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Propter Honoris Respectum

Rights and Their Critics

Cass R. Sunstein*

The Bill of Rights has now been part of the United States Constitution for more than two hundred years. In the recent past, that short document has inspired reform movements throughout the world—not merely in the Soviet Union, Hungary, Romania, Poland, and East Germany, but in such places as South Africa, China, and Taiwan as well. It is therefore nothing short of remarkable that the international interest in the Bill of Rights has come at a time when the very concept of rights, or of a polity pervaded by rights, is under attack in the United States.

The attack on rights has sometimes been highly influential. It underlies a prominent new journal, *The Responsive Community*, and it cuts across ideological lines.¹ Justice Clarence Thomas has delivered a passionate and widely reported plea for responsibilities instead of rights.² In so saying, Justice Thomas echoed a general

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1 See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994); DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). Various challenges to rights can be found in the journal founded by Professor Etzioni, *THE RESPONSIVE COMMUNITY*. See, e.g., *The Responsive Communitarian Platform: Rights and Responsibilities*, *RESPONSIVE COMMUNITY*, Winter 1991/92, at 4, 18-20 (listing 57 signatories to the platform). Something with parallel concern, I believe, underlies RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994), and also CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* (1994). A helpful recent discussion can be found in Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994).

2 Justice Clarence Thomas, *The Rights Revolution and America's Urban Poor: Vic-*

claim about the pathologies of legal practices during the Warren Court era. More generally, it is urged that a culture of rights encourages a form of selfishness and an unwillingness to compromise that are incompatible with citizenship.³ Along related but distinct lines, academic critics have suggested that aggressive judicial review or perhaps judicial review itself, protecting identified rights, is by its nature incompatible with democracy.⁴

These various claims have received hospitable receptions in prominent places. Many of the Supreme Court's recent decisions embrace the idea that the creation of rights can be destructive to democratic governance.⁵ The attack on "substantive due process" reflects this claim quite vividly.⁶ In recent deliberations, Congress and the executive branch have been increasingly attentive to the view that government, instead of recognizing rights, should encourage people to exercise greater responsibility.⁷ On this view, those who are disadvantaged should take their welfare into their own hands and should not expect assistance from government operating in response to claims of right. Moreover, it is said, those who are advantaged should respond not to rights laid down by the state, but to their own sense of responsibility to people in need. If the 1960s and the early 1970s were an era of rights, it seems likely that the 1990s will be a period in which responsibilities move increasingly to the fore.

tims or Beneficiaries?, Address Before the Federalist Society and the Manhattan Institute (May 16, 1994), in 60 VITAL SPEECHES OF THE DAY 514, 514-17 (1994); see also, e.g., Neil A. Lewis, *Justice Thomas Assails Victim Mentality*, N.Y. TIMES, May 17, 1994, at A14.

3 See, e.g., GLENDON, *supra* note 1, at 1-17; CHRISTOPHER LASCH, *THE REVOLT OF THE MASSES* (1995).

4 See, from different angles, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993); Jeremy Waldron, *Freeman's Defense of Judicial Review*, 13 LAW & PHIL. 27 (1994); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993).

5 See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

6 See, e.g., *Bowers v. Hardwick*, 478 U.S. at 194-95 ("There should be, therefore, great resistance to expand the substantive reach of th[e] Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.").

7 See, e.g., R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 274-83 (1994); President Bill Clinton, Address Before the National Baptist Convention (Sept. 9, 1994) (describing a "crisis of values" and a "lack of individual responsibility"); Dan Quayle, *The Poverty of Values*, Address Before the Commonwealth Club of California (Sept. 8, 1994) ("[O]ur public policy today, unfortunately, reflects a philosophy of rights and entitlements rather than responsibility.").

Many critics of rights observe that American political debate, especially since the New Deal, has come to center on a bewildering and proliferating array of "rights"—that it has yielded to a kind of "rights revolution" involving the courts, Congress, and the President.⁸ These rights, many of them quite novel, include a wide range of safeguards for criminal defendants; prevention against the abuse and neglect of children; guarantees to improve the treatment of the mentally and physically disabled;⁹ protection of consumers from sharp practices; and a remarkable array of efforts to safeguard the environment.¹⁰ To be sure, some people think that the growing list of rights is an important or precious social achievement, supplementing a catalog of protected interests started but hardly finished in the founding period.¹¹ But many others disagree. They believe that America's transformation into "the land of rights" has had harmful, even disastrous consequences.¹²

My goal in this Essay is to disaggregate and to evaluate the claims now brought against rights. I suggest that much of the attack is based on confusion and on a failure to make necessary distinctions. The attack is best aimed at particular rights, not at rights as such. In its usual form, it depends on a misunderstanding of what rights are and of what they do. It rests on empirical claims that are hard to support. It offers a cultural diagnosis that is only part of a complex picture, for there has been no general shift to rights from responsibilities.

In the end, I claim that the critique of rights has no merit as such, and that the plausible claims that it contains should be stated far more cautiously and narrowly. When so stated, the claims can be discussed as part of a debate over which rights it is best to have, rather than as a debate over whether rights are pernicious merely by virtue of being rights.

This Essay comes in three parts. Part I tries to separate the various components of the attack on rights. Part II identifies some

8 See GLENDON, *supra* note 1, at 4-7; HOWARD, *supra* note 1, at 116-33; Thomas, *supra* note 2.

9 See, e.g., MELNICK, *supra* note 7, at 41-51.

10 See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 11-46 (1990).

11 See the various views catalogued in MELNICK, *supra* note 7. This way of viewing things builds on President Roosevelt's plea for a second bill of rights. See *infra* note 84 and accompanying text.

12 See GLENDON, *supra* note 1, at 1-17; see also Thomas, *supra* note 2.

truths in this attack, but shows that most of these truths are partial. Part III deals with an increasingly important question—the relationship between rights and responsibilities.

I. THE CHARGES

Numerous charges have been made against rights, and it will be useful to begin by separating distinct claims that tend to be run together. We might disaggregate the charges into six different categories.

A. *The Social Foundations of Rights*

Some people suggest, as part of their critique of rights, that rights are essentially social and collective in character and that the rhetoric of rights obscures this point.¹³ For example, rights come from the state in the sense that they depend for their existence on collective institutions.¹⁴ Without the law of property, set out by the collectivity, property rights cannot be secure. Without the law of contract, saying that agreements are enforceable under certain conditions, contracts could not exist in the way that we understand them. In the critics' view, many claims based on rights, and especially claims for individual rights, tend to disguise the social character of rights and in particular the need for collective and communal support.¹⁵ The result, it is said, is confusion and an inability to draw lines between rights that are desirable from the social point of view and rights that are not.

B. *The Rigidity of Rights*

Other critics charge that rights have a strident and absolutist character, and that for this reason they impoverish political discourse.¹⁶ Rights do not admit of compromise. They do not allow room for competing considerations. For this reason, they impair and even foreclose deliberation over complex issues not realistical-

13 See, e.g., KENNEDY, *supra* note 1, at 83-88. The point emerges from legal realist work. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923). See a related discussion, from a different angle, in JOSEPH RAZ, *THE MORALITY OF FREEDOM* 165-255 (1986).

14 The point is made well, though hardly as part of a critique of rights, in JULES L. COLEMAN, *RISKS AND WRONGS* 61 (1992).

15 See, e.g., KENNEDY, *supra* note 1, at 83-88.

16 See, e.g., GLENDON, *supra* note 1, at 45-46.

ly soluble by simple formulas. Rights thus have many of the defects of rules.¹⁷ A person claiming a right—for example, a handicapped person claiming that all buildings should be accessible to people who use wheelchairs—may not be willing to allow a process of balancing in which we judge, for example, whether accessibility for wheelchairs really makes sense in light of the relevant costs and benefits.¹⁸ A characteristic problem with rules is that they do not permit people to make individual judgments about whether following the rules really is reasonable in particular cases.¹⁹ Rights have the identical problem.

Rooted in nineteenth-century ideas of absolute sovereignty over property, rights are said to be ill-adapted to what we usually need, that is, a careful discussion of trade-offs and competing concerns. If rights are (in Ronald Dworkin's suggestive and influential phrase, criticized below) "trumps,"²⁰ they are for that very reason harmful to the difficult process of accommodating different goals and considerations in resolving such thorny problems as abortion, the environment, and plant closings.

C. Indeterminacy

In one of his greatest aphorisms, Justice Holmes wrote that "[g]eneral propositions do not decide concrete cases."²¹ Rights, of course, take the form of general propositions. For this reason they are said to be indeterminate and thus unhelpful.²²

If we know that there is a right to private property, we do not know whether an occupational safety and health law or a law requiring beach access is permissible. In fact, we know relatively little. Standing by itself, the constitutional protection against government "takings" tells us very little about how to handle particular problems. This is true of rights generally. To say that there is a right to equal protection of the law is not to say, for example, that affirmative action programs are acceptable, mandatory, or prohibited. In fact, the right to equal protection of the law re-

17 See, e.g., HOWARD, *supra* note 1, at 116-33.

18 See *id.* at 113-18.

19 See EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

20 RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) ("Individual rights are political trumps held by individuals.").

21 *Lochner v. New York*, 198 U.S. 45, 76 (1904) (Holmes, J., dissenting).

22 See, e.g., Tushnet, *supra* note 1, at 1371-76.

quires a great deal of supplemental work to decide cases. The right must be specified in order to have concrete meaning. The specification will depend on premises not contained within the announcement of the right itself.²³ Rights purport to solve problems, but when stated abstractly—it is claimed—they are at most the beginning of a discussion.

Perhaps the area of free speech is the most vivid illustration. Everyone agrees that such a right exists; but without supplemental work, we cannot know how to handle the hard questions raised by commercial speech, libel, obscenity, or campaign finance restrictions. A serious problem with modern free speech discussions is that the term “free speech” tends to be used as if it handled the hard questions by itself.²⁴

D. *Excessive Individualism*

A different objection is that rights are unduly individualistic and associated with highly undesirable characteristics, including selfishness and indifference to others.²⁵ Rights miss the “dimension of sociality;”²⁶ they posit selfish, isolated individuals who assert what is theirs, rather than participating in communal life. Rights, it is said, neglect the moral and social dimensions of important problems.

The important and contested right of privacy, for example, is said to have emerged as an unduly individual right, rooted in the “property paradigm” and loosened from connections to others.²⁷ Critics urge that this conception of the issues involved in the so-called privacy cases misses crucial aspects of the relevant problems—abortion, family living arrangements, and the asserted right to die. Such issues do not involve simple privacy; they call up a range of issues about networks of relationships, between individuals and the state, between individuals and families, between individuals and localities. Perhaps the abortion issue is especially problematic when conceived in terms of a “right to privacy.” Many people, on both sides of the abortion controversy, are uncomfortable with the “privacy” rhetoric. Inattentive to the unborn or to

23 See Henry Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 306 (1990).

24 This is a problem in NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995).

25 See GLENDON, *supra* note 1, at 75, 178; Tushnet, *supra* note 1.

26 See GLENDON, *supra* note 1, at 109-44.

27 See *id.* at 20-25, 48-50.

the situation of mothers, American law has been said to have, perversely, left the pregnant woman genuinely alone, without people "willing to help her either to have the abortion she desired, or to keep and raise the child who was eventually born."²⁸

Similarly, American law is said to be unequipped even to describe the harms faced by a community destroyed by the closing of a plant employing most of its members. These harms include the loss of a rich neighborhood life—"roots, relationships, solidarity, sense of place, and shared memory"²⁹ On the critics' view, the individualistic character of recent formulations has left Americans with a crucial linguistic and conceptual deficiency. Rights talk is a principal culprit. Since rights are claimed by individuals, it is said, rights promote and encourage a community whose members think of social problems in the most narrow, self-interested terms.

E. Protection of Existing Distributions and Practices

To some critics, a key problem with rights is that they tend to be used for what the critics see as pernicious ends. Partly because rights are indeterminate in the abstract, they can be used as an excessively conservative and antidemocratic force, protecting existing distributions from scrutiny and change.³⁰ Some people think that the historical function of rights has been to insulate current practice from legitimate democratic oversight. Thus the Fifth Amendment was invoked to protect slavery before the Civil War;³¹ thus the Fourteenth Amendment was used to attack social welfare legislation in the early part of this century;³² thus the First Amendment is used to invalidate campaign finance legislation³³ today.³⁴

On this view, rights are too readily invoked in the service of goals that are unworthy or that at least should be subject to democratic rather than judicial resolution. A key problem with rights is

28 *Id.* at 58.

29 *Id.* at 30; see also Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

30 See KENNEDY, *supra* note 1; Tushnet, *supra* note 1, at 1371-82; cf. J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

31 See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

32 See *Lochner v. New York*, 198 U.S. 45 (1905).

33 See *Buckley v. Valeo*, 424 U.S. 1 (1976).

34 For a broadside attack on judicial invocation of rights, see generally Becker, *supra* note 4.

that they are brought in the service of existing distributions of authority and power.

F. *Rights Versus Responsibilities*

A final and especially prominent objection is that the emphasis on rights tends to crowd out the issue of responsibility. In American law and in American public discourse, some critics complain, it is too rare to find the idea that people owe duties to each other, or that civic virtue is to be cultivated, prized, and lived. Rights, and especially new protections of rights since the 1960s, are said to be a major problem here.

In a simple formulation: People who insist on their rights too infrequently explore what it is right to do. Or they become dependent on the official institutions charged with safeguarding rights, rather than doing things for themselves. The controversy over whether rights turn women or blacks into a "dependent class" is in part about this issue.³⁵ People who insist that their status as victims entitles them to enforce their legal rights may not conceive of themselves in ways that engender equality and equal citizenship.

Thus Justice Thomas has objected to the "judicial revolution in individual rights," and has challenged as harmful "the idea that our society had failed to safeguard the interests of minorities, the poor and other groups; and, as a consequence, was, in fact, primarily at fault for their plight."³⁶ Justice Thomas particularly lamented the fact that "[m]any began questioning whether the poor and minorities could be blamed for the crimes they committed."³⁷ In his view, "[o]ur legal institutions and popular culture began identifying those accused of wrong doing as victims of upbringing and circumstance."³⁸ This was unfortunate, for "[i]n the long run, a society that abandons personal responsibility will lose its moral sense. And it is the urban poor whose lives are being destroyed the most by this loss of moral sense."³⁹ According to Justice Thomas:

The very same ideas that prompted the judicial revolution

35 See, e.g., KATHERINE ROIPHE, *THE MORNING AFTER: FEAR, SEX AND FEMINISM ON COLLEGE CAMPUSES* (1993); SOMMERS, *supra* note 1.

36 Thomas, *supra* note 2, at 516.

37 *Id.*

38 *Id.*

39 *Id.* at 517.

. . . and that circumscribed the authority of local communities to set standards for decorum and civility on the streets or in the public schools also made it far more difficult for the criminal justice system to hold people responsible for the consequences of their harmful acts.⁴⁰

When black people insist on rights and “demand . . . from [their] oppressors [] more lenient standards of conduct,” they produce a state of dependency worse than slavery.⁴¹

Professor Mary Ann Glendon, an especially prominent and evenhanded critic of rights, is similarly concerned about the effects of rights on responsibilities.⁴² Thus Glendon devotes a good deal of space to the “duty to rescue,” a duty not recognized by American law.⁴³ If a person ignores someone who is drowning, he will not be held accountable, even if rescue could occur with little effort. Glendon deplores this result, arguing at a minimum for a statement, in law, that such a duty exists. On Glendon’s view, it is important to attend to responsibility as well as rights. American law does this far too infrequently.

Along similar lines, Glendon challenges the view (on which the current Supreme Court is increasingly insistent⁴⁴) that the Constitution imposes no affirmative duties on government. She suggests, though with some ambivalence, that police officers should be obliged to protect people from serious threats and that social workers should have a duty to protect children from domestic violence when they are on notice that such violence will occur. Above all, Glendon fears that judicial decisions that fail to recognize these duties have harmed public discourse and social understandings. The important point is the general one: Critics of rights argue that the emphasis on rights diminishes individual commitments to duty and responsibility.

II. CONCEPTS AND PARTIAL TRUTHS

In this section, I attempt to clarify some of the conceptual issues at stake in the critique of rights. I suggest as well that the

40 *Id.* at 516.

41 *Id.* at 517.

42 GLENDON, *supra* note 1, at 76-108.

43 *Id.* at 78-89.

44 *See* *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 196 (1989) (The Due Process Clause “confers no affirmative right to governmental aid, even where such aid may be necessary to secure life.”).

critique embodies some limited and partial (and important) truths, but that it does not by any means support a general challenge to rights.⁴⁵ The critics of rights have, in short, misconceived their target.

A. *Definitional Issues*

Begin with a definition of rights. This is a regrettably complex issue, and I will have to deal with it briefly and tentatively here.⁴⁶ Sometimes the term "rights" is intended to refer to important human interests, or (what is not the same thing) to those interests that operate as "trumps" in the sense that they cannot be compromised by reference to collective policies or goals. If we identify rights with important human interests, the critique of rights loses its force. Who could object to social protection of important human interests?

The conception of rights as interests that operate as "trumps" against the collectivity raises more difficulty, largely because it is not clear that this conception is really helpful. The first problem is that almost every right is defeasible at some point, and defeasible just because the collective interest is very strong. In American law, no right is absolute. If, for example, the rest of the human race will be eliminated because of the protection of a right, the right will certainly be redefined or legitimately infringed, probably under some version of the "compelling interest" test. The real question then becomes when rights are defeasible because of collective justifications—under what conditions and for what reasons. The formula of "trumps" is misleading for this reason. We need to know what sorts of reasons are admissible and how weighty they must be; these are the key questions in the exploration of rights.

Rights characteristically limit the kinds of arguments that can be used by way of justification, and they characteristically require justifications of special weight.⁴⁷ Above all, rights exclude certain

45 For similar assessments, see McClain, *supra* note 1, at 990-94.

46 For an especially instructive discussion of the definition of rights, see RAZ, *supra* note 13, at 165-92.

47 See Richard H. Pildes, *Avoiding Reasons: Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994). Note that it is important to inquire into two different dimensions—legitimacy and weight. Some grounds for infringing on rights are inadmissible even if they are weighty. Thus, racial prejudice is not a legitimate reason for racial discrimination, and offense at the content of ideas is not a legitimate reason for infringing on free speech.

otherwise admissible reasons for action.⁴⁸ But ideas of this kind do not support the “trumps” metaphor and indeed lead in quite different directions.

The second problem is that many conceptual puzzles are raised by the understanding of rights as interests operating “against” the collectivity. Often rights are something that the collectivity recognizes and protects in order to protect its interests. If this is so, there is no easy opposition between rights and the collectivity. In fact many rights are best understood as a solution to a collective action problem and especially to a prisoner’s dilemma faced by people lacking legal entitlements; property rights themselves have this character.⁴⁹ Rights are collectively conferred and designed to promote collective interests. They are protected by social institutions for social reasons. In such cases, rights may in a sense operate against the collectivity once they are conferred; government may not take property just because it wants to do so. But even in such cases, rights are guaranteed in the first instance both by and for the collectivity (which of course has no existence apart from the individuals who compose it).

In any case, many people who are insistent on rights do not see rights as opposing the collectivity, at least not in any simple sense. Rights often have the purpose of creating a certain kind of society. Consider here Joseph Raz’s suggestion:

If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.⁵⁰

The point suggests that many rights deserve to exist because of their collective consequences.

This idea can be embraced by people from diverse perspectives; I offer some truncated remarks. Utilitarians would be likely to make a large space for rights, because the protection of identified interests as rights can promote utility. There is no tension between utilitarianism and rights, though the utilitarian account of rights is distinctive and controversial.⁵¹ Economic analysts of law

48 See the discussion of exclusionary reasons in JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35-48 (2d ed. 1992).

49 See COLEMAN, *supra* note 14, at 3.

50 JOSEPH RAZ, *Rights and Individual Well-Being*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 29, 39 (1994).

51 See JONATHAN RILEY, *LIBERAL UTILITARIANISM* 150-80 (1988); see also RAZ, *supra* note

are hardly critical of rights. On the contrary, they take rights to be crucial instruments for promoting economic goals.⁵² Those who emphasize the need to base social and legal practices on a conception of the human good, or of human flourishing, will also make room for rights insofar as rights can be shown to be a method of promoting human flourishing.⁵³ Under this view, a conception of the good is prior to a conception of the right; but rights are a crucial part of the good, or a crucial way of achieving the good, for purposes of both theory and practice.

Some people associate rights with "nature."⁵⁴ The natural rights tradition is, to say the least, a complex one, and I cannot sort out its various claims here. But some of those who point to "nature" should probably be understood to say that certain distinctly human characteristics and capacities call for or fit with a certain category of rights. If social and legal practices must be based on the natural capacities of human beings, we might be led to embrace a set of rights that promote those capacities.⁵⁵ Perhaps people who espouse this view will see natural rights as worthy of respect whatever the particular community may think. That claim may be correct, but it does not oppose rights in any simple sense to the collectivity. Many of the rights sought by the natural law tradition have everything to do with sociality and its preconditions.⁵⁶

Of course deontological writers offer a very different conception of rights, seeing them not as instruments for maximizing utility or wealth, or as a way of promoting the best conception of the human good, but as reflecting respect for individuals as persons.⁵⁷ Here we may indeed have an opposition between the individual and the community. Under this conception of rights, it remains necessary to justify any particular understanding of rights, and thus to offer reasons for their existence. But perhaps those

50, at 32 (criticizing the utilitarian account of rights); Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3 (1982).

52 See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 1-15 (4th ed. 1992).

53 See, e.g., AMARTYA SEN, *INEQUALITY REEXAMINED* 44-58 (1992); Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 228-240 (R. Bruce Douglass et al. eds., 1984).

54 See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1988).

55 This conception of rights emerges from *id.*

56 See *id.*

57 See, e.g., DWORKIN, *supra* note 20, at 212. An important claim for duties rather than rights emerges from ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* (1989).

reasons need not refer to collective goals. On the other hand, some (broadly speaking) deontological writers do insist on the collective goals that underlie rights, suggesting that rights have their origin in such goals.⁵⁸

Let us put these conceptual difficulties to one side and define rights in a way that should be congenial to both supporters and critics of rights: Rights are legally enforceable instruments for the protection of their claimants. Rights are thus practical instruments that can be invoked in courts of law by individuals or groups against both private parties and the state. (To say that rights operate against society is not to say that their justification is not social. Rights operating against society may have social justification; consider the right to free speech or the right to private property.) This is a highly pragmatic conception of rights, one that tries to put philosophical issues to one side and to identify instead the actual functions of rights in the world. I think that it is this understanding of rights, and not the contested theoretical issues, that underlies the critique of rights.

B. *Republicanism, Liberalism, and Rights*

Now shift to the place of rights in American constitutionalism. A good deal of work in constitutional law has dealt with the role of "republican" thought in the American tradition.⁵⁹ The republican ideal prizes a deliberative conception of democracy—one in which popular sovereignty entails not simple majoritarianism, but an effort to ensure a form of reason-giving in the public sphere.⁶⁰ Efforts to revive the republican tradition have been designed in part to oppose the view that the protection of antecedently given "rights" is the sole purpose of the American constitutional tradition. On the contrary, the notion that rights are antecedently given leads to real confusion. Many rights are protected as such because they are a precondition for democratic deliberation,⁶¹

58 For a particularly illuminating discussion, see RAZ, *supra* note 13, at 165-80.

59 See, e.g., Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

60 See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17-21 (1993).

61 Many but not all rights are necessary for democratic deliberation. See James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993).

and in any case the American constitutional order seeks deliberation about ordinary issues not implicating rights at all.

Some people think that liberalism and republicanism are at odds⁶² and that rights have a natural place in liberalism but an awkward one in republican thought. But there is no opposition between the liberal tradition and the republican tradition as these have operated in the United States; and republicanism is hardly hostile to rights. To be sure, we could generate conceptions of republicanism that are opposed to liberalism, and vice versa. A conception of republicanism that distrusts rights altogether, or that sees duty to the community as an overriding obligation of all citizens,⁶³ or that seeks to impose a unitary conception of the good, would indeed be antiliberal. Moreover, a conception of liberalism that sees politics as an effort to aggregate private preferences would indeed be antirepublican, since it would place no premium on deliberation or civic virtue. But the aspiration to deliberative democracy can certainly be understood in such a way as to be both liberal and republican. The liberal tradition is committed to the justification of government outcomes by reference to reasons⁶⁴ and also to a form of government by discussion.⁶⁵

Some critics of the "republican revival" think that republicanism and rights are at odds. On this view, republicanism is "ominous" insofar as it prizes democratic deliberation and downgrades private rights.⁶⁶ But this is a misreading of the republican tradition. The Framers of the Constitution were certainly republicans, and they certainly believed in rights. Modern forms of republicanism are enthusiastic about rights. If deliberation and citizenship are desirable, rights of free speech, for example, seem indispensable, and we may be led to guarantee rights of religious liberty,⁶⁷ rights of private property, and rights in the criminal justice sys-

62 See, e.g., Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

63 See Sunstein, *supra* note 59, at 40 n.51 (discussing Benjamin Rush's proposal for teaching each citizen "that he does not belong to himself, but that he is public property").

64 See the discussion of public reason in JOHN RAWLS, *POLITICAL LIBERALISM* 216-20 (1993).

65 See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993).

66 See Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

67 See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

tem—and also to protect the rule of law, a constraint on government power that seems a precondition for citizenship.⁶⁸

Of course a commitment to republicanism—a vague and general creed capable of many diverse specifications—does not lead to any particular constellation of rights. But republicans are likely to make much use of rights to promote their own deepest ideals.

C. *Truths and Partial Truths*

From the previous discussion we can see a wide range of strands in the challenge to rights. The challenge is highly eclectic. Moreover, there are some truths in many of these points, and it will be useful to explore those truths.

Of course rights do depend for their existence on collective institutions. As we know them, rights require public protection and support.⁶⁹ Protection of the individual—of property or person—cannot easily occur without collective help.⁷⁰ But this descriptive point is hardly an argument against rights. Many good things depend for their existence on collective institutions, and this is not an argument that those things are bad. Economic prosperity, a pluralistic culture, sufficient quantities of nutrition, housing for all or most, freedom from violence, racial equality, low rates of unemployment—all these are, under imaginable conditions, secured best or only with collective help. They are no less desirable for that.⁷¹

68 I discuss some of these issues in Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907 (1993).

69 An important qualification comes from ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991) (showing that social norms, with law-like functions, can emerge spontaneously).

70 Self-help remedies are of course imaginable, but they would likely lead to much more fragile protection of property and person than modern politics seek.

71 The general point is made by the greatest critic of socialism in the twentieth century, Friedrich Hayek:

It is regrettable, though not difficult to explain, that in the past much less attention has been given to the positive requirements of a successful working of the competitive system than to these [previously discussed] negative points. The functioning of a competition not only requires adequate organisation [sic] of certain institutions like money, markets, and channels of information—some of which can never be adequately provided by private enterprise—but it depends above all on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.

FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 28-29 (1946).

It is also important to point out that references to rights can make for unduly rigid understandings of complex problems and can sometimes stop discussion in its tracks before analysis has even started. Claims of right often have the vices of rules. Even worse, rights can be conclusions masquerading as reasons. In thinking about claims of right, it is often necessary to be detailed and concrete about the social consequences of competing courses of action. The invocation of "rights" can be a serious obstacle to this process. Consider, for example, the current debates over regulation of the electronic media, violent pornography, hate speech at universities, or advertising for cigarettes. To say that any restriction on these forms of expression violates the "right to free speech" may in the end be correct; but this requires a long and complex argument, not a shorthand phrase. The claim of a "right to free speech" is far too general and abstract to support the argument. Here it does seem important and true to say that rights, stated abstractly, do not solve concrete cases. They are indeterminate until they are specified.

As they operate in law, rights generally *are* specified. Hence the rights protected by the Constitution and the common law are far from indeterminate, however hard it is to know what they are when stated abstractly. The claim of indeterminacy is for this reason far too broad. The problem, to which the critics have correctly drawn attention, lies in the use of general claims of right to resolve cases in which the specification has not yet occurred.

It is also true that efforts to think about many social and economic problems in terms of rights can obscure those problems. A claimed right to clean air and water or to safe products and workplaces makes little sense in light of the need for close assessment, in particular cases, of the advantages of greater environmental protection or more safety, as compared with the possible accompanying disadvantages—higher prices, lower wages, less employment, and more poverty. Perhaps the legal system will create rights of a kind after it has undertaken this assessment. But to the extent that the regulatory programs of the 1970s were billed as simple vindications of "rights," they severely impaired political deliberation about their content and about the necessity for trade-offs.⁷²

It seems correct too to say that civic virtue—responsibility to one's neighbors and to one's nation—is an important part of

72 I attempt to defend this claim in SUNSTEIN, *supra* note 10, at 74-110.

citizenship. This is an aspect of citizenship that is notoriously neglected in public discussion and social practice. Whether rights are the culprit here may be questioned. But insofar as rights are understood in purely self-interested terms, it is certainly conceivable that they can crowd out issues of responsibility.

Nor should it be denied that rights can protect existing distributions and practices. Many rights, particularly those associated with the Takings Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments, have been so understood for many years.⁷³ But this is hardly a challenge to rights. Whether rights *do* have this function depends not on their status as rights but on what, particularly, rights are. And whether rights *should* protect existing distributions and practices cannot be decided in the abstract. Such protection is not always a bad idea. Whether it is justified depends on the appropriate weight to be given to the interests in stability and expectations, and on the merits of those distributions and practices. This is a complex matter that cannot be resolved a priori.

D. *Confusions and Misconceptions*

Despite the various partial truths in the attack on rights, there is a pervasive problem in that attack: Rights need not have the functions or consequences that they are alleged to have. The challenge to rights is properly directed against certain kinds of rights, not against rights in general. At most, the challenge to rights creates a contingent, partial warning about the appropriate content of rights and about the possibly harmful role of certain social institutions safeguarding rights. It is not what it purports to be, that is, a general claim about rights as a social institution. More specifically, the current devaluation of rights suffers from two serious problems. Both of these problems are products of some pervasive confusions.

Many critics of rights complain about what they see as a cultural shift from the 1960s, in which rights have crowded out responsibilities.⁷⁴ Simply as a matter of cultural description, the claim is far too crude. In some areas, including for example sexuality, it is plausible to say that a belief in private autonomy has

⁷³ See, e.g., RICHARD A. EPSTEIN, *TAKINGS* (1985); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

⁷⁴ See, e.g., GLENDON, *supra* note 1, at 1-17.

prevailed at the expense of a commitment to responsible behavior. But in other areas, the last few decades have witnessed an increase in social and legal responsibilities and a decreased commitment to rights. Consider, for example, cigarette smoking; corporate misconduct; air and water pollution; sexual harassment; and racist and sexist speech. In all of these areas, people who were formerly autonomous, and free to act in accordance with their own claims of right, are now subject to socially and sometimes legally enforced responsibilities. We have seen, in the last few decades, a redefinition of areas of right and a redefinition of areas of responsibility. I do not intend to celebrate these redefinitions, but only to suggest that purely as a matter of description, there has been no general shift from responsibility to rights.

Now turn from description to evaluation. The first problem is that whether rights are associated with excessive individualism, with excessive self-interest, or with anything else that is excessive depends on what rights specifically are. It should go without saying that rights are designed to protect human beings,⁷⁵ each of whom is an individual; but this cannot be a complaint of the critics of rights. Instead, many such critics seem to object that rights are associated with pernicious forms of individualism and self-interestedness. But this is not the case. To take two examples, the right to subsistence and the right to environmental quality—whether or not these should be codified in law—do not seem to promote selfishness. Both rights might be products of altruism, and may promote altruism and even feelings of responsibility. In fact many rights are designed to encourage precisely the forms of deliberation and communal interaction that critics favor. A wide range of protected interests count as “rights,” and the critics fail to make some important distinctions among diverse legal instruments.

The second problem is that the critics seem to think that the explosion of “rights talk” accounts for certain social failures, including failures of social responsibility. This is far too simple a claim. In fact, the opposite is as likely true—failures of social responsibility give rise to assertions of rights. In any case, the claimed association depends on empirical claims that are highly speculative and that lack clear support.

⁷⁵ I mean to put to one side and not to assess the question whether nonhuman creatures or objects should have rights, for the ultimate protection of human beings or for other reasons.

1. Diverse Rights

The two problems can be brought together if we attend to a familiar conceptual confusion.⁷⁶ Often critics write as if rights and responsibilities are opposed, or as if those who favor the former are completely different from those who favor the latter. As they see it, rights are individual, atomistic, selfish, crude, licentious, antisocial, and associated with the Warren Court. Responsibilities, on the other hand, are seen as collective, social, altruistic, nuanced, and associated with appropriate or traditional values. But this understanding is quite inadequate, for some rights lack the characteristics claimed for them, and other rights have the features associated with responsibilities.⁷⁷

For example, the right to freedom of speech may be owned by individuals, but it is a precondition for a highly social process, that of democratic deliberation. That right keeps open the channels of communication; it is emphatically communal in character. It ensures a *sine quo non* of sociality, an opportunity for people to speak with one other. Indeed, everyone who owns a speech right does so partly so as to contribute to the collectivity; it is this fact that explains the government's inability to "buy" speech rights even when a speaker would like to sell.⁷⁸ So too, the right to associational freedom is hardly individualistic. It is meant precisely to protect collective action and sociality.

Consider another time-honored liberal right, the right to a jury trial. This right is far from atomistic. Quite the contrary, it ensures a role for the community in adjudicative proceedings.⁷⁹ The right to religious liberty protects individuals (surely this does not count against the right), but it is also designed to protect the collectivity by ensuring social peace and thus by making democracy possible.⁸⁰ The right to vote, also owned by individuals, protects

76 A related confusion is embodied in the notion that rights posit a wholly autonomous, asocial "subject." Rights do no such thing. They are political instruments with no necessary metaphysical foundation.

77 See, e.g., Akhil R. Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131, 1201-10 (1991) (discussing the nonatomistic character of most rights at the founding period).

78 See, e.g., Cass R. Sunstein, *Government Control of Information*, 79 CAL. L. REV. 889, 914-16 (1986).

79 See Amar, *supra* note 77, at 1182-99.

80 See Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY 19 (Jon Elster & Rune Slagstad eds., 1988).

collective processes of governance. The right to be free from racial discrimination, protected against the states by the Fourteenth Amendment, is not antisocial. It ensures communal decency by protecting against the exclusion of subordinated groups. The right to be free from racial discrimination also guarantees a form of sociality.

Even the right to property can be understood not as a method for protecting self-interested acquisition (though it does have this function), but instead as an indispensable condition for citizenship, a collective goal and a collective good.⁸¹ If property can be taken at the government's whim, people are not likely to have the independence and the security that will permit them to criticize the government openly. More generally, we have seen that the right to private property solves a collective action problem faced by everyone in the state of nature, and in that sense, supplies what is both technically and nontechnically described as a collective good.

At this stage we can make the Hohfeldian⁸² point too often neglected by many critics of rights: In an important sense, rights and duties imply each other.⁸³ They are correlative. To say that someone has a right is usually to say that someone else has a duty. If Jones has a right to property, other people have a duty not to trespass on what Jones owns. If Smith has a right to be free from racial discrimination in employment, employers have a duty to ignore the color of Smith's skin. The right not to be murdered imposes a duty on people not to take the lives of others. Rights are not opposed to responsibilities. On the contrary, rights *are* responsibilities.

Not only do rights create duties, but the imposition of a duty also serves to create a right. If X is under a duty not to discriminate or not to trespass, people dealing with X possess certain rights. Most duties create a correlative right. Return, in this connection, to one of Professor Glendon's special concerns—the question whether we should create a duty to help others. That duty seems to be a classic communal responsibility, far removed from the legalistic world of rights. But appearances are misleading.

81 See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 1-30 (1988) (discussing the diverse functions of the right to property).

82 See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

83 A qualification emerges from RAZ, *supra* note 13, at 170-71, but the qualification does not seem important to my purposes here.

Indeed, Glendon's discussion comes close to an argument not only for a new duty, but also for a new right: a right to assistance, to be granted to vulnerable people and held by them against both other people and the government. Glendon herself refers to Franklin Roosevelt's proposed "second bill of rights," which included the right to adequate food and clothing, to a decent home, to adequate medical care, to good education, and to a useful and remunerative job.⁸⁴ Of course these are rights and their invocation represents a form of "rights talk," but they certainly and emphatically reflect a sense of collective responsibility.⁸⁵ They are not associated with self-interest, or at least not (in any simple sense) with the self-interest of those who must respect them.

It is perfectly possible that any such second bill of rights would be a bad idea. That is not my point. No one should deny that the proliferation of rights may be unfortunate or worse; too many rights may even contradict one another. The new Eastern European Constitutions are an unfortunate illustration.⁸⁶ I am not attempting to defend any particular system or set of rights, but instead suggesting something far simpler: Since rights tend to imply responsibilities simply as a matter of logic, and vice versa, it is not easy to understand the claim that American law needs responsibilities rather than or in addition to rights.

The claimed opposition between rights and responsibilities faces some additional difficulties as well. Rights of the most traditional sort, including property, may be the necessary condition for enabling a sense of collective responsibility to flourish. People without rights to their property may be so dependent on official will that they cannot exercise their responsibilities as citizens. Moreover, a principal characteristic of totalitarian states is the endless cataloguing of responsibilities owed by citizens to the state. The Soviet Constitution was an ignoble example. For example, that Constitution created a duty "to make thrifty use of the

84 President Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41 (Samuel I. Rosenman ed., 1969); see also GLENDON, *supra* note 1, at 104.

85 The suggestion that responsibility should be exercised instead of legal compulsion is taken up in Part III *infra*.

86 See Cass R. Sunstein, *Something Old, Something New*, E. EUR. CONST. REV., Spring 1992, at 18.

people's wealth,"⁸⁷ "to preserve and protect socialist property,"⁸⁸ to "work conscientiously,"⁸⁹ and "to concern themselves with the upbringing of children."⁹⁰ The Soviet Constitution offers a cautionary note against enthusiasm for responsibilities, at least if these are to be treated as an explicit, legally codified concern of the state (putting the Hohfeldian point to one side).⁹¹

These points suggest a broad conclusion about the recent criticism of rights. Those who believe in more reflective public deliberation are making an important point; we have far too little such deliberation, and part of the problem involves unduly simple arguments based on alleged rights. But the critics should not claim to be making so general a criticism of rights. Instead, they should offer a fine-grained account allowing people to identify both the sorts of interests that cannot be intruded on without special justification and the sorts of institutions that should protect various interests. Surely such an inquiry will justify a redescription of certain interests in terms that have nothing to do with rights or that treats rights not as axiomatic but as the outcomes of a complex set of judgments. For example, consider the problems of environmental protection and plant closings.⁹² But it is equally certain that many "rights" will survive in their current state.

2. Constitutional Rights and Judicial Review

It is important to insist that such an inquiry will suggest that the category of human rights is not coextensive with the category of constitutional rights or the category of judicially enforceable rights. Constitutional rights qualify as such for special and partly contingent reasons, having to do with institutional issues and with the reasons for distrust of ordinary politics in the particular nation.⁹³ Constitutional rights are usually and rightly thought to have a "vertical" dimension, allocating power between the government and the individual. But they also have an important "horizontal" dimension, allocating power among different branches of government by, for example, granting authority to the judiciary

87 *Id.* (Article 61).

88 *Id.*

89 *Id.* (Article 60).

90 *Id.* (Article 65).

91 *See id.* at 18-19.

92 *See* GLENDON, *supra* note 1, at 29-30, 111-12.

93 *See* Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 *TEX. L. REV.* 305 (1993).

that might otherwise be exercised by the legislature. The horizontal allocation requires some justification in terms of the different capacities of different institutions.

Many critics are speaking to the issue of institutional character, complaining about courts, not about rights.⁹⁴ But there is often a solid justification for a constitutional and also judicial role in the protection of rights. Under plausible assumptions, the institution of constitutional rights will survive as an invaluable one, especially to the extent that such rights can safeguard interests that are at excessive risk in ordinary politics. It is also likely, in many imaginable situations, that the institution of judicial review will survive as well.⁹⁵ Many prominent critics of judicial review are making conceivably but only contingently convincing empirical claims about the likely inclinations and character of judges.⁹⁶ They are not doing what they purport to be doing, that is, showing a general incompatibility between judicially vindicated constitutional rights and democracy. Often such rights promote democracy, and are not antithetical to it.⁹⁷ The attack on an excessive judicial role should be separated from the attack on rights as such.

3. The Legal System and Its Pathologies

Perhaps these basic arguments would not entirely satisfy many critics of rights. Perhaps they would want to characterize the problem as the constant resort to the legal system as a remedy for social ills, rather than the use of public deliberative processes and, best of all, of self-help and nongovernmental institutions. In the last generation we have seen quite absurd claims of right in cases involving the law of tort and the law of the Constitution. Is it unconstitutional—invasive of right—for government to require people to wear helmets when they ride motorcycles?⁹⁸ Many people think that such questions are rhetorical and that such cases give rights a bad name.

94 See, e.g., WALDRON, *supra* note 81.

95 There is of course a difference between constitutional rights and judicially enforceable constitutional rights; some constitutional rights might be enforceable only through politics.

96 See WALDRON, *supra* note 81.

97 The classic statement is JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

98 See, e.g., *Picou v. Gillum*, 874 F.2d 1519 (11th Cir.), *cert. denied*, 493 U.S. 920 (1989).

It may therefore be the peculiar interaction between American individualism, American law, and "rights talk," rather than rights themselves, with which critics are most concerned. On this view, the problem is not so much rights in general, but rights claims that deny obligations to others, that ignore the possibility that private actors can and should take care of themselves, and that are associated with immaturity, personal self-interest, hedonism, and the short term. To the extent that the critics seek to revive a richer and more differentiated kind of public debate and to emphasize the need for greater attention to the possibilities and obligations of private organizations, they are entirely persuasive. The mind-numbingly familiar oppositions of matched legalistic rights—pro-life versus pro-choice, associational freedom versus nondiscrimination, business autonomy versus employment rights—are part of the culture of the soundbite, which provides no help to those seeking to think through or to assist people with complex realities.

But it is important to sort out the relationships between "rights talk" and "the impoverishment of political discourse."⁹⁹ Some critics suggest that political discourse is in significant part a creature of what happens with courts and law.¹⁰⁰ But this is an empirical claim, and it may not be true. To be sure, political discourse is often impoverished, and correctives for the current situation should be a principal concern of current reformers. This is a central issue for modern democracies. If one looks at the prominent places for political discussion—say, the television and most popular radio stations—one will find little deliberation and little serious attention to public issues, and such attention as there is appears sensationalistic, prurient, sentimental, and banal.¹⁰¹ Sometimes the banality consists of reflexive claims about rights.

Important questions, however, remain: To what extent can this phenomenon be attributed to "rights talk" within the judiciary and the legal system? By what mechanism has "rights talk" produced problems in public deliberation? Can an association be shown? Careful work has shown that many arguments about the social effects of judicial decisions tend to be overstated, specula-

99 GLENDON, *supra* note 1, at x.

100 See, e.g., *id.* at 87, 105.

101 See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993). For a helpful discussion of American traditions in this respect, see JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON* 1-39 (1994).

tive, or without much support.¹⁰² The current situation—of inadequate democratic deliberation—is not clearly traceable to judicial protection of rights. On the contrary, it is far more plausibly a product of the system of education and the demands of the broadcasting market.¹⁰³ If the critics' concern is with impoverished political discourse, they might focus on the incentives, norms, and practices of those who impart political information—on their responsibilities, and on the legal framework, or rights, under which they undertake those responsibilities.

There is enormous room for reform here, drawing on experience in other nations and involving changes both in private sector practices and in the regulatory system governing the media.¹⁰⁴ For example, the government might offer larger subsidies to high quality broadcasting or encourage more attention to public issues through licensing policies. It might offer guidelines or recommendations designed to work against the culture of the soundbite. It might attempt to encourage opinion polls that involve public deliberation rather than quick and often ill-considered individual reactions.¹⁰⁵ All this seems plausible. What I am questioning is the suggestion that "rights" are a major culprit here. On the contrary, rights of some sort are likely to be an important part of any effort to improve public deliberation.

III. RIGHTS AND RESPONSIBILITIES REVISITED

I have suggested that many of the most enthusiastic and vivid challenges to rights are based on the idea that the American emphasis on rights, and perhaps especially on legal rights, has caused a weakened sense of social responsibility. The Hohfeldian point—that rights impose responsibilities, while responsibilities create rights—severely complicates this idea. But putting that point to one side, we should acknowledge that an insistence on people's rights ought not to disparage people's responsibilities. This idea could perhaps qualify as a twenty-first-century analogue to the Ninth Amendment.¹⁰⁶ Certainly we should keep in mind the important point that people may have a right to do something that

102 See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1990).

103 See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 44-82 (1994).

104 See *id.* at 80-82.

105 See JAMES FISHKIN, *DEMOCRACY AND DELIBERATION* (1991).

106 "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

they would be irresponsible to do. Or to put things another way, it may be very wrong to exercise one's rights.

Indeed, it is unquestionably objectionable to engage in much conduct that one has a right to do. Some platitudes are worth repeating: We may have a right to say offensive things, even grotesquely offensive things, but most people do not and should not exercise that right very often. People may have a right to treat each other in many disrespectful ways, but disrespectful treatment is not for that reason acceptable. An extremely wealthy person has a right to keep all his money (after taxes), and to give none of it to charity, but selfishness and hoarding are not to be applauded. A lawyer has a right to refuse to do pro bono work, but lawyers should generally do pro bono work.

The point bears particularly on the controversial issues of pregnancy and abortion. Under the Constitution, women have a right to have abortions. But it is important to insist that this is a right that ought not to be exercised, or to have to be exercised, very often, and that in a society with 1.5 million abortions per year, something is extremely wrong. Even people who favor the abortion right ought to be clear that an abortion is a tragic event and that steps should be taken to make abortions rare. In the aftermath of the Supreme Court's refusal to overrule *Roe v. Wade*,¹⁰⁷ it is perfectly appropriate for people on all sides of the issue to shift public debate in the direction of ways to minimize the incidence of abortion. Efforts to discourage pregnancies that will result in abortions, and even to discourage abortion itself through moral suasion, should not, as a general rule, be taken as unfortunate interferences with a "right," even if some such efforts might be rejected as punitive or discriminatory.

However we may think about this heated subject, the example demonstrates the basic point that a nation ought not to say that because people have a legal right to do something, society and its various components have no business complaining about people who exercise that right, or engaging in moral disapproval of people who do what they have a right to do. On the contrary, a large part of moral education consists of the inculcation of norms and values that discourage harmful or offensive behavior even though it is not unlawful. One possible pathology of a culture of rights is that people will think that because they have a right to do X, they cannot be criticized or blamed for doing X. This conclusion ap-

107 See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

pears to have become common with respect to free speech, where speakers sometimes complain that it is objectionable even to challenge them for engaging in offensive or degrading speech.¹⁰⁸ A well-functioning culture distinguishes legal censure from moral censure. It allows people the freedom to do many things that are properly criticized on moral grounds.

The point bears on recent claims by Justice Thomas and other critics of rights. Justice Thomas is concerned that an emphasis on what people have a right to do has produced a kind of moral relativism and standardlessness where right-holders insist on their rights and do not pause to evaluate whether their conduct is valuable to themselves or to society. Justice Thomas is particularly troubled that the grant of rights can make people, and especially disadvantaged people, think of themselves as victims, whose basic goal is to assert their claims and to seek protection from government. On this view, the recognition of rights can generate forms of dependency, self-pity, and lack of initiative that are extremely damaging to rights-holders themselves. Ideas of this sort have also played a role in recent arguments, sometimes made by self-proclaimed feminists countering certain prominent feminist claims—with the critics urging that the emphasis on, for example, rights against sexual harassment and pornography has encouraged women to join a cult of victimhood, in which equality and self-respect become all the more difficult to obtain.¹⁰⁹

The fear of an association between the recognition of legal rights and failures in responsibility and self-help seems plausible in many settings. People who lack rights to desirable goods may—from fear, self-interest, or sheer desperation—engage in socially productive conduct. (Of course they may engage in unproductive and even dangerous conduct instead.) For example, there is a familiar and wholly reasonable fear that a “right to welfare” could discourage productive labor. It is possible too that people who think of themselves as victims, needing and enforcing rights, will fail to engage in activity that is ultimately rewarding to themselves and to society as a whole.

108 For example, some people have claimed “censorship” in response to Senator Paul Simon’s attempts to monitor televised violence. See, e.g., Raymond L. Fischer, *Is It Possible to Regulate Television Violence?*, USA TODAY, July, 1994 (Magazine), at 72 (describing the ACLU’s position that “violent speech has been protected by the First Amendment for more than 50 years” and media organizations’ opposition to the “momentum building in Washington for censorship as a solution to violence”).

109 See SOMMERS, *supra* note 1; STROSSEN, *supra* note 24, at 119-40, 179-215.

These claims are, however, empirical ones, and they are quite speculative. They cannot be credited in the abstract. Whether they are true, and in what settings they are true, requires much more work than has been supplied thus far. Indeed, the converse phenomenon may occur, with recipients of rights conceiving of themselves as anything but victims and helpless. Perhaps people who are given rights—to own property, to be free from segregation, to be free from sexual harassment—will be more likely to conceive of themselves as receiving and deserving equal respect. It is surely plausible that the recognition of rights often converts people from victims into citizens. Certainly a major point of rights guarantee is to do precisely this.

In an important respect, moreover, the critique of rights in favor of responsibilities seems to have things backward. Rights claims are often a response to a failure of social responsibility rather than a cause of individual irresponsibility. We might look again at the abortion problem, which, for many, exemplifies the hazards of rights-based approaches.¹¹⁰ To be sure, it does seem inadequate to think of abortion in terms of a right to “privacy”—a word that does not appear in the Constitution at all and that in any case fails to come to grips with the abortion question. To oppose the abstract “right to life” to the equally abstract “right to choose” is entirely unhelpful. As many people have suggested, a social goal might be not to protect an abstract right to choose, but instead to develop methods to protect unborn life while simultaneously providing help and support for mothers.¹¹¹

If we acknowledge all this, how, if at all, might the abortion right be justified? The answer has everything to do with social context and with failures of social responsibility. Under conditions of equality on the basis of sex and without widespread poverty, the argument for an abortion right would be far weaker.¹¹² Surely it is correct to say that in a society in which duties to the vulnerable were taken seriously, the case for a right to abortion would be much less plausible than it now is. In such a society, men as well as women would be required (by social norms and perhaps by

110 See, e.g., GLENDON, *supra* note 1, at 58-66, 164-68.

111 See, e.g., MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Michael W. McConnell, *Religion and the Search for a Principled Middle Ground on Abortion*, 92 MICH. L. REV. 1893 (1994) (reviewing ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993)).

112 This is one lesson of Glendon's work, though it is not a lesson that Glendon draws herself. See GLENDON, *supra* note 111.

law) to devote their bodies to the protection of their children. In such a society, women who need help would get help—before, during, and after pregnancy.¹¹³ In such a society, the existence of social assistance would argue against the right to abortion, by making child-bearing and child-rearing less difficult and less a source of inequality than it now is for many women.

Most important, in such a society restrictions on abortion would be based on a general and neutral form of compassion for the vulnerable, rather than the now pervasive desire—prominent, though (I emphasize) by no means universal, in the pro-life movement—to control women's reproductive capacities, and by means of that control to prescribe traditional gender rules through law, and in that way to continue a system of discrimination that is based on sex.

I have described a society in which any right to abortion might seem puzzling or even unnecessary. This is not, of course, the society in which we live. If one looks at the context in which restrictions on abortion take place—at their real purposes and their real effects—the abortion right is most plausibly rooted not in privacy but in the right to equality on the basis of sex. I cannot fully support the claim here,¹¹⁴ but a few points, bearing on the nature of rights claims in general, may be suggestive.

Current law does not compel men to devote their bodies to the protection of other people, even if life is at stake, and even if men are responsible for the very existence of those people. Many studies have shown that current restrictions on abortion could not be enacted without the active support of those who believe that such restrictions are an important means of reasserting traditional gender roles.¹¹⁵ Of course such support is not barred by any legitimate theory of democracy, but it suggests that the relevant laws are in fact founded in significant part (though certainly not universally) in prejudice. And under current conditions, women who need social assistance or (at least equally important) help from fathers do not get nearly enough—not merely during pregnancy, but before and after as well.

If this is the case, the very existence of the abortion right can be seen as a response to a failure of social responsibility. The

113 See *id.* at 53-58 (discussing the European practice of care for pregnant women).

114 See SUNSTEIN, *supra* note 60, at 270-85, for a more complete discussion of this claim.

115 See, e.g., KRISTEN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

right cannot be justified in the abstract—its existence owes everything to context. In this lies a large lesson. Rights often emerge precisely because of the refusal of private and public institutions to recognize and to carry out their duties. When the environment is badly degraded, when the most vulnerable people are left to fend for themselves, or when children are at risk, it should be unsurprising to find vigorous if apparently odd claims for “rights.” The claims for a right to clean air and water, to food, to a decent place to live, to a safe workplace, to children’s rights, or to “free reproductive choice”—all these must be understood in their context, as responses to failures of social responsibility.

Critics of rights are sometimes persuasive in asserting that rights-based arguments can obscure the problems at hand. It is very plausible to think that vulnerable people should not have a legally enforceable right to freedom from everything to which they are vulnerable, in part because such a right could impair responsibility. It is very plausible to think that instead of emphasizing a right to abortion, we should alter the social conditions that make abortion attractive or necessary. Arguments on behalf of rights can simplify complex issues, beg important questions, and treat issues involving trade-offs among competing goals as soluble through easy formulas. But it would be unfortunate if plausible objections to rights-based thinking were taken as a reason to ignore or to disparage those who are proclaiming their rights, rather than to improve the conditions that have made it necessary for people to resort to proclamations of rights in the first place.

IV. CONCLUSION

There have been many different strands in recent critiques of rights. Some of those strands point to legitimate concerns. We can identify rights claims that are genuinely absurd, and it is important to acknowledge that a society pervaded by rights may be pathological. My basic point here is that the category of rights is extremely broad and that for this reason, no general critique of rights will make much sense. Those who blame “rights” have misdescribed their real target. In the last generation, moreover, there has been no general shift from responsibilities to rights. Instead there have been multiple particular shifts in both directions.

Some rights are a precondition for social interaction. Rights are not opposed to responsibilities, at least not in any simple way; rights *are* responsibilities. Rights need not be associated with excessive self-interest or excessive individualism. The real question is

not whether we should have rights, but what rights we should have. Some of what I have discussed here bears on that question, but to make much progress on it, much more will have to be said about both values and facts. I conclude with the suggestion that we should cease discussing whether rights are desirable and cease opposing rights to responsibilities. We should embark instead on the more fine-grained task of deciding what categories of rights are appropriate in what settings.

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