly, we shall aim for what I shall call a *naturalistic* approach to rights in general; and finally, among the different ways of characterizing rights, we shall focus on rights as *statuses*, *instruments* and *conduits*. Let me say some more about each of these now.

## Rights as a social practice

Philosophers often want to keep two ways of approaching a concept or value separate, and for good reason. On the one hand, there is the project of philosophical justification, and on the other, the project of description or history. It is one thing to justify something,

and quite another to describe it or show how it works, or how it was used by such and such a culture or person. There have been complicated attempts to link these two modes of doing philosophy, most famously by Hegel, but the tension remains central to much philosophical work. We find it in the discussion of rights, too. Some philosophers set out to provide a formal theory of rights that sets out stringent conceptual and logical criteria for determining what counts as a right. Others posit some crucial property of or valid claim about persons, the presence of which warrants the ascription of rights. The idea is to provide a clear and rigorous standard against which to discipline our ordinary usage, as opposed to explaining how the concept arose. Rights, according to one version of this approach, are things that we *discover* – like laws of nature, or the structure of a chemical compound – as opposed to constructing ourselves.

Other philosophers start with the function of rights: what are people (or institutions, or corporations) *doing* when they appeal to rights? What role do rights play in our moral arguments or in our political practices? Looking at the function of rights can be more or less historically sensitive. Some see rights as having a single function across time and space – for example, to secure certain kinds of protected choices, or to promote a certain conception of well-being – or as having several such functions at once. Other theorists refer to a specific cultural or national "language" or framework of rights in order to explain the way it picks out specific interests or conceptions of well-being in a particular society (see e.g. Primus 1999). Here the claim is that the language of rights is itself derivative of, or at least highly dependent on, other more fundamental shared moral understandings, which themselves might be historically contingent in various ways. We can still talk about discovering rights as opposed to constructing them, but the discovery is now a distinctly historical and political one.

In what follows, I shall assume that rights are best understood as a *social practice*. What does this mean? First of all, rights are the kinds of things that are dependent on a social language of some kind, as opposed to standing independent of it, like atoms or molecules. At a minimum, a practice is any coherent (and complex) form of socially established cooperative human activity. Of course, the degree of coherence (and cooperativeness) will vary between



different practices, and some philosophers offer more specific definitions, such that planting turnips is not a practice but farming is, or that chess is a practice but tic-tac-toe (noughts and crosses) is not (MacIntyre 1984: 187). I shall leave aside these debates here. Let us just assume that the social practice of claiming and recognizing rights is coherent enough to count as a practice in the broad sense. This means that rights will only make sense given a particular social context, one in which making a rights claim, for example, is recognized as a legitimate move in a game, so to speak, that others can understand and recognize. Charles Taylor (1985f: 32–4) uses the example of voting to demonstrate what is involved in a social practice: putting a cross beside someone's name on a slip of paper and putting this into a box counts in the right context as voting for that person (see Flathman 1976; Primus 1999: 28–34). In a different context, without that particular social understanding and without the particular social language of voting – involving the various distinctions and identifications between different social acts, relations and structures – those acts would not amount to a vote. Now sometimes practices are tightly rule-bound – think of chess – but other times not. And in most cases, even with chess, we use aspects of particular vocabularies in new and creative ways. This is a particularly important point with regard to rights. Our practice of rights is significantly open-ended or "underdetermined"; people regularly refer to or claim something as a "right" that will often stand outside normal usage, and yet still be at least comprehensible to others. As we shall see, this drives some philosophers crazy. Rights "inflation" is seen as a problem that rigorous conceptual analysis must eliminate.

So a practice-dependent approach to rights makes practices relevant not only to the application of a theory of rights, but also to its justification. The content of that justification will depend, in part, on the content and scope of the practices out of which it emerges and to which it is meant to apply. A practice-independent approach to rights, on the other hand, rejects the idea that any practice-mediated relations people might have, or the culturally distinct nature of particular practices, affects the justifying reasons for a theory of rights. We shall explore both kinds of approaches to rights in the chapters that follow, but what I am calling a "naturalistic" approach to rights clearly embraces something like the former.

Does this mean that a practice-dependent approach is incapable of criticizing extant institutions or practices? Does it mean that if a particular social and historical practice entails that a minority group is to be denied basic rights, there is nothing more than can be said? We shall explore this challenge in greater detail in Chapter 8, but the short answer is no. Social practices are complex and require interpretation and elaboration. There is more than one perspective involved in making sense of the nature of the practice in question. Moreover, as I suggested above, the very idea of rights is closely connected to the notion that "might makes right" is unacceptable as a way of justifying the exercise of power over individuals. If the exercise of power by governments or institutions affects the vital interests of individuals in significant ways, then their legitimacy is always potentially in question.

Thinking of rights in this way also means that rights are fundamentally *social* in character; they presuppose various kinds of interactions among people, and thus various social arrangements, including norms and institutions. As we shall see, many argue that the language of rights is intimately linked with political "atomism". Political atomism refers, basically, to the idea that we should seek to understand human social relations as reducible to relations between individuals. Society, according to this view, consists fundamentally of individuals seeking to fulfil their own particular ends (Taylor 1985e). Historically there are two examples of this shift. First, especially as the language of individual rights began to develop in the sixteenth and seventeenth centuries, we see a close relation between rights and property (*ius* and *dominium*). A tight link was often drawn between having a right and having the freedom (or sovereignty) to dispose of one's property, including one's person, in ways that were protected from interference (and especially state interference). Respect for rights was a condition for the legitimacy of state power, not the other way around. The second example is a sharp break from the Aristotelian view that one could not be a fully competent human agent outside the bounds of a particular kind of political society. Social contract theory and the use of the device of a "state of nature", operated with a very different conception of man's nature in relation to politics (or to the *polis* or city).

This picture of the moral individualism of rights is certainly true in important respects. But the language and practice of rights also



introduced new ways of relating to others – new modes of sociability, in other words – as much as they mark the emergence of the moral importance of the separateness of persons. And so rights are also fundamentally *relational* in character (see Michelman 1986; Minnow 1990; Nedelsky 1993; Habermas 1996). Any account of rights will need to show how they operate as a *system*, or a *structure* of entitlements and responsibilities. In particular, they represent a particular distribution of freedom and authority. Rights entail, as we have already seen, various correlative and reciprocal duties, permissions, immunities, liberties and powers.[1] They establish patterns of relationships that impose benefits and burdens on people and institutions to varying degrees. Although rights can shield or protect individuals or groups from various kinds of interference (not limited to state interference), they also embed them in a complex web of social and political institutions and norms. To claim a right, for example, is by definition to affect the interests and actions of others, since you are seeking a particular form of recognition or acknowledgement of an urgent or important claim on your behalf. Moreover, rights can not only be claimed but waived; my not standing on my rights, for example, can signal a form of conditional trust in relation to others, or an assertion of autonomy on my part. More generally, the activities involved in the practice of rights – claiming, waiving, negotiating, accepting, recognizing, justifying, and so on – are all activities that go on *between* persons.

A system of rights therefore works not only to shield individuals from each other in various ways, but also to draw them together in others, often at the same time. They establish not only barriers but also lines of interaction. They can work to align individual behaviour with social and cultural norms, just as much as they can protect someone against them. For example, a legal right to sue for defamation or invasion of privacy can serve to align legal standards with a certain cultural or conception of civility, just as much as it empowers individuals to protect their autonomy.[2] The distribution of rights also depends on deeper and more systematic arguments about the interests or capacities they are said to protect and promote, and ultimately about the kind of society in which they are best realized or "housed". In short, rights presuppose a wider account of the social and political order in which they are to be situated. Rights presuppose community or, better yet, *communities*.

So the choice is not between a theory of rights that is relational and one that is not. Rather, it is between different kinds of social relations in which rights will play some part.

## A naturalistic approach to rights

There are two ways of giving a "naturalistic" account of something. In contemporary analytic philosophy, naturalism tends to be closely aligned with the methodology of the natural sciences. To give a naturalistic account of X, then, is to give an explanation of it continuous with empirical enquiry in the sciences. But which sciences, exactly, and in what sense should our explanations be "continuous" with them? Sometimes this is intended in the sense that naturalistic explanations should replace traditional philosophical concepts and the practice of conceptual analysis and justification. More moderate versions suggest that we need to pay greater attention to empirical facts about the kinds of creatures we are and the world in which we live.

A second sense of naturalism is to give an account of X in terms that are continuous with the kind of creatures we are, subject not only to physical and biological laws but also as social and cultural agents. Here a naturalistic account of human behaviour is necessarily an account of human beings not only as part of nature, but also living under (and helping to create) culture. This means a naturalistic account of human behaviour needs to draw not only on the methodologies and approaches of the natural sciences, but also the human and social sciences, as well as the humanities. If it is an ethological truth that human beings live under culture, then we need also to make sense of the complex ideas and beliefs people form about those cultures. In particular, human beings live according to *norms*, and this provides a particular focus for the discussion below. So, what we are is a function, in part, of our biological or genetic make-up, in the loose sense of providing us with dispositions towards displaying certain properties or phenotypic traits in certain kinds of contexts. But what we are is also, crucially, a function of the way we are shaped and moulded by cultural and social factors and how these factors are in turn shaped by us. It is our nature, as Anthony Appiah (2005: 211) has put it, to shape our natures. A naturalistic ethics, and a naturalistic approach to moral and political philosophy, must account for these facts as well.



As applied to moral and political phenomena then, naturalism in this second sense is closely aligned with what I shall call a sense of *realism*, but not as this term is normally used by metaphysicians or in meta-ethics, nor by theorists of international relations. Rather, to give a naturalistic account of moral or political phenomena is to try to avoid both moralism and reductionism, an approach that analyses the capacities and intentions of human beings, as we think an "experienced, honest, subtle and unoptimistic interpreter might ... [analyse] human behaviour elsewhere" (B. Williams 1995a: 68). For Williams, a naturalistic account of moral psychology, for example, avoids explanatory excess by pointing to the way various assumptions about the psychology underlying a particular (moralized) account of the will are themselves moral assumptions in need of explanation (*ibid.*: 65–76).[3] Nietzsche, according to Williams, offers just such a minimalist moral psychology; not for the sake of being reductionist, but rather in order to clarify at what point unwarranted idealizations about human capacities enter into our ways of explaining them.

If we turn to some recent political theory, we can find similar examples of this kind of approach. Carole Pateman (1987) and Charles Mills (1997), provide what I would call a naturalistic account of social contract theory. Against the grain of contemporary contractarian political thought, which seeks to distance itself from any kind of historical claim, Pateman and Mills reconnect contractarianism to the way it has been used in the history of political thought, especially as a means of describing and explaining the genesis of society and the moral psychology of its citizens (and especially its non-citizens) (e.g. Mills 1997: 5–6, 12–13). The point is to show how a supposedly ideal contract can end up as part of the rationalization of distinctly non-ideal aspects of the actual polity. For Pateman, that means exposing a hierarchical sexual contract underlying the apparently egalitarian ethos of social contract theory as it emerged in the early modern period. Mills, taking some inspiration from Pateman's work, focuses on the way various somatic norms shape assumptions about the capacities of the contracting agents and work to exclude non-whites from effective membership in the body politic.

What would it mean then to give a naturalistic account of rights? First, one could argue that rights are natural in the sense of being

derivative of certain natural laws, as we shall see when we discuss these kinds of arguments in Chapter 2. Rights, for these theorists, are those moral qualities that form part of our rational and sociable nature, and that are prior to and independent of our belonging to any particular political community.

Secondly, one could argue that the language and practice of rights is conventional in certain crucial respects. Consider David Hume's account of the emergence of justice. In the original "frame of our minds", wrote Hume, "our strongest affection is confined to ourselves; our next is extended to our relations and acquaintances; and it is only the weakest which reaches to strangers and indifferent persons". It is this "partiality", he contends, that is an obstacle to the establishment of social arrangements that can overcome the "inconveniences" of human nature. The remedy, in part, is the emergence of conventions of justice and property, which are not "derived from nature, but from *artifice*; or more properly speaking, nature provides a remedy in the judgement of and understanding, for what is irregular and incommodious in the affections" (Hume 1978: 500). Artificial things have their causes in nature, but are ultimately the result of human action, and as such possess a certain function. (The sense of justice "arises artificially tho' *necessarily* from education, and human conventions" [*ibid.*: 483].) The rules of justice emerge then as a result of an individual's pursuit of a particular end, namely, the satisfaction of their "interested passions": that is, self-interest (*ibid.*: 429, 499–500). The unintended effect of the pursuit of these private interests, however, is the emergence of the institutions of justice and property, which, in the end, serve the public good. For Hume, there are certain constancies of human nature (a modified self-interest and confined benevolence) that, combined with a feature of the world (relative scarcity), lead to regularities in human behaviour, including the emergence of certain moral and political institutions.[4] But since these institutions ultimately rely on human beliefs and practices, they are subject to modification and change according to context. Thus, in the case of justice, who owns exactly what will vary from society to society, and even the kinds of things that might count as property will be variable (hence the importance of *de facto* possessions in his theory of justice) (see Haakonssen 1981: 38–44). For Hume, certain facts about human nature provide "test-principles"



that necessarily refer to the existing value systems of the particular society in question.[5]

The naturalistic approach I am appealing to has certain structural affinities with Hume's, in that both seek to avoid an easy opposition between nature and convention, and between historicist and rationalist accounts of normativity. In particular, both seek to place the role of history (and the passions) at the centre of an account of normativity. But there are differences too. For Hume, the survival of a particular institution, and ultimately the moral beliefs that grow up around it, was sufficient evidence of it conforming to human nature, and thus of a kind of psychological necessity attached to those attitudes and beliefs. These laws of nature are not derived from statements about human nature, but caused by certain features of human nature ("confined generosity", etc.) placed in a world such as ours. And because men have an ability to balance long-term against short-term interests, they come to be bound by the rules they create, and hence they acquire a certain independent status (Haakonssen 1981: 37). But the contingency of the connection between our moral attitudes and the particular institutions and customs (or norms) of our society can be emphasized even more strongly than Hume does. The social and political institutions of Australia or Canada, for example, are not "natural" in the sense of conforming to (or being caused by) any deep facts about human nature, but rather in so far as they are the product of the collusion between "bare" nature – the basic, innate equipment all human beings have – and "second nature" – the particular interactions, relations of power and sociability characteristic of a particular community or society.[6]

The naturalistic approach appealed to here also has affinities with Martha Nussbaum (1992; 1995; 2000: esp. ch. 2) and Amartya Sen's "capabilities" approach to distributive justice. The capabilities approach draws on claims about there being basic and central capabilities required for any valuable form of human "functioning". The methodology combines a distinctive reading of Aristotle's discussion of human nature in the *Nicomachean Ethics*, John Rawls's theory of "reflective equilibrium" (in *A Theory of Justice*), and his grappling with the "fact of reasonable pluralism" in *Political Liberalism*. In short, for Nussbaum, the aim is to establish some basic, widely shareable and provisional judgements about human nature,

and then build on these in wrestling with more specific ethical and political questions. In particular, Nussbaum argues that there are certain "central capabilities" of human beings – such as the capacity for practical reason and sociability (she goes on to provide a list of ten) – that almost everyone can acknowledge as essential to living a life that is recognizably human.[7] Human beings need some basic "innate equipment", or "basic capabilities", to achieve these central capabilities, but they also need material and institutional support to actually achieve them (e.g. education, adequate nutrition, etc.). The central capabilities are thus also "combined capabilities", since they combine "internal training" with "external" material, social and institutional support.

Once again, what is striking in this account is the presumption about the interaction between nature and culture, and the deep shaping of human behaviour and attitudes by the norms and institutions within which we act. Indeed, the whole notion of a "combined capability" offers an interesting way of thinking about the nature of rights in general (Nussbaum 2000; see also Ivison 2002: ch. 6). Human beings are complex assemblages of desire and affect as well as rational preferences and beliefs. Any genuinely political theory of rights has to make sense of both of these aspects of human agency.

### Statuses, instruments and conduits

So take rights to be a (complex) social practice, not only an abstract set of metaphysical claims. And take a generally naturalistic approach to the analysis of rights, in the sense of paying attention to the dynamic structure of rights claims and their historical and practical character. What follows from doing so?

Rights, just like any other political value, have to be argued for and justified. They are not self-evident and they are not self-validating (despite what the drafters of the United States Declaration of Independence suggest). Two of the most common frameworks within which rights are justified are, broadly, *deontological* and *consequentialist*. We shall explore these different approaches in chapters to come, but it might help to introduce the basic differences here.

For the deontologist, rights are ascribed to individuals on the basis of their possessing certain capacities or attributes that warrant



the special protection or recognition that rights purportedly provide. For the consequentialist, rights are ascribed on the basis that respecting them is a means of bringing about some desirable state of affairs, whether maximizing utility, promoting the interests of the worst off, or ensuring fairness and so on.

Some of the most powerful ways of representing the nature of rights in political philosophy has been to link them to the notion of an inviolable sphere or *boundary* within which the basic freedom of an individual is protected. This was encouraged, in part, by the close relation between the late medieval and early modern language of "*ius*" (right) and "*dominium*" (property). It was also encouraged by the development of the notion of rights as pre-political or "natural": as something that individuals possessed prior to entering political society and that structured subsequent political relations. (We shall be exploring these ideas in more detail in Chapter 2.) In more recent times, Ronald Dworkin has provided an influential metaphor of rights being akin to *trumps*, which has reinforced the idea of an inviolable boundary. A trump is a playing card that takes priority over any previous cards played. Thus, certain kinds of rights, according to Dworkin (1977), "trump" other kinds of political justifications that state a goal for the community as a whole. If an individual has a right to free speech, for example, then it is wrong for political officials to violate that right, even if doing so would make the community as a whole better off in some relevant way. Lying behind Dworkin's argument is a strong claim about the equal moral worth of each individual, and the way respect for individual rights helps to express and manifest that belief. (Note that it does not say anything about which rights should trump other *rights* when they conflict.) Robert Nozick (1974), who also linked rights to a strong sense of the inviolability of individuals, provided another way of thinking about rights in this way: rights as *side-constraints* on the pursuit of consequences, including even good consequences (such as the aim of maximizing the non-violation of rights).

Another way of justifying rights is broadly consequentialist or "instrumentalist". Here the basic idea is to locate a theory of rights in relation to the promotion of a set of desired consequences, or optimal distribution of interests.[8] Rule utilitarianism provides one such argument: respect rules that protect or promote individual rights in so far as doing so promotes utility overall. Utilitarianism

is vulnerable to objections about whether or not it can capture the intuition about the inviolability of the individual discussed above, which drives many of the deontological arguments about rights. But as we shall see, utilitarianism is only one form of consequentialism and, moreover, the whole point of this approach is precisely to challenge the kind of intuitions deontologists appeal to.

Rights can also be justified as instruments for achieving goals other than the maximization of utility. Rawls, for example, a famous critic of utilitarianism, defined the optimal distribution of rights as that which would be chosen from the perspective of the original position. Rights are valuable to the extent that they promote justice understood as fairness. It so happens, though, that his first principle of justice is one that gives what he calls the "basic liberties" – essentially, basic rights to do with political liberty (voting, holding public office, freedom of speech, assembly, freedom from arbitrary arrest and the integrity of the person) – priority over other kinds of political justifications (Rawls 1999b: 52–4).

So rights can be understood to refer to the *status* of individuals, as an expression of the fundamental moral worth of individuals and their inherent dignity. And they can be understood as *instruments* or tools for promoting human well-being.

But we also need to see how rights can become embedded within various relations of power, as much as they are often deployed against them. And so we need to understand rights as not only statuses or instruments, but also as what I shall call *conduits*. The ascription of rights entails the distribution of a particular set of powers and capacities. We shall explore this in greater detail below when we turn to the critics of rights, especially those inspired by the work of Foucault. But one does not need to read Foucault to get a sense of how rights cannot, on their own, provide an automatic immunity against the exercise of power. The interaction and interpenetration of the social norms and the practice of rights, for example, means that the critical potential of rights claims will always be ambiguous to some extent. And the fact that rights are indeed so intimately linked to law and the juridical edifice of the state and its agencies means that the ascription and effectiveness of rights will be shaped by various historical and political forces at work in that society. Rights are one among a number of tools that individuals and groups can use to deflect or redirect various relations of powers that act on them. But they are *counter*-powers as opposed to inherently *anti*-powers; they never stand fully outside relations of power, even as they are deployed against them. Taking up the naturalistic approach helps shed light on the sense in which rights can be conduits of power just as much as they protect us from it.



## Taking distinctions seriously

Finally, let us turn to the issue of how the general approach I am taking to rights might affect some of the standard ways of carving up modern philosophical discussions of rights. What I hope is that by the end of the book these distinctions will still be useful to you, but grasped in a new way. There are two, in particular, that I want to mention here and that we shall be returning to at different points as we proceed.

### Moral and legal rights

First, although accepting that there is a distinction between moral and legal rights, the naturalistic approach adopted here seeks to recast it in various ways. Lawyers and moral philosophers have each claimed paternity over rights. Jeremy Bentham (1748–1832) famously observed: a "right is with me the child of law ... a natural right is a son that never had a father" (1987b: 334). Many contemporary critics of modern human rights have similar worries, concerned not so much to dispute the moral claims underlying moral rights as to cast doubt on the philosophical coherence and political sense of appealing to rights without any meaningful system of enforcement in place (e.g. Geuss 2001). However, others point to the fact that rights – especially human rights – often matter most precisely in the absence of any settled legal doctrine, or even any effective system of enforcement. They are manifesto claims, as Feinberg called them; aspirational claims meant to expose the moral shortcomings of our current legal and political arrangements, and intended to help motivate change.[9] So criticism of a state for their denial of basic political rights to minority groups, for example, is taken as evidence that there are rights that exist in some sense outside or apart from their legal enactment. This view accords

with the language of discovery commonly employed when speaking about rights. For example, in relation to the recent history of "indigenous rights" lawyers and historians sometimes speak of the *acknowledgement* that Aboriginal people possess certain rights, or the *recognition* of those rights by the law.[10] In turn, this language of recognition and acknowledgement relies on an implicit distinction between legal rights and the underlying moral rights that find expression in legal form.

Many philosophers believe that rights exist if an acceptable moral argument for them can be provided. While they are happy with the idea that institutional rights evolve over time in response to changing beliefs and attitudes, they believe that if something is a moral right then it has always been so, even if people have failed to recognize it, or failed to extend it to others. To believe that moral rights are subject to historical change, according to this view, is to confuse rights with mere beliefs about rights, or to confuse the object of moral philosophy with that of historical sociology.

Consider, for example, Alan Gewirth's claim that the acceptability of a moral argument has nothing to do with the actual beliefs of individuals, and thus that there is a sense in which if a particular right exists (i.e. for which a morally valid justification can be given), then it must always have existed. Gewirth argues that the rights-bearing feature is the human capacity to act in pursuit of our chosen ends. This leads him to conclude that all human beings have a right to freedom and well-being since these are necessary conditions of such agency (Gewirth 1982: 6–7, 41–67). For Gewirth, the existence of human rights depends mainly on the existence of certain moral justificatory reasons. This means that even if human beings in the past did not claim human rights or even know whether they had them, they still had them. Human rights are discovered not invented.

These questions touch on very basic issues about the justification of morality, which we cannot hope to settle here. But at the limit, moral rights have to be anchored in some way to established human practices if they are to be knowable to creatures like us. The naturalistic approach sketched above departs sharply from Gewirth in a number of ways.[11]

First, as MacIntyre (1984: 65) and others have pointed out, and as the social practice approach to rights makes explicit, the very



idea of claiming certain things as rights depends for its intelligibility on the existence of certain kinds of social institutions, norms and practices. Now, there is no *a priori* reason why we cannot say that particular ways of acting that are socially sanctioned might not amount to rights, whether or not the society in question employs the language of rights, and whether or not the sanctions employed correspond to the kinds of social institutions and practices with which we are familiar. But on my view, the practice of rights is a distinctive (albeit complex) practice that has its origins in a particular set of moral and practical discourses. That it has these particular origins does not necessarily affect its ultimate moral validity (as much as it will shape it in various ways), or its extension to very different circumstances or contexts. However, the naturalistic approach, given its emphasis on the dynamic interrelatedness between the moral, historical and institutional dimensions of rights, rejects the ahistorical approach expressed in Gewirth's argument. This ahistorical view is implausible as a concept of rights in general just because so many of the rights we take for granted are bound up with the material and ideological conditions of a particular kind of society. For example, freedom of the press, freedom of information, rights to privacy or to publicly provided health care, or the rights for equal access to education and employment are all rights that belong to people who live in a particular kind of society. They are justified not only by virtue of certain beliefs about desirable ways of being allowed to act and desirable ways of acting towards others, but also by virtue of certain beliefs about the economic and social workings of the society: for example, the belief that it is technologically and economically feasible to provide such entitlements without undue cost to the capacity to achieve other important goals. Although there might indeed be some general rights that come close to the kind of moral primitives appealed to by Gewirth, it's striking that this is very far removed from the list of rights familiar to most modern readers and embodied in the most famous human rights documents of the twentieth century, which are much more extensive and hard to reduce to a subset of basic (essentially negative) rights.

The naturalistic approach takes the interrelatedness between the moral, historical and political dimensions of rights seriously, and that means it is particularly concerned with the conditions

of something becoming an effective moral right in a given society at a given time (or not, for that matter). For example, in so far as we now accept that indigenous people have a moral right to at least some of their traditional lands, it is implausible to suggest that this right always existed and that people were simply ignorant or unaware of it. In the Australian context, given what we know about the theories of property entitlement, racial hierarchy and the conditions of civilization that were common in the eighteenth and nineteenth centuries, and given what we know about the levels of ignorance with regard to Aboriginal culture, it seems a stretch to say that Aboriginal people actually had a moral right to their land at that time. There were dissenting moral views, of course, but the overwhelming weight of public and legal opinion was informed by versions of the natural law doctrine of "discovery", or the general attitudes embodied in law about the supposed inferiority of Aboriginal people denied them any justified entitlement to their lands or ways of life. By contrast, such prejudicial beliefs have become more difficult to sustain and justify in recent years. The commitment to equality has become stronger and more extensive. As a result, it makes more sense, I think, to say that new moral rights have come into existence, just as old ones have disappeared. Indigenous political movements have taken hold of both moral arguments and legal tools and tried to fashion new claims in light of changed historical and social circumstances.

The struggle to align legal and moral rights will become a particularly difficult issue when we turn to our discussion of human rights. For now, I think it is useful to think of the zone in between the moral and the legal as a crucial aspect of the political character of rights. The moral and legal aspects of rights are two sides of the same coin: two dimensions of a self-consciously political approach to rights.

### "Interest" versus "choice" (or "will") theories of rights

Two of the most influential accounts of rights in analytic philosophy in recent years are the *interest* and *choice* (or will) theories of rights. On the choice account, as argued by H. L. A. Hart, the clearest (or strictest) sense of a right refers to an uncontested domain of *choice* for the individual. To be a rights-holder is to have control over the



duty in question, in the sense of being able to demand or waive the performance of an action. So I have a claim-right against Y that Y $\phi$ just in case I have some measure of control (or "sovereignty", as Hart puts it later on in the article) over Y's duty (Hart 1984).[12] For Hart, furthermore, a right to liberty is fundamental to and presupposed by all other claims about individual rights. As Hart puts it, duties with correlative rights in this sense are a "normative property belonging to the right holder, and this figure becomes intelligible by reference to the special form of control over a correlative duty which a person with such a right is given by the law" (*ibid.*: 95). It follows that claim-rights cannot be attributed to things that cannot exercise the control and powers central to this account, such as babies or the very old, horses or a forest.

Now the advantage of this account is the direct link between my having a full measure of control over Y's duty, such that Y's duty is owed to me. A clear correlation is drawn between my right and Y's duty, which then can be customized according to the degree of control at issue (lesser or greater, etc.). As a descriptive theory of legal rights it has the advantage of matching closely the paradigms found in contract law and the criminal law, for example, as well as accounting for the asymmetry between the civil and criminal law (a point well made by Jones 1994; Sreenivasan 2005). It links the interests people have in claiming rights to a particular interest in autonomous choice. Recalling the quadratic structure of rights laid out in the Introduction, according to choice theory, the *subject* of rights is the free willing agent; the *substance* lies in the allocation of *powers* of control; the *basis* of rights lies in human freedom; and the *purpose* of rights is to demarcate "spheres of practical choice" (Steiner 1998: 238).

Once expanded to a story about moral rights, however, this conceptual fastidiousness quickly runs into trouble. First of all, it seems to limit rights to only those beings capable of autonomy, thus potentially ruling out as possible moral-rights-holders (except via proxy) the unborn, infants, the mentally disabled and animals. If moral rights are to act, in part, as constraints on the pursuit of goals, then babies or the mentally disabled (or animals for that matter) are here denied an important source of protection. Even if infants, for example, are owed duties of various kinds, if they are incapable of being a rights-holder themselves then the interests

to which those duties refer might be vulnerable to the interests of *proper* rights-holders, or as mere inputs into a utilitarian decision procedure (see Edumundson 2004: 128). More generally, defenders of the rights of the unborn or of animals, for example, will not be impressed that their claims are ruled out of consideration by what seems to be conceptual fiat.

A second problem is inalienable rights. We might think that a rights-holder should be disabled from being free to waive certain rights and duties, for example, from enslaving himself.[13] This is usually justified as being in the interest of the rights-holder and as *strengthening* the claim-right, not weakening it. The idea is that I have a claim-right not to be enslaved, or not to be operated on without informed consent and so on (i.e. in these cases my capacity to assert my will is lessened, but at no cost to the force of the claim-right, which the choice theory must deny). For some, the inability to generalize from the paradigm cases of the choice theory to the cases of inalienability and incompetence reveal certain fatal flaws (see Sreenivasan 2005). Still, others have tried to refine choice theory to address the challenges (see Kramer *et al.* 1998). In so far as autonomy can be understood along a spectrum, as opposed to being all or nothing, there may be room for accommodating some of the concerns expressed by the counter-examples of babies and inalienability.

According to the interest theory, on the other hand, any necessary link between the capacity for choice and the pre-emptory force of a right is blurred, if not broken. In its simplest terms, the interest theory of rights just says: rights exist to promote or protect certain key interests of the rights-claimant.[14] To say I have a right to *X* is to say that someone else has a duty to perform some act (or omission) that is in my interests. But which interests exactly? Only those whose protection or promotion can be accepted as a reason sufficient for holding some other person (or persons) to be under a duty. However, to claim a right is not to have already justified the interest at stake, but merely to assert it; justification of the underlying claim has to be forthcoming. Thus Joseph Raz, a pre-eminent defender of the interest theory of rights, defines rights in this way: "To say of an individual or group that it has a right is to say that an aspect of their well-being is ground for holding another to be under a duty" (1986: 259).[15] Note that although the interest theory



says that only those things capable of having interests are eligible for being rights-holders, this still entails a broad range of potential claimants (including babies, dogs and the mentally incompetent).[16] In fact, on its own, the interest theory does not identify the relevant interests or distinguish between those that really matter and those that do not. And so interest theory extends the notion of a claim-right to a much wider range of cases than does the choice theory. And it can readily acknowledge, depending on the arguments used, that some interests may be so profound as to warrant disabling individuals or groups from waiving them (since it makes no necessary claim between rights and autonomous choice, although autonomous choice may indeed be an important interest that should be protected). If I have a sufficiently strong interest in not being enslaved, or in not being operated on without my consent, then *X*'s duties not to do any of these things is owed to me. The justification for doing so may depend on beliefs or arguments to do with things other than the exercise of autonomous choice, which might allow for a greater balancing of competing values, especially in conditions of deep disagreement about the good. However, as some critics assert, it might equally lead to incoherence about the nature of rights, since the language of interests is so general and promiscuous.

It is sometimes suggested by advocates of the choice theory that its descriptive austerity at least offers the possibility of a normatively minimalist account of the logical structure of rights, and that this will contribute to greater clarity about both legal and moral rights. But it turns out that the theory is difficult to sustain, even as a description of legal practice, let alone as a general account of moral rights. At best it represents a particular account of the force of rights in modern liberal societies, concerned above all to protect the formal structure of the law from becoming too heavily encroached on by promiscuous moralism and the short-term demands of policy (see e.g. Simmonds 1998: 213). To protect the integrity of rights, and particularly the connection between the value of choice and the pre-emptory force of rights, choice theory claims they should be interpreted as a set of especially important protected options, and not merely one set of interests to be balanced against others. But this now moves the choice theory some steps away from the conceptual austerity with which it began and

more to the centre of contestable political debate, negating one of its supposed advantages over the interest theory.

The naturalistic account sketched above fully embraces the inevitability of disagreement over which interests matter most for our judgements about rights, and this raises some serious challenges for both it and the interest theory more generally. We should embrace an endogenous and historical approach to the emergence of the interests to which rights refer. And because the naturalistic approach conceives of individual choice and action as always enmeshed within various relations of interdependence and power, any claim about the necessary connection between autonomy and rights will have to be carefully qualified. So the interest theory is much closer to the general approach to rights I take in the book as a whole.

Having sketched the basic elements of the naturalistic approach to rights, and especially the focus on the political character of rights, let us turn to some of the most prominent arguments about rights in the history of political thought. We shall return to some of the points raised above as we work through these fascinating arguments, especially the distinctions between subjective and objective rights, moral and legal rights, and the choice and interest theories.

# 2 Natural law and natural rights

The Commonwealth of learning here is taking a complete holiday; we have all become politicians.

(John Locke to P. van Limborch, 7 August 1689)

## Introduction

One of the most straightforward ways of thinking about rights is to say that people just have them: that it is a basic moral fact about persons. Just as our conception of a person includes things such as "has reason" or "is a conscious being", so it includes the idea that people have rights. The American philosopher Robert Nozick famously opened his critique of liberal egalitarianism, *Anarchy, State and Utopia*, with this claim: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)" (1974: ix). Nozick was drawing on a rich tradition of thinking about the nature of rights. He did so in order to promote libertarian political ends, using the basic claim about the inviolability of individual rights – and especially property rights – to undermine the case for redistributive social justice and an expansive welfare state. But as we shall see, to assert that people have rights in virtue of their personhood, or their "humanity", that they have "natural rights", in other words, can lend itself to any number of different political ends. The Declaration of the Rights of Man and of the Citizen made by the French Assembly in 1789 proclaimed in its second article that "[the] aim of every political association is the preservation of the natural and inalienable rights

## 1. A naturalistic approach

1. To borrow the terms introduced by Wesley Hohfeld and discussed in the Introduction above. See Walter Wheeler Cook (ed.), *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (Westport, CT: Greenwood Press, 1978).
2. The example is from Robert Post, "Democratic Constitutionalism and Cultural Heterogeneity", *Australian Journal of Legal Philosophy* 25(2) (2000), 65–84.
3. For more general remarks on realism in political theory see Williams, *In the Beginning Was the Deed*, 1–17.
4. Recall Baier's genealogy of rights discussed above, in the Introduction.
5. The phrase is Knud Haakonssen's (*The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* [Cambridge: Cambridge University Press, 1981], 43). For David Hume, history provides the material through which to identify and fix the "principles of [the moral philosopher's] science", just as the "natural philosopher becomes acquainted with the nature of plants ... by the experiments which he forms concerning them"; see *A Treatise of Human Nature*, L. A. Selby-Bigge (ed.) (Oxford: Clarendon Press, [1739–40] 1978), 84. Ambition, avarice, self-love, vanity, friendship, generosity and public spirit operate in just about every society.
6. The idea of a "second nature" is from Moira Gatens and Genevieve Lloyd, *Collective Imaginings: Spinoza, Past and Present* (London, Routledge, 1999) pp. 118, 136.
7. Note that the claim is evaluative: all human beings have the innate equipment required for practical reasoning, and so on, but Nussbaum presupposes a normative premise that these capabilities are ones we actually do value, or at least should value, given the opportunity to think through the consequences of denying their centrality to our lives. For Nussbaum the political goal is capability, not functioning.
8. I am indebted here to Leif Wenar's discussion in "Rights", *Stanford Encyclopaedia of Philosophy*, http://plato.stanford.edu/ (accessed October 2007), esp. §6.2.
9. "We say that 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" (Sumner, *The Moral Foundation of Rights*, 13). But cf. Derrick Darby, "Blacks and Rights: A Bittersweet Legacy", *Law, Culture and Humanities* 2(3) (2006), 420–39.
10. For example, John Chesterman and Brian Galligan refer to native title rights as evidence of "the acknowledgment that Aborigines possess certain rights that do not pertain to other Australians" (*Citizens Without Rights: Aborigines and Australian Citizenship* [Cambridge: Cambridge University Press, 1997], 193). Similarly, they suggest that, with the legal recognition of native title, "Aborigines, for the first time, have been recognised by the law to possess certain rights that cannot be possessed by non-Aborigines" (*ibid.*, 199). In other contexts they speak as though these rights themselves, and not simply their recognition or institutionalization, develop and change over time. They therefore appear to accept both that Aboriginal rights are not reducible to legal rights and that these rights are evolving over time. I am grateful to Paul Patton for discussion on this point.
11. I am in indebted in the paragraphs that follow to discussion with and forthcoming work by Paul Patton.
12. The control refers to three powers: to waive the duty; to enforce the duty; or to waive Y's duty to compensate me for his original breach.



13. See the discussion of Locke in Chapter 3. It was precisely the logical possibility of alienation that Grotius and Hobbes took advantage of in linking natural rights to the justification of authoritarian rule. In fact, the denial of inalienability has often been linked to a denial of those aspects of human agency that warrant ascribing rights to particular individuals in the first place, as in the case of slaves, indigenous peoples and women (although with reference to different properties or capacities in each case).
14. The most important contemporary defence of the interest theory of rights is Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
15. Note that this puts a brake on third-party beneficiaries, which is a problem for other kinds of interest theories, since third-party beneficiaries do not have interests sufficiently strong to warrant having a right in the way Raz sets the condition (my interest has to be such that it justifies X's duty to me). However, it is not clear that Raz has fully escaped the problem of third-party beneficiaries here; see the discussion by Gopal Sreenivasan, "A Hybrid Theory of Claim-Rights", *Oxford Journal of Legal Studies* 25(2) (2005), 257–74, esp. 265–7.
16. For Raz, only those things that have ultimate, non-derivative value can have rights, hence not plants; this raises various complications, but still leaves a fairly wide array of possible rights-holders. See the discussion in *The Morality of Freedom*, 175–80.

## 2. Natural law and natural rights

1. For a penetrating critique of the distinction between negative and positive rights along these lines see Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton, 1999).
2. For a very interesting discussion of the "work" of politics in this sense see Jill Frank, *A Democracy of Distinction: Aristotle and the Work of Politics* (Chicago, IL: University of Chicago Press, 2005).
3. The emergence of this idea of natural rights can be traced back at least to the first part of the fourteenth century and the English Franciscan William of Ockham, and his redefinition of *dominium* as a power of action. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta, GA: Scholars Press, 1997); cf. Quentin Skinner, *The Foundations of Modern Political Thought Volume Two: The Age of Reformation* (Cambridge: Cambridge University Press, 1978), 176–70.
4. Vitoria himself did not think the Indians had done any such thing with regard to the Spanish. On this conception of "commerce" and the "right of hospitality" see Anthony Pagden, "Stoicism, Cosmopolitanism and the Legacy of European Imperialism", *Constellations* 7(1) (2000), 3–22; see also his *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c.1800* (New Haven, CT: Yale University Press, 1995), 51–62. Cf. Sankar Muthu, *Enlightenment Against Empire* (Princeton, NJ: Princeton University Press, 2004).
5. On the emergence of Catholic and Protestant resistance theory see Quentin Skinner's now classic *Foundations of Modern Political Thought, Volume One: The Renaissance* (Cambridge: Cambridge University Press, 1978) and *Volume Two: The Age of Reformation*.
6. This concern with unity, and the relation between the unity of the city and nature, is a central issue for what historians of this period refer to as "civil philosophy" or *scientia civilis*; see Quentin Skinner, "Hobbes's Changing