TAKING THE RIGHT SERIOUSLY: HOHFELDIAN SEMIOTICS AND RIGHTS DISCOURSE

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INTRODUCTION

Duncan Kennedy presents a deep critique of contemporary legal thought which he summarizes as a "death of reason critique."[1] His key claims are that normative inferencing—central to the formalization of legal thinking in conceptual jurisprudence (*Begriffsjurisprudenz*)[2]—has proved itself at best problematic, at worst impossible, and that the hope that conceptual jurisprudence would close all legal gaps (lacunes) and solve each paradox and problem of the law was misplaced;[3] further, Kennedy notes that rather than enjoying foreseeable justice based on law, we live within an ad hoc system which often fails to identify and implement substantive justice.[4]

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[1] *See* David Kennedy, *Duncan Kennedy, A Critique of Adjudication: Fin De Siècle*, 22 CARDOZO L. REV. 991, 997 (2001); *see also* Duncan Kennedy, *The "death of reason" narrative*, *in* Legal History, *available at* http://duncankennedy.net/legal_history/index.html.

[2] "The transformation of private law thinking was accomplished by the iteration and reiteration of the public/private distinction to differentiate fields within the private domain, and then to further internally differentiate each field. The upshot was a 'will theory' within private law, with the will being either the will of the parties or the will of the state." DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT xiii (2006).

[3] "The irony was that the very success of the enterprise of subsuming all legal relationships under a single small set of concepts eventually destroyed belief that it was the concepts themselves that determined the outcomes of their application. When the abstractions had performed their task of integrating legal thought, it became apparent that while pre-Classical particularity had been irrational, the new unity was merely linguistic – a verbal trick – rather than substantive reconstruction. We came gradually to see that there were an infinity of possible results that might all plausibly find expression in the new conceptual language, and, what was worse, might all claim to be derivation of the abstract governing principles. The concepts then could be nothing more than a vocabulary for categorizing, describing and comparing, rather than the elements in a method for deriving outcomes. The famous principles, taken together, appeared either self-contradictory or so vague as to be worthless as guides to particular decisions." *Id.* at xxiii.

[4] *See generally*, *id.*

I heartily agree with Kennedy here: the legal system often fails to work substantive justice. However, rather than presenting an abstract theoretical critique of why the system *cannot* work, as Kennedy does[5] (and it often *cannot*—just look at the issue of torture[6] to see what I mean, or go directly to the death penalty for a plain example of injustice),[7] I try to present concrete, material propositions of where and how the system *could* work—*if it wanted to*. I do so to empower other critical jurists. I also do so because U.S. global hegemony is not unbeatable. An alternative to kill-for-oil federal imperialism in the name of freedom-to-torture *could* exist. Rather than creating abstractions which may be taken up by a supreme court in a hundred years, I try to provide judges the tools necessary to make decisions today that reach the right results.

I. RIGHTS AND LAWS

A key characteristic of contemporary legal thought is "rights discourse." What is "rights discourse"? A discursive practice[8] is a dialog (not a resolution) between different viewpoints. Rights discourse, then, is the practice by various contending theorists of determining or imposing some vision of "rights." I argue that most rights discourse is unpersuasive, due to unscientific conceptual apparatuses and mythological counterfactual views of reality. The term "right," like the term "law," is polysemic[9] and ambiguous, and the two terms often overlap. As a consequence of these realities, most rights discourse is doomed to incoherence and failure. Though most rights discourse is doomed to futility and irrelevance, that is *not* due to a fatal flaw in the idea of the rule of law or the idea that logic is inevitably indeterminate.[10] Indeed, a dialectics of rights is

[5] *See, e.g.*, Duncan Kennedy, *The Critique of Rights in Critical Legal Studies, in* LEFT LEGALISM / LEFT CRITIQUE 178 (Brown & Halley eds., 2002).

[6] *See, e.g.*, Eric Engle, *The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 1 (2006).

[7] *See, e.g.*, Christopher M. Johnson, *Death is Unconstitutional: How Capital Punishment Became Illegal in America — A Future History*, 6 PIERCE L. REV. 365 (2008).

[8] MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (1972).

[9] *See, e.g.*, Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes For Law,* 137 U. PA. L. REV. 1105, 1213 (1989).

[10] *See, e.g.*, Lawrence B. Solum, *Indeterminacy*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 488 (Dennis Patterson ed.,1996).

possible.[11] Legal science can and should extirpate ambiguity, polysemicity, and confusion from rights discourse so as to compel a dialectical resolution of the conflicts over what is right and what rights are.

II. Rights Discourse

A. *Dworkin*

The most famous — and in my opinion, one of the failed — contemporary views of rights discourse is propounded by Ronald Dworkin. Dworkin tries to describe "principles"[12] as "rights"[13] and to distinguish them from "policies."[14]

> When lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards.
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> . . . I just spoke of "principles policies, and other sorts of standards." Most often I shall use the term "principle" generically, to refer to the whole set of these standards other than rules; occasionally, however, I shall be more precise, and distinguish

[11] *See generally*, Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement, in* FEMINIST LEGAL THEORY: FOUNDATIONS 507 (D. Kelly Weisberg ed., 1993).

[12] RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985).

[13] "I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong a principle. The distinction can be collapsed by construing a principle as stating a social goal (*i.e.*, the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (*i.e.*, the principle that the goal the policy embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number). In some contexts the distinction has uses which are lost if it is thus collapsed." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-23 (1977).

[14] DWORKIN, *supra* note 12, at 72.

> between principles and policies. . . . I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. . . . I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. . . . The distinction can be collapsed by construing a principle as stating a *social* goal (emphasis added) . . . or by construing a policy as stating a principle . . . or by adopting the utilitarian thesis that principles of justice are disguised statements of goals . . . . In some contexts the distinction has uses which are lost if it is thus collapsed.[15]

Dworkin thus argues that principles, policies, and other sorts of standards operate differently than rules, and reaches the conclusion that principles are privileged compared with other rules.[16] He doesn't say *how* policies or principles (which are in fact meta-rules – rules for establishing other rules) logically differ from other rules. In fact, they don't. All rules are conditionals in the form of "*if* . . . *then*." Meta-rules tell us how to choose and apply other rules. That is their only ontological difference from other rules, as far as I can see. I think Dworkin may be trying to differentiate the "rights" and "principles" of conceptual jurisprudence from the "standards" and "goals" of legal process interest balancing. If so, the distinction is ill put, as policies and principles alike are teleological ends which the law seeks to fulfill.

Dworkin may also be trying to make a distinction between "legal rights" and "collective (political) goals." He writes:

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. . . . Arguments of principle justify a political decision by

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[15] DWORKIN, *supra* note 13, at 22-23.

[16] RONALD DWORKIN, *Is law a system of rules?, in* THE PHILOSOPHY OF LAW (Ronald Dworkin ed., 1977).

> showing that the decision respects or secures some individual or group right.[17]

However, a problem lies therein—Dworkin hasn't adequately defined his basic terms, i.e., rights, principles, policies, goals, and standards. A good typology might distinguish among "rights" on the basis of whether they are individual or collective, or whether they are "procedural" "negative" "freedoms from . . ." rather than "affirmative" "rights to . . ." For example, prohibitions against gender and racial discrimination are *collective* rights. Yet they are also "merely" procedural guarantees.

Dworkin fails to make these distinctions. Instead, he attempts to distinguish "principles" and "rights" from "policies."[18] He seems to be trying to confront whether rights are individual or collective, positive or natural. However his treatment of that is necessarily underdeveloped since he doesn't present a detailed typology of rights, distinguishing only between "principles," "rights," and "policies." His distinctions between "principles," "rights," and "policies" might be defensible if he were to argue that "rights" are individual, natural, and/or substantive, whereas "policies" are collective, positive, and procedural. But it seems he doesn't consciously make such distinctions.

In any event such a typology would be open to critique because it is only somewhat accurate. Political rights, such as the right to vote and the right to free speech are "merely" procedural rights. Yet they doubtless would be perceived by Dworkin as hierarchically superior to other rights. Likewise, prohibitions against racial discrimination or gender discrimination are collective and also show that the substantive/procedural distinction doesn't always hold water. Again, Dworkin would likely argue that laws prohibiting sex discrimination and race discrimination—which are *collective* claims—are laws that protect "rights."

Dworkin even admits his distinctions are not final because he recognizes the existence of collective rights ("principles"). In fact his typology is incomplete and cannot succeed in its own natural law terms because Dworkin, like most of the rest of late modernity, doesn't see the complementary character of natural

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[17] DWORKIN, *supra* note 13, at 82.
[18] DWORKIN, *supra* note 16, at 82.

law and positive law. Some laws are natural and universal, inevitable. Others are positive, variable, and dependent upon society. "Rights" could be adequately distinguished thereby as "natural" or "positive" and then further distinguished on the basis of whether they are individual or collective, whether they are "procedural" "negative" "freedoms from" or "affirmative" "rights to." Dworkin doesn't reach these distinctions, and his theory as presented is untenable due to lack of adequate basic definition.

Dworkin also tries to distinguish justice, fairness, and morality from other goals which are also good – which leads to further confusion in his theory by introducing more undefined basic terms. What is justice? Dworkin doesn't seem to define it, at least as far as I have read. Plato and Aristotle already had radically different ideas about what "justice" and the "just" are. Though, you can always add Thomas Moore or Karl Marx to see how deep and contested this human desire to the good is – so deep that the idea of "justice" is quite contested: "justice" is polysemic. Dworkin, so far as I have read him, does not appear to define his basic terms even by reference—he *seems* to be a Kantean-Lockean liberal, minus the social contract. Dworkin also appears oblivious to the fact that moral theory since about 1880 has been hotly contested and transforming. A thought experiment shows how much society has changed. If you took a time traveler from 1800 and put them in today's society of: Legal prostitution here, gay marriage there, abortion just about everywhere, and premarital sex, they would be shocked, to say nothing of the complete pornification of the west via internet—and by the way, no one much goes to church anymore. We're not in Kansas anymore. Dworkin believes in the moral. So do I. However we might have different ideas about what morality is. He doesn't seem to have defined what he means by morality.

So, I think Dworkin is remarkably unsuccessful at proving his positions (1) that there is a fundamental difference between "rights" and "policies," and (2) that "rights" do—or should—"trump" policies. However, even if wrong and basically flawed, Dworkin's ideas were surprisingly resonant for a time because he basically argued from the presumption that the system was legitimate. Just like the poor desperately *need* basic rights just to survive—survival rights—the rich and powerful likewise *need* to believe that they *deserve* luxury even in the midst of famine and war. Who can blame them? *There are no evil people.* However, there are destructive and unhealthy *actions* (there are also

healthy, constructive actions). All those “evil” people think they are doing what is right, natural, or good; that they are justified; that they are making the best choices possible; or even that they haven’t any other choice! ***You would not do any differently if you were in their shoes.*** Their dysfunctional (self-)destructive behaviors are the result of a lack of awareness that better alternatives even exist (I don’t have to be abusive just to survive?), and/or the inability to see themselves in those better alternatives (I could live in a nice house instead of a being homeless?), and/or that they do not know how they could properly obtain the better alternatives (If I dress nicely people will like me and even help me find a decent job?). So, the real battle against injustice is to make others aware of their other, better, opportunities.

I regard Dworkin’s views on rights as unpersuasive and untenable. His moral theory and his theory of justice are underdeveloped. His basic terms are not well defined. Dworkin’s work is often criticized.[19] While he admits these weaknesses,[20] the problems with his work—undeveloped theories of justice and morality due to terminological ambiguity and enthymematic liberal/individualist presumptions—remain. These flaws are why I see his thought as much more limited than it need be.

In sum, because Dworkin does not seek out the origins and significations of his basic terms in legal history and practice, he cannot (and does not) adequately define them. The result is confusion. While tenable distinctions between “principles,” “rights,” and “policies” *could* be made by recognizing the complementary character of positive law versus natural justice, and then distinguishing between substance and procedure, between and individual and collective, Dworkin does not do so. Dworkin does not prove that his “principles,” whatever they may be, are “objective.” How could he? He failed to adequately define “principle” in the first place. The failure also results in his inability to prove that “principles” “trump” “policies,” or that they should. Instead, Dworkin fixates on tautology: “principles” are somehow outside of politics and somehow superior to policy. But he doesn’t explain *how* any of that is so or *why*. Nor does he explain how to distinguish a “policy” from a “principle” or why “principles”

[19] *See, e.g.*, DWORKIN AND HIS CRITICS (Justine Burley ed., 2004).

[20] “[M]y critics have not understood the points I wish to make. I acknowledge that the responsibility for those misunderstandings is mine.” DWORKIN, *supra* note 13, at 291.

should trump "policies"; apparently, he presumes we all share his liberal individualist rights centric world view. I don't. I'm not an individualist. I am probably authoritarian not liberal. I am certainly instrumentalist about rights: "*rights*" *are an effective and convenient way to organize and subdue conflict*. That's it.

Like most of the rest of late modernity, Dworkin didn't understand that *positive law and natural justice are complementary, not dichotomous*. So, while Dworkin doesn't prove his thesis, and at times errs, the categories he tries to use ("rights," "policies," and "principles") can be coerced into something useful by way of a more rigorous methodology. If we see natural rights and positive law as complementary, derive a well defined typology of rights from legal practice, and apply that typology to his work, we can cure Dworkin's theory of its defects. This corrective recapitulation of Dworkin's theory can occur even though the liberal individualist presuppositions that are its foundation are erroneous. These erroneous foundations are exposed more obviously in the work of John Rawls.

B. *Rawls*

Dworkin doesn't make the social contract central to his vision. Rather, he is honest enough to recognize that social contract arguments are untenable:

> It would be very different, of course, if every citizen were a party to an actual, historical agreement to accept and obey political decisions taken in the way his community's political decisions are in fact taken. Then the historical fact of agreement would provide at least a good prima facie case. . . . So some political philosophers have been tempted to say that we have in fact agreed to a social contract of that kind tacitly. . . . But no one can argue that very long with a straight face.[21]

Rawls, in contrast to Dworkin, presupposes a state of nature[22] and a social contract.[23] The trouble is, rights-centric, individualist, social contract liberalism willfully ignores the realities of social

[21] RONALD DWORKIN, LAW'S EMPIRE 192 (1986).
[22] JOHN RAWLS, A THEORY OF JUSTICE 136 (1973) ("veil of ignorance").
[23] *Id.* at 119 ("original position").

injustice. It also ignores the fact that there never was a social contract, nor any state of nature. Social contract theory also ignores related problems: How is the social contract is formed? Why does the social contract bind successive generations?[24] Failings such as these basically doom liberal individualist theory, because faulty conclusions generally follow faulty presumptions.

I do not regard Dworkin or Rawls as having crafted theoretically tenable versions of natural law, despite the fact that I regard natural law theory[25] as correctly describing some laws, for example, *jus cogens*. Positivism and natural law are complementary, not dichotomous. Dworkin and Rawls do not present tenable theories because they work from faulty basic presumptions and/or fail to adequately define basic terms.

C. *Hohfeld*

Although social contract / liberal individualist rights discourse is generally incoherent due to its disconnect from reality, tenable rights discourses do exist. Hohfeld argues that rather than thinking of "rights" as implying corresponding "duties" and "remedies," or even other "rights," we should recognize the term "rights" as fatally flawed.[26] He proposes in its place a Pierceian semiotic analysis with about eight different forms of legal relation.[27] Of course, Pierce's semiotics creates an infinite number of potential forms of claims. One main point of Pierce's semiotics is that between any two things there is a third relation, and between the relation and either of the two things there is another intentional entity, and so on, ad infinitum.[28] So Hohfeld, following Pierce, focuses on relations between entities, and then relations between relations, and so on. Technically, the derivation of new terms could go on forever.

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[24] Related problems include the question of how a social contract is formed, and why a social contract must bind successive generations.

[25] I.e., law as natural reasoning.

[26] *See generally*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16, 28-29 (1913).

[27] *Rights and Liberties*, in 2 THE PHILOSOPHY OF LAW, AN ENCYCLOPEDIA 753 (Christopher Gray ed., 1999). Some of the terms Hohfeld uses *are* defined in the law (e.g., immunities, privileges, liabilities, powers, disabilities, liberties) but sometimes with a meaning different than his own and generally with much less precision.

[28] *See* C.S. PEIRCE ET AL., STUDIES IN LOGIC BY MEMBERS OF THE JOHNS HOPKINS UNIVERSITY 182-186 (1883).

I agree with Hohfeld in one sense, but disagree in another. He is right to criticize rights—this recursive conceit just showed you why, i.e., the term "right" is polysemic. We can rapidly perceive this problem when we ask: *What is the difference between a "right" and a "law"?* We soon discover that there is significant overlap between the two. Are "right" and "law" the same thing? At times "right" and "law" *do* describe the same thing—but not at all times—because "right" and "law" are polysemic terms, with several definitions, some of which overlap, but not all. The very terms "right" and "law" are ambiguous. Thus the term "right," alone and unmodified, is a bad analytical tool.

Hohfeld properly seeks a more precise and scientific terminology due to the ambiguities he noted in rights discourse. However, his efforts at logically deducing and distinguishing—in an ever more abstract and disconnected way—more and more terms, is impractical. Rather, we would be better off if we focused on historical uses of the term "rights" in practice (praxis) in order to identify terms workable in the real world, rather than abstractions.[29]

I argue elsewhere, I think correctly, that all laws, whether "rights," "principles," or "plenary decisions of the central committee," are conditional statements, i.e., statements in the form of *if x* (condition) . . . *then y* (consequence).[30] Put in terms of the "bad man theory" (which I don't subscribe to, because law isn't merely a cop with a gun), *law is a threat and/or a promise*. Wherever you see a law you can transform it into a conditional. So, for example, "there is a law sanctioning *x*" can be reformulated as "If you do *x*, then I can go to court and force you to do not *x*." And this is incidentally how I define our first term: *vested* rights. ***A vested right is a legally enforceable claim***.

Part of the problem with rights discourse is that it is conclusory reasoning, i.e., tautology. "*Rights*" *are the conclusion of power struggles*. Wherever you say "I have a right," what you

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[29] Other scholars think Peirce is worth working on. *See, e.g.*, Rex Martin, *On Hohfeldian Liberties*, *in* Werner Krawietz, THE REASONABLE AS RATIONAL? ON LEGAL ARGUMENTATION AND JUSTICIATION - FESTSCHRIFT FOR AULIS AARNIO 87 (2000). This may be due to not recognizing the possible infinite regress in any Peircean semiotics, or because they do not search deeply enough into the law to disambiguate the polysemic term "rights" as I try to do here.

[30] Eric Engle, *Law: Lex v. Ius*, 1 J. JURIS 31, 39 (2008), *available at* http://www.jurisprudence.com.au/vol1 _engle.pdf.

really mean is, "If you don't agree with my claim I can get a cop and/or take you to court and they will make you pay, one way or the other." That is a materialist understanding of rights. Every "right" is only a "claim," but if you can get a judge and/or a cop to back you up, your "claim" just turned into "right." The "right" is an abstract entity—it does not itself have a material existence. A "right" is a mental projection from material reality, an abstraction and formalization of material reality.

So, I do not argue that rights are "natural," "transcendent," "self evident," "universal," "forms" (that would be liberal individualist idealism by the way). "Rights" are nominal abstractions. *Rights don't really exist*. Rights are not real entities. They are objects of intention, ideations. I argue that "rights" do however have a superstructural logical form (a conditional statement: *if . . . then*) which is itself a reflection of (=induced from) material existence (the facts of life) and then reflected back into material practice (a cop with a gun, a judge with a cop) as deductions. This is the inductive-deductive method: We induce our life experiences into general abstract propositions and then apply those abstractions concretely into our future experiences.

It is important to note however that though "rights" are not "real," they are also not merely "the bad man theory" – a cop with a gun. "*Rights*" *are effective in part because they are logically persuasive and thus do not need violent enforcement due to the Foucauldian self-policing of actors.*[31] Laws and rights are not *merely* threats. They are *also* internalized self-concepts, expectations, *desires*. People *want* to live in a structured, organized world where they are treated with justice. Some of us even *need* that (illusory) sense of order and fairness – and in fact *all the more so that life is chaotic, unpredictable, dangerous and unfair!* The love of rights is at times a fear of wrongs. So, *the idea of rights is attractive and persuasive*. It is this attractive persuasive power which explains why a badly defined concept is also seductive. Rights look really good when you're drunk or in love with them.

[31] *See generally*, MICHEL FOUCAULT, THE BIRTH OF THE CLINIC (Pantheon Books 1973) (1963).

III. Types of Rights

Hohfeld proposes a potentially infinite and, in all events, complex typology. He tries to form solid distinctions between "right," "no right," "claim" and a half dozen or so other terms. I think these distinctions are needlessly complex and are not in any event the language courts have used, or even are using. Occam teaches that we should not multiply intentional entities beyond what is needed to explain all phenomena completely. Good science is parsimonious because parsimony creates fewer possible errors and results in a clearer system: a simple yet powerful and elegant formalization with explanatory and predictive power. Good science also builds on the basis of existing knowledge, when possible. Thus, while I criticize "rights" as (1) polysemic and ambiguous; (2) often merely a reflection of inane counterfactual social contract mythology; (3) merely the conclusion of power struggles; and (4) thus conclusory with no inherent ("natural") a priori hierarchical superiority, I nonetheless coerce a workable scientific definition of "rights" by invoking adjectives, because *the exploited and oppressed of the world need justice like you need water and food.* Rights are how we get that.

The adjectives I use to qualify rights are not of my own invention. Rather, I draw on legal history for qualifications of rights. I do so for three reasons.

1) Science builds on existing knowledge to attain progress. If I can see a bit farther, it is only because I am standing on the shoulders of brave intelligent visionaries.

2) Courts are *much* likelier to take up ideas presented on the basis of prior courts' decisions rather than the inventions of isolated idiosyncratic scholars, at least in the common law, though that is less true in civilianist law.

3) Qualifications of "rights" drawn from existing legal terminology can be used to disambiguate the term "rights" adequately to render it scientifically useful.

The crux of Hohfeld's argument is that "rights" do not necessarily imply corresponding remedies, duties, or other rights. However, Hohfeld seems more interested in taking up Peircian semiotics than in studying legal history. A piercing analysis of legal history would quickly reveal existing vocabulary useful for

disambiguating the term "right"—a polysemic and conclusory shibboleth— which enables us to coerce the term into something scientifically useful, an unequivocal element of legal science. A scientific approach to law/right distinguishes first between perfect (vested) rights and imperfect rights, to which we now turn our attention.

A. *Perfect (Vested) Rights*

Perfect rights are vested rights, and the two terms are here used interchangeably. That is, they give rise to a legal claim enforceable in a court of law. By "an enforceable claim" I mean simply a conditional assertion with an imperative consequence: If defendant does *x*, plaintiff can go to court and force defendant to do not *x*. To say a person has a right is conclusory, because rights are the conclusions of power struggles. However, to understand in whose favor the power struggle will be decided, it is crucial to distinguish between *vested* (perfect) and *executory* (imperfect) rights. For every vested right there is a corresponding legal remedy. Moreover, for every vested right there is a corresponding legal duty. Finally, vested rights may (or may not) imply other accessory rights.

1. Example of Vested Rights: Property

Historically, property consisted of the rights of use (usus), including abuse (abusus), and also the rights to the products of the property, e.g., fruits and rents (fructus).

The right of property ownership becomes vested by actual possession coupled with good legal title. Historically, if one had good title and actual possession, there was not much anyone else could do about how the owner used, abused, or consumed his property or its products. Of course, this concept of absolute exclusivity and precisely defined right is completely alien to contemporary legal thought, which sees rights as relative, divisible, and somewhat amorphous.

I make the point not to say which conception of property is better or fairer, but to demonstrate the internal coherence of the Roman law here, which was so coherent it was taken up throughout Europe. Good doctrinal knowledge can be the basis for coherent reform laws. At the theoretical level, we can – and even should – likewise argue over whether conceptual jurisprudence

(*Begriffsjurisprudenz*) [32] or legal process interest-balancing (*Interessenjurisprudenz*)[33] is more effective, and whether those theories are complementary or contradictory, and in what regards. But to do so we need a common language that will be taken up and used by courts: Perfect rights imply a remedy and a corresponding duty. This is what distinguishes them from imperfect rights, to which we now turn our attention.

B. *Imperfect Rights*

The next form of rights I wish to speak of are "imperfect rights." Imperfect rights do not necessarily imply any legally enforceable claim, corresponding legal duty, or legal remedy. They *may*, however, imply political remedies, practical remedies, or a means of transforming a claim into a perfect right.

1. *Rights At-Will: Permissions, Privileges, and Licenses*

There are several types of imperfect rights. A *permission*, like a *license*, is revocable at the will of the grantor. A *privilege* may also be revocable at will—there is a right, but it exists only to the extent of the grantor's will. These are revocable rights.

Example: *Ferae Naturae*

I wish to go hunting. To do so these days I need a *license*; I have no right to hunt without the permission of the state. Since the activity is dangerous, and its object is *res communis*, the state grants me the license but maintains the ability to revoke its grant at-will.[34] The point is, the right exists, but is defeasible.

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[32] *See generally*, Frankfurt von Rudolf Wiethölter, *Begriffs – oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm*, *in* INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS. BEWAHRUNG ODER WENDE? FESTSCHRIFT FÜR GERHARD KEGEL 213 (Alexander Lüderitz und Jochen Schröder eds., 1977).

[33] *See, e.g.*, Philipp Heck, *Gesetzesauslegung und Interessenjurisprudenz [Interpretation of the Law and Jurisprudence of Interest]*, 112 Archiv für die civilistische Praxis [Archive for the Civilian Practice] 1 (1914).

[34] If the state claimed no right to license a taking of the unowned thing, then it would be *res nullius*.

2. *Potential Rights: Mere Expectancies*

In contrast, a mere expectancy is not even held at the will of another. It is a potential right. If one executes the required act, the right is actuated and transformed from a mere expectancy (an imperfect executory right) into a vested perfect right (and thus a legally enforceable one). These are potential rights.

Example: *Ferae Naturae*

I still want to go hunting, and now I have obtained the mandatory state license. I now have the opportunity to get a vested right to wild meat by hunting and killing Bambi (or Thumper, take your pick). Now, if I shoot Bambi and you shoot Bambi, and each shot is mortal, we each have an expectancy—but no vested right. Rather, the right vests in whoever between us reaches Bambi's corpse first and then takes it (*caption*). Here, caption vests the right.

This fact pattern, taken from *Pierson v. Post*,[35] is the *same issue* addressed by *Marbury v. Madison*,[36] i.e., whether one's interest (in wild game or a commission) is a mere expectancy or a vested right. Of course, these distinctions are conclusory! They are *the conclusions* of *power struggles*. However, they are *predictable* conclusions that follow *certain rules of argumentation*. These rules must themselves be *predictable*, because otherwise basic business transactions which benefit society at large could not occur. Just as people *need* rights to feel safe (self-preservation), people also need rights to prosper (self-actualization). Small wonder that there is such a to-do about rights!

3. *Hortatory Rights: Programmatic Goals*

Hortatory rights are another form of non-vested rights, i.e., imperfect rights. Hortatory rights can and should be distinguished from revocable rights and potential rights. Hortatory rights are desirable programmatic political goals for the society to attain. They do not create any enforceable individual or collective legal claim. They do however give rise to a collective political claim. Most interestingly, hortatory rights can be used as interpretive

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[35] Pierson v. Post, 3 Cai.175 (N.Y. Sup. Ct. 1805).
[36] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

guides for the determination of substantive rights – that is, as warrants for other arguments.[37] So, though rights such as mere expectancies and hortations are *not* vested, they nonetheless have legal significance. Hohfeld is right, there is more to rights than meets the eye!

Example: The Right to Food; "Fourth Generation Rights"[38]

The right to food is a great idea.[39] No one should starve. People who are starving *cannot* help you; people who are not starving *can* help you. People who are starving are desperate and have nothing to lose. People who are not starving are not so desperate as to kill themselves (or you) in order to feed their families. However, the right to food is a collective programmatic goal, an objective to be attained over time, as society enjoys increased economic strength. Further, the right to food, a hortatory programmatic right, serves as an interpretive guide to the positive binding content of other laws.

All imperfect rights have this in common: they do not imply any enforceable remedy, any other right, or any other duty. They may however create a political claim. Some imperfect rights can be transformed into perfect rights. Others cannot. Hortatory rights do not give rise to a chance to create a vested right on performance of some given action. Expectancies do. In sum, imperfect rights create no current legally enforceable claim. They may sometimes be able to be transformed into vested (perfect) rights; they may give rise to a political claim; they may even serve as a guide to the interpretations of other laws, which in turn would determine whether other rights are or are not vested.

This defeasible character of rights explains in part why classical philosophical logic is not an accurate analytical tool in the context of rights discourse. Aristotelian theoretical logic (unlike his practical logic – *phronesis*) is atemporal and non-

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[37] Germany v. U.S., 1999 I.C.J. Pleadings 1 (Sept. 16) (Lagrand Case, Memorial of the Federal Republic of Germany; written proceedings of merits and questions of jurisdiction and admissibility), *available at* http://www.icj-cij.org/docket/files/104/8552.pdf.

[38] For a synthetic description of the generational theory of human rights, *see* Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 254-66 (2006).

[39] *See generally*, THE RIGHT TO FOOD (Philip Alston & Katarina Tomaševski eds., 1984).

defeasible. So rights discourse, for Aristotle, would have been lost in the uncertain operational world of rhetoric. Aristotle did not make "rights" central to his vision of justice.[40] Rather, he was a materialist (and quite rightly so). Further, Aristotle's theoretical logic was non-defeasible (legal logic) because his theoretical logic concerned universal truths.[41] In contrast, Aristotle's legal praxis (rhetoric) was defeasible (practical reasoning), i.e., practical reasoning concerns contingent, not necessary, truths. For Aristotle, the machinations of rhetoric were tactical, even lies—the lies of an advocate defending his client.

Aristotle's *theory* (logic) was a tool for *judges and legislators*. His rhetoric (practical reasoning – *phronesis*) was a tool for *advocates*. These two components of the Aristotelian organon were epistemologically and ontologically very different. They were intended to serve entirely different functions. Aristotle did not want, expect, or desire judges to take either parties' advocate "at face value," but did expect judges to recognize advocates as cunning clever rhetoricians, and thus view their arguments skeptically and prudentially within the greater framework of a scientific object which stemmed from the nature of things. *This was not the adversarial system as we see it today. There was no expectation of truth emerging from the conflicting lies of the advocates.* Truth was instead guaranteed by the judge as guardian of an aristocratic order based on merit. Truth was not, and could never be, the product of the conflicting lies of the advocates in the Greek justice system.

C. *Other Distinctions Among Rights*

There are several other popular and legal distinctions among rights.[42] I do not find them particularly useful analytically speaking. However, others may disagree and any typology should try to be complete.

Sometimes courts and commentators assert that fundamental rights are *procedural* but not *substantive*. Rationales supporting their arguments include:

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[40] *See* Eric Engle, *Aristotle, Law and Justice: The Tragic Hero*, 35 N. KY. L. REV. 1, 4-15 (2008).
[41] *See* ARISTOTLE, POLITICA: BOOK V (350 B.C.E.), *reprinted in* THE BASIC WORKS OF ARISTOTLE 1232 (Richard McKeon ed., Benjamin Jowett trans., Random House 1941).
[42] *See* Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219 (2006).

1) Procedural rights determine the content of other rights;

2) Procedural rights do not inflict any (or at worst, only minimal) external costs; and

3) Procedural rights are "negative" "freedoms from" state interference not "affirmative" "rights to" resources.

I don't find those arguments so persuasive. That isn't the point. The point is that whether there is or is not a "right to education" doesn't depend on arbitrary processes. It depends on who argues from more warrants more persuasively. I do not find the "*substantive*" versus "*procedural*" distinction at all useful in determining whether a right does or does not exist and what its content is or implications are. But you might disagree—and so might a judge, and in the end it is He who counts.[43] The law certainly does make the distinction between "substance" and "procedure," rather frequently, in fact.

Similarly, the distinction between "affirmative" "rights to" versus "negative" "freedoms from" also strikes me as not very useful. However, courts make that distinction fairly regularly, in predictable fashions which advocates as rhetoricians cannot afford to ignore, and we as legal scientists must account for—if possible—as something other than stupid judges not thinking enough about the lies they are told by advocates.

The real point about rights discourse—beyond seeing it as conclusory yet tractable and able to be coerced into workable definitions which can be successfully presented to courts—is this: Even if we can expose or impose internal rationality and coherence on the law, that doesn't change the fact that the system can be both internally coherent and unfair. Guess what? It often is.

IV. INFERRING RIGHTS

We can usefully distinguish "rights" from one another by disambiguating the polysemic term and supplying historically-accepted qualifying adjectives. Such disambiguation is necessary to determine whether and to what extent we can infer among rights, a matter to which we now turn.

[43] Fuck patriarchy.

There seem to be at least three forms of normative inferencing:

1) Inferring a duty from a right ("for every right there is a correlative duty");[44]

2) Inferring a remedy from a right ("for every right there is a remedy");[45] and

3) Inferring a right from some other right (e.g., "the greater implies the lesser").[46]

These three inferences are different from each other in theory, although they seem to always elicit the same answer in practice, i.e., "sometimes." Rights do not *necessarily* imply remedies, duties or some other right, but they *possibly* do. We have seen examples where I have a right but you have no corresponding duty (*ferae naturae*), or where I have a nominal right but no enforceable claim (hortatory programmatic rights). When the right is "vested," it implies duties and remedies and maybe even other rights. When the right is "imperfect," i.e., "executory," then it has no *necessary* implications, though it *may* have possible implications, including a political remedy or influence upon other interpretations.

So, can we infer among norms? Paradoxically, Kelsen, though arguing for a variety of conceptual jurisprudence, did not believe we could infer among norms (his view changed from the first edition of *Pure Theory of Law*, where he did apply logic to the relations among norms,[47] to the rejection of logic as governing

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[44] *See*, *e.g.*, Martti Koskenniemi, *The Effect of Rights on Political Culture*, *in* THE EU AND HUMAN RIGHTS 102 (Philip Alston ed., 1999).

[45] "[I]t is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 130, at 1632 (William C. Jones ed., Edition de Luxe 1916); *see also,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

[46] Of course this concept is vague and manipulable, but predictability may result when converged with *stare decisis*.

[47] "La fondation de la validité d'une norme positive, c'est à dire posée par un acte de volonté et qui prescrit une certaine conduite, a lieu par une procédure syllogistique. Dans ce syllogisme, la majeure est une norme considérée comme objectivement valable, ou plus exactement: l'énonciation, l'assertion d'une telle norme, aux termes de laquelle on doit obéir aux commandements d'une certaine personne, c'est à dire se conduire conformement à la signification subjective de ces actes de commandement; la

the relationships among norms in his *General Theory of Norms*[48]). This was so because he took up the popular view regarding the relationship between facts and statements about facts, which is attributed (in my opinion, wrongly) to David Hume.[49] I reject Kelsen's self-defeating view of norms and argue that, in fact, we can infer from one norm (rule) to another. How do we infer among norms (rights)? We infer among norms—e.g., rules, rights, principles, policies, standards, and goals—using logic. We use natural reasoning to render implicit relations explicit and thereby determine the natural, fitting, and appropriate relations among rights, duties, and remedies. Thus, we use well-known, logical methods, namely:

1) Induction (common law): Applying the rule in one case to another case;

2) Deduction (civil law): Inferring from a general rule to determine the outcome in a specific case;

3) Inductive-Deductive Reasoning: Using induction to generate new deductive rules and then applying those deductive rules to new cases;

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mineure est l'énoncé du fait que cette personne a proscrit que l'on doit se conduire de telle ou tell façon; et la conclusion: l'assertion de la validité de la norme que l'on doit se conduire de la façon ainsi déterminée. . . . La norme que la majeure pose—proposition qui procure le fondement—comme une norme objectivement valable est une norme fondamentale si sa validité objective ne peut plus faire l'objet d'une question. Elle ne peut plus faire l'objet d'une question si elle ne peut plus être fondée par le moyen d'un processus syllogistique. Et elle ne peut plus être fondée de cette façon si l'assertion du fait que cette norme a été posée par l'acte de volonté d'une personne ne peut plus constituer la mineure d'un syllogisme." HANS KELSEN, THÉORIE PURE DU DROIT 268 (Univ. of Cal. Press ed., 1967) (1934).

[48] "Comme on l'a précédemment remarqué, le syllogisme théorique, dont la majeure est un énoncé général et dont la conclusion est un énoncé individuel correspondant à l'énonce général, ne mène pas à un acte de pensée dont cet énoncé individuel est la signification. Le prétendu syllogisme normatif, dont la majeure est une norme générale et dont la conclusion est une norme individuelle correspondant à la norme générale, mène encore moins à un acte de volonté, dont la norme individuelle est la signification." HANS KELSEN, THEORIE GENERALE DES NORMES 317 (Presses Universitaires de France 1996).

[49] HANS KELSEN, GENERAL THEORY OF NORMS 86 (Michael Hartney trans., Clarendon Press 1991).

4) Analogical Argumentation: Arguing that common characteristics 1, 2, and 3 make A like B.[50] (Analogical argumentation, unlike deduction, is not a theoretically *necessary* conclusion);

5) Probabilistic Argumentation: I.e., statistical argument;

6) Ampliation: Developing a new general rule from a set of cases;

7) Teleology: Arguing from, or to, the goals of the law;

8) Forward Chaining of Inferences: Connecting inferences using basic logical functors[51] (implication, conjunction, disjunction, strict implication, negation, etc.);

9) Backward Chaining of Inferences: Result-oriented reasoning, chained together using the above-mentioned functors; and

10) Anything else that will convince the judge. Really.

Rights are implied from well-formed arguments, which in turn are based on and invoke warrants. Essentially, the task of legal argumentation is to assemble warrants for a particular interpretation. Whichever side amasses more and better warrants for its desired interpretation wins. *This persuasive function of rights discourse is crucial to the legitimization of the state.*

It might seem bizarre to be talking about "rights" at all since they do not have any real existence and are in fact merely the conclusions of power struggles. Rights are legal fictions. So is the state. However, they are fictions backed up with force. Is that persuasive? No. Robbery is also backed up with force. Moreover, *robbers think they are acting fairly: "I only steal from the rich."* But a just state is not a mafia writ large, a band of thieves.

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[50] *See, e.g.*, Jefferson White, *Analogical Reasoning, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 584 (Dennis Patterson ed., Blackwell Publishers Ltd. 1996).

[51] *See* Wikipedia, *Functor*, *available at* http://en.wikipedia.org/wiki/Functor (2009).

What makes the just state somehow different than a robber or a criminal gang? Given that the state and the rights it creates and upholds are legal fictions, why are laws other than arbitrary? Why must/should/does the state use logic to determine its laws? Laws are made according to rules of logic in order to be persuasive so that the system is perceived as just and thus becomes a self-enforcing, self-policing, and self-reproducing foucauldian panopticon.[52] Laws made and argued logically persuade judges and the general public that the outcomes they generate are fair. The state and its laws *are* fictions—fictions backed up by a gun.

But the state and its laws are so much more than a fiction backed up by guns. These fictions are also backed up by expectations, desires, social sanctions, *even hopes and dreams*. The result? *Voluntary compliance with rules, and their enforcement by the ruled on the not-so-voluntarily compliant*. Though the state and its laws are fictions, we ignore them at our own peril, *and they have predictable operationality—*unlike a band of criminals. The legal system uses logic as a tool for self-policing so that the system is persuasive, self enforcing, attractive, and thus reproductive of hierarchy. The rules are *not* arbitrary, capricious, and/or universally or even generally abusive—class bias (race is a proxy for class in the U.S.) is implemented systematically and operationally, with plenty of places for opt-in and opt-out – and thus a remarkable flexibility. Otherwise no one would obey *or ensure others obey*. Finally, not only does the legal system use logic as a tool for self-justification, it uses the rights formed out of that logic as the means to the end of the good life. The system is not only *persuasive*, it is also *attractive, self-enforcing, self-reproducing, and sustainable—*it produces and reproduces hierarchy and structures conflict. Criminality isn't sustainable because it disincentivizes production and raises transaction costs. Criminal conflicts are completely unstructured. People have rights because they *need* them (or at least think they do), and because they are, at least sometimes—maybe even often—

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[52] *See* JEREMY BENTHAM, THE INSPECTION-HOUSE: CONTAINING THE IDEA OF A NEW PRINCIPLE OF CONSTRUCTION APPLICABLE TO ANY SORT OF ESTABLISHMENT, IN WHICH PERSONS OF ANY DESCRIPTION ARE TO BE KEPT UNDER INSPECTION; AND IN PARTICULAR TO PENITENTIARY-HOUSES, PRISONS, HOUSES OF INDUSTRY, WORK-HOUSES, POOR-HOUSES, LAZARETTOS, MANUFACTORIES, HOSPITALS, MAD-HOUSES, AND SCHOOLS: WITH A PLAN OF MANAGEMENT ADAPTED TO THE PRINCIPLE: IN A SERIES OF LETTERS, WRITTEN IN THE YEAR 1787, FROM CRECHEFF IN WHITE RUSSIA TO A FRIEND IN ENGLAND, *reprinted in* THE PANOPTICON WRITINGS (Miran Bozovic ed., Verso 1995).

a useful way to organize the social body, to channel social conflict and make it less and less destructive.

Rights as commands have no truth-value and thus cannot imply anything. But the idea of rights can be persuasive, and in fact decisive, when linked to logical arguments based on policy and purpose (teleology), on similar structure and facts (analogy[53]), on practical observations (inductions), or on theoretical *a priori* rules (deductions). "Rights" are like a magnet; a tool for amassing and structuring arguments and their warrants and also for structuring expectations and desires. *Properly structured, rights discourse can be used by progressives to undermine racism, sexism, homophobia, patriarchy, greed, and war.* ***"Rights" are a weapon.*** And whether that weapon will be used by or against the exploited and oppressed depends upon how effectively rights are marshaled by the progressive population.

Conclusion

Rights are the conclusion of power struggles. Thus, all statements of rights are conclusory. Statements about the conclusions of power struggles are, well, conclusory. If that statement seems tautological it is, because it is. When rights are expressed as commands, they are mere imperatives, lack any truth-value, and imply nothing; it is impossible to infer truth or falsehood exclusively from statements that are neither true nor false. In contrast, when rights are expressed as conditionals, they may have a truth-value and imply other duties, remedies, and even other rights.

At least in the first world, rights discourse invokes numerous falsehoods (such as the failed social contract myth) and is analytically ambiguous (potentially infinite terms and definitions) and, in my opinion, is generally based on flawed assumptions (liberal individualism, even at times philosophical idealism e.g. neoplatonism). Thus, rights discourse can, and at times should, be avoided due to ambiguity and the potential for abuse. True, one can disambiguate the terms. However, for legal science (i.e., *la doctrine*, *Rechtslehre*, scholarship) one would be much better off using an unambiguous logical syntax such as logical functors. Logical functors express legal relations as logical operations (e.g., conditional statements as parts of syllogisms).

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[53] *See, e.g.*, LLOYD WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (Cambridge Univ. Press 2005).

However, since rights discourse is so dear to Anglo-American liberal individualism, it is inescapable. Thus, this essay tries to coerce the pre-scientific (neo-)feudal term "rights" into a scientifically-useful tool, such that others who insist on using or discussing "rights" may do so while avoiding some of the traps of legal theory – such as Hume's "law." We could avoid rights discourse altogether if we merely used logical functors. For example, $((p=>q)*(q=>r))=>(p=>r)$ is so much clearer than Dworkin. Right?