

illustrating the broad ideas developed in them through examination of several concrete issues.

A. THE NOTION OF 'RIGHTS': ORIGINS AND RELATION TO 'DUTIES'

We here consider different understandings, historical and contemporary, of the notion of 'rights' and inquire whether rights have inherent implications for a society's moral, political and socio-economic order. For example, does rights rhetoric in a constitution and statutes, or in a dominant moral and political theory, point to an individualistic, communitarian, or other type of society? Does it necessarily assume certain institutional arrangements for government, such as a constitutional separation of powers and an independent judiciary?

The readings begin with brief descriptions of the evolution from earlier concepts of natural law and natural rights to contemporary notions of rights in domestic and international contexts.

BURNS WESTON, HUMAN RIGHTS 20 New Encyclopedia Britannica (15th ed 1992)

... The expression 'human rights' is relatively new, having come into everyday parlance only since World War II and the founding of the United Nations in 1945. It replaces the phrase 'natural rights', which fell into disfavour in part because the concept of natural law (to which it was intimately linked) had become a matter of great controversy, and the later phrase 'the rights of Man' ...

... It was primarily for the 17th and 18th centuries, however, to elaborate upon this modernist conception of natural law as meaning or implying natural rights. The scientific and intellectual achievements of the 17th century ... encouraged a belief in natural law and universal order; and during the 18th century, the so-called Age of Enlightenment, a growing confidence in human reason and in the perfectability of human affairs led to its more comprehensive expression. Particularly to be noted are the writings of the 17th-century English philosopher John Locke—arguably the most important natural law theorist of modern times—and the works of the 18th-century Philosophes centred mainly in Paris, including Montesquieu, Voltaire, and Jean-Jacques Rousseau. Locke argued in detail, mainly in writings associated with the Revolution of 1688 (the Glorious Revolution), that certain rights self-evidently pertain to individuals as human beings (because they existed in 'the state of nature' before humankind entered civil society); that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property; that, upon entering civil society (pursuant to a 'social contract'),

humankind surrendered to the state only the right to enforce these natural rights, not the rights themselves; and that the state's failure to secure these reserved natural rights (the state itself being under contract to safeguard the interests of its members) gives rise to a right to responsible, popular revolution. The Philosophes, building on Locke and others and embracing many and varied currents of thought with a common supreme faith in reason, vigorously attacked religious and scientific dogmatism, intolerance, censorship, and social-economic restraints. They sought to discover and act upon universally valid principles harmoniously governing nature, humanity, and society, including the theory of the inalienable 'rights of Man' that became their fundamental ethical and social gospel.

All this liberal intellectual ferment had, not surprisingly, great influence on the Western world of the late 18th and early 19th centuries. Together with the practical example of England's Revolution of 1688 and the resulting Bill of Rights, it provided the rationale for the wave of revolutionary agitation that then swept the West, most notably in North America and France. Thomas Jefferson, who had studied Locke and Montesquieu and who asserted that his countrymen were a 'free people claiming their rights as derived from the laws of nature and not as the gift of their Chief Magistrate', gave poetic eloquence to the plain prose of the 17th century in the Declaration of Independence proclaimed by the 13 American Colonies on July 4, 1776: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness'. Similarly, the Marquis de Lafayette ... imitated the pronouncements of the English and American revolutions in the [French] Declaration of the Rights of Man and of the Citizen of August 26, 1789. Insisting that 'men are born and remain free and equal in rights', the declaration proclaims that 'the aim of every political association is the preservation of the natural and imprescriptible rights of man', identifies these rights as 'Liberty, Property, Safety and Resistance to Oppression', and defines 'liberty' so as to include the right to free speech, freedom of association, religious freedom, and freedom from arbitrary arrest and confinement (as if anticipating the Bill of Rights added in 1791 to the Constitution of the United States of 1787).

In sum, the idea of human rights, called by another name, played a key role in the late 18th- and early 19th-century struggles against political absolutism. It was, indeed, the failure of rulers to respect the principles of freedom and equality, which had been central to natural law philosophy almost from the beginning, that was responsible for this development ...

... [B]ecause they were conceived in essentially absolutist—'inalienable', 'unalterable', 'eternal'—terms, natural rights were found increasingly to come into conflict with one another. Most importantly, the doctrine of natural rights came under powerful philosophical and political attack from both the right and the left.

In England, for example, conservatives Edmund Burke and David Hume united with liberal Jeremy Bentham in condemning the doctrine, the former out of fear that public affirmation of natural rights would lead to social upheaval, the latter out of concern lest declarations and proclamations of natural rights substitute for effective legislation. In his *Reflections on the Revolution in France* (1790), Burke, a believer in natural law who nonetheless denied that the 'rights of Man' could be

derived from it, criticized the drafters of the Declaration of the Rights of Man and of the Citizen for proclaiming the 'monstrous fiction' of human equality, which, he argued, serves but to inspire 'false ideas and vain expectations in men destined to travel in the obscure walk of laborious life'. Bentham, one of the founders of Utilitarianism and a nonbeliever, was no less scornful. 'Rights', he wrote, 'is the child of law; from real law come real rights; but from imaginary laws, from "law of nature", come imaginary rights. . . . Natural rights is simple nonsense; natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts'. Hume agreed with Bentham: natural law and natural rights, he insisted, are unreal metaphysical phenomena.

This assault upon natural law and natural rights, thus begun during the late 18th century, both intensified and broadened during the 19th and early 20th centuries. John Stuart Mill, despite his vigorous defense of liberty, proclaimed that rights ultimately are founded on utility. The German jurist Friedrich Karl von Savigny, England's Sir Henry Maine, and other historicalists emphasized that rights are a function of cultural and environmental variables unique to particular communities. And the jurist John Austin and the philosopher Ludwig Wittgenstein insisted, respectively, that the only law is 'the command of the sovereign' (a phrase of Thomas Hobbes) and that the only truth is that which can be established by verifiable experience. By World War I, there were scarcely any theorists who would or could defend the 'rights of Man' along the lines of natural law. . . .

Yet, though the heyday of natural rights proved short, the idea of human rights nonetheless endured in one form or another. The abolition of slavery, factory legislation, popular education, trade unionism, the universal suffrage movement—these and other examples of 19th-century reformist impulse afford ample evidence that the idea was not to be extinguished even if its transempirical derivation had become a matter of general skepticism. But it was not until the rise and fall of Nazi Germany that the idea of rights—human rights—came truly into its own. . . .

To say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope—which is to say, their definition. Some of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content—these and kindred issues are matters of ongoing debate and likely will remain so as long as there exist contending approaches to public order and scarcities among resources.

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DAVID SIDORSKY, CONTEMPORARY REINTERPRETATIONS OF THE CONCEPT OF HUMAN RIGHTS

in Sidorsky (ed.), *Essays on Human Rights* (1979), at 89

...

In a context in which escalating rhetorical support for human rights as a cause célèbre coexists with systematic abuse of many of these rights, it is not surprising that the very meaning of human rights has become contested. Radically different definitions and interpretations of human rights have been proposed, each of which claims the banner of human rights. . . .

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In turning to the contemporary interpretations and the current uses of the concept of human rights, even before examining the ways in which the idea is contested, an appropriate starting point is the recognition that the term seems to be fulfilling two different, although consistent, functions. On the one hand, the phrase *universal human rights* is used to assert that universal norms or standards are applicable to all human societies. This assertion has its roots in ancient ideas of universal justice and in medieval notions of natural law. . . .

On the other hand, the idea of human rights is used to affirm that all individuals, solely by virtue of being human, have moral rights which no society or state should deny. This idea has its classic source in seventeenth- and eighteenth-century theories of natural rights. . . .

...

The Theory of Natural Rights

The theory of natural rights had a major influence in the development of the political self-consciousness of modern Western society. The idea of natural rights as the sole justification for any political society was a challenge to all established political authority. From the perspective of the theory of natural rights, all the recognized theories of legitimacy—the divine rights of kings, the pragmatic necessity of stable political rule, conformity to divine or natural law or rootedness in historical and institutional traditions—were inadequate. A political regime was justified only if it satisfied the natural rights of its citizens.

The current function of the theory of human rights, unlike the doctrine of natural rights, is not primarily that of serving as a principle of legitimacy within a particular national state. It has become part of an effort to develop standards of achievement with respect to citizens' rights within an international community. Yet it is significant in this context to recognize the continuity between the traditional theory of natural rights and recent formulations of human rights. Six elements of that continuity merit special examination.

First, it was characteristic of theorists of natural rights to develop a list of specific rights. Although these rights allegedly derived from the universal and evident desires of all men, the content of various bills or declarations of rights differed. The appearance or omission of a specified right, like the right to property, was an index of the importance given in social policy to the defense or realization of that right. This tradition has been adopted in the theory of human rights and

has resulted, for example, in the articulation of the more extended list of thirty rights that mark the Universal Declaration of Human Rights.

Second, in all traditional theories of natural rights, such rights were ascribed only to human beings . . .

The further implication is that any human being, solely by virtue of his potential ability to exercise rational choice, had rights. It was in this sense that the theory of natural rights proposed the equality of all men. Since having natural rights was intrinsically connected to being a human being, there was a basis for the later transition from the phraseology of *natural rights* to that of *human rights*.

Third, a major characterization of natural rights derived from this belief that rights are the properties of persons capable of exercising rational choice. For, when men asserted their natural rights they were expressing their autonomy as individuals. Hence, the model or pattern for the exercise of natural rights became the protection of the sphere of the autonomous individual from arbitrary incursion by the state or other coercive association. The listing of the right to life, for example, did not involve a commitment to the extension or universalization of health care or to actions for shaping a safer environment but to a rule of law that would restrain arbitrary acts of violence, especially those of governmental authorities, against individuals. Similarly, the natural right to liberty did not refer to support of policies that would enhance self-realization through the universalization of education, but it did require the legal protection of individuals against arbitrary imprisonment.

Since the natural rights of men were bound intrinsically to their capacity to exercise rational choice as autonomous beings, the list of natural rights comprised what have been termed negative freedoms, rather than positive liberty, that is, the freedoms that protect the individual *from* the invasion of his domain of selfhood or privacy rather than the freedom of the individual or group *to* achieve its purposes or ideals. This stress is evident in the many detailed lists of the declarations or bills or rights that proliferated in the late eighteenth and early nineteenth centuries. The inclusion of a number of human rights that relate to social and economic development is a point of difference between the classic theory of natural rights and the theory that led to the Universal Declaration of Human Rights. That inclusion, and the priority to be assigned to social and economic rights, has become the single most contested item in discussions of contemporary theory of human rights.

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Fifth, natural rights, as the adjective shows, derive from the order of *nature* or from the nature of 'natural man' but not from society or history. Indeed, as truths of nature they were held to be rationally self-evident: that is, if the meaning of the term is understood, then all rational beings could intuitively know that men had natural rights. In this view, the recognition that the theory of natural rights had its genesis in the rise to power of the middle class no more shows the relativity of natural rights than the fact that the calculus was discovered in seventeenth-century Germany or England makes its truth relative to that place and time. While rational intuition is no longer relevant for the contemporary views of human rights, the belief that rights are universal, and not relative, to particular social or historical

culture has become, if anything, even more important in their use as international norms.

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NOTE

The following readings describe their authors' understandings of basic characteristics of rights in contemporary legal and political discourse and argument. The brief excerpt from Eugene Kamenka distinguishes claims of rights from other types of claims. Duncan Kennedy analyzes rights discourse as it has evolved in a liberal political culture such as the United States. He is thus more attentive to the role of rights in adjudication than are most of the materials in this coursebook, which examine rights discourse in the framework not of judicial opinions but of broader political processes—advocacy and speeches, UN resolutions, committee reports, investigative missions, scholarly writings and so on. Nonetheless, the analysis and critique of rights in Kennedy's book inform rights discourse throughout the international human rights movement as well. In the two readings that follow, Cass Sunstein and Karl Klare respond in different ways to aspects of the broad 'critique of rights' that schools of thought and groups throughout the world have developed over recent decades.

Ideas in these readings are central to grasping the special characteristics, strengths and weaknesses of a movement based on rights, whether rights language figures in broad political debates or in the opinions of courts.

EUGENE KAMENKA, HUMAN RIGHTS, PEOPLES' RIGHTS

in James Crawford (ed.), *The Rights of Peoples* (1988), at 127

Rights are claims that have achieved a special kind of endorsement or success: legal rights by a legal system; human rights by widespread sentiment or an international order. All rights arise in specific historical circumstances. They are claims made, conceded or granted by people who are themselves historically and socially shaped. They are asserted by people on their own behalf or as perceived and endorsed implications of specific historical traditions, institutions and arrangements or of a historically conditioned theory of human needs and human aspirations, or of a human conception of a Divine plan and purpose. In objective fact as opposed to (some) subjective feeling, they are neither eternal nor inalienable, neither prior to society or societies nor independent of them. Some such rights can be singled out, and they often are singled out, as social ideals, as goals to strive toward. But even as such, they cannot be divorced from social content and context.

Claims presented as rights are claims that are often, perhaps usually, presented as having a special kind of importance, urgency, universality, or endorsement that makes them more than disparate or simply subjective demands. Their success is dependent on such endorsement—by a government or a legal system that has power to grant and protect such rights, by a tradition or institution whose

authority is accepted in those circles that recognize these claims as rights, by widespread social sentiment, regionally, nationally, or internationally.

Claims, whether presented as rights or not, conflict. So do the traditions, institutions and authorities that endorse the claim as a right. They conflict both with each other and, often, in their internal structure, implications and working out. . . .

The concept of human rights is no longer tied to belief in God or natural law in its classical sense. But it still seeks or claims a form of endorsement that transcends or pretends to transcend specific historical institutions and traditions, legal systems, governments, or national and even regional communities. Like moral claims more generally, it asserts in its own behalf moral and sometimes even logical priority—connection with the very concept (treated as morally loaded) of what it means to be a human being or a person, or of what it means to behave morally. These are questions on which moral philosophers do have a certain expertise, at least in seeing where the difficulties lie, and on which they, like ordinary people throughout the world, have long disagreed and continue to disagree.

DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION

(1997), at 305

[Kennedy, a leading scholar in the critical legal studies movement that started in the United States and spread to other countries, devotes part of his book to the examination and critique of rights. He is not directly concerned with the substance of rights—for example, whether a right to free speech should have broader or narrower boundaries—but rather with the discourse of rights itself, with the way in which advocates and courts argue and reason about rights. Thus Kennedy examines matters such as the assumptions made by courts and advocates about rights, the distinctive characteristics of rights rhetoric, and the types of reasoning (legal and other) that are explicitly or implicitly involved in the interpretation, elaboration and application of rights to given cases or contexts.]

These ideas, although rooted in this book in the American experience, bear directly on rights discourse in the international human rights movement. The ideas below figure in the responses by Karl Klare and Cass Sunstein to criticism of rights and rights rhetoric that appear in the next following materials.

Kennedy notes that rights 'play a central role in the American mode of political discourse'. He describes rights as 'mediators' between two elements or domains in that discourse: *value judgments*, which he describes as matters of preference, related to subjectivity of views and to 'philosophical' premises; and *factual judgments* (also referred to as *factoid*) that represent the domain of the scientific, the empirical, objective judgments.

A few excerpts from the chapters on rights follow.]

[I]t seems to me that in American political discourse [the ways of understanding the nature of rights] all presuppose a basic distinction between rights

argument and other kinds of normative argument. The point of an appeal to a right, the reason for making it, is that it *can't be reduced* to a mere 'value judgment' that one outcome is better than another. Yet it is possible to make rights arguments about matters that fall outside the domain commonly understood as factual, that is, about political or policy questions of how the government ought to act. In other words, rights are mediators between the domain of pure value judgments and the domain of factual judgments.

The word 'mediation' here means that reasoning from the right is understood to have properties from both sides of the divide: 'value' as in value judgment, but 'reasoning' as in 'logic', with the possibility of correctness. Rights reasoning, in short, allows you to be right about your value judgments, rather than just stating 'preferences', as in 'I prefer chocolate to vanilla ice cream'. The mediation is possible because rights are understood to have two crucial properties.

First, they are 'universal' in the sense that they derive from needs or values or preferences that every person shares or ought to share. For this reason, everyone does or ought to agree that they are desirable. This is the first aspect of rights as mediators: they follow from values but are neither arbitrary nor subjective because they are universal.

Second, they are 'factoid', in the sense that 'once you acknowledge the existence of the right, then you have to agree that its observance *requires* *x*, *y*, and *z*'. For example, everyone recognizes that the statement 'be good' is too vague to help resolve concrete conflicts, even though it is universal. But once we have derived a *right* from universal needs or values, it is understood to be possible to have a relatively objective, rational, determinate discussion of how it ought to be instantiated in social or legal rules.

I pointed out [earlier] that rights occupy an ambiguous status with respect to the distinction between rules and reasons for rules. 'Congress shall make no law abridging the freedom of speech' is an enacted rule of the legal system, but 'protecting freedom of speech' is a reason for adopting a rule, or for choosing one interpretation of a rule over another. In this second usage, the right is understood to be something that is outside and preexists legal reasoning.

The outside right is something that a person has even if the legal order doesn't recognize it and even if 'exercising' it is illegal. 'I have the right to engage in homosexual intercourse, even if it is forbidden by the sodomy statutes of every government in the universe'. Or 'slavery denies the right to personal freedom, which exists in spite of and above the law of slave states'.

The Constitution, and state and federal statutes, legalize some highly abstract outside rights, such as the right of free speech in the First Amendment or of property in the Fourteenth. Positive law also legalizes less abstract rights that are understood to derive from more abstract, but not enacted, outside rights. . . .

[Kennedy observes that these 'outside' rights, which preexist any incorporation of them into law (for example, the right not to be tortured by state officials exists whether or not the formal legal system incorporates it and thus makes it a

'legal' right), can be analogized to 'natural rights' in classical liberal political theory.

When a party to litigation makes a legal claim of right, other factors come into play, such as the 'duty of interpretive fidelity' of judges who are bound by the legal formulation of the right and have a duty to be faithful to it in their interpretation and application. The adjudication of constitutional rights brings all these problems together. When incorporated in a constitution, such as the First Amendment to the United States Constitution, constitutional rights 'are both legal rights embedded in and formed by legal argumentative practice (legal rules) and entities that "exist" prior to and outside the constitution'. Thus argument based on constitutional rights involves both 'legal argument (under a duty of interpretive fidelity) and legislative argument (appealing to the political values of the community)'. By 'legislative argument', Kennedy refers to the broad range of arguments based on preferences, values, and policies that are characteristically advanced by opposing parties and interests within the legislative political process.

Kennedy then discusses legal rights in legal reasoning. He notes that rights arguments 'are open to the same analysis of open texture of indeterminacy as legal argument in general'. He describes one of the ways in which the critique of legal rights collapses the distinction between rights-based argument and policy argument in general. For example, suppose that a claimant appeals to the right to free speech to urge a court to interpret some rule in a way that protects free speech. The court will frequently 'balance' the conflicting claims, perhaps the right to free speech and (with respect to sexually abusive speech in the workplace) the other party's right to a nonabusive workplace. What determines the balance struck by the court is not any logical chain of reasoning from the asserted right, or from two asserted conflicting rights, but the court's 'considering obviously open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability'.]

The upshot, when both sides are well represented, is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning, one proceeding from the plaintiff's rights and the other from the defendant's. Yes, the employer has property rights, but the picketers have free-speech rights. Yes, the harasser has free-speech rights, but the harassed has a right to be free of sex discrimination in the workplace. Yes, the landowner has the right to do whatever he wants on his land, but his neighbor has a right to be free from unreasonable interference. And each chain is open to an internal critique.

Sometimes the judge more or less arbitrarily endorses one side over the other; sometimes she throws in the towel and balances. The lesson of practice for the doubter is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence. The critique of legal rights reasoning becomes just a special case of the general critique of policy argument: once it is shown that the case requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than the 'subjective' or 'political' commitments of the judges, that are deciding the outcome.

...

People sometimes say, 'A critique of rights? But if you got rid of rights, then the state could do anything it wanted to you! What about the right of privacy? We wouldn't have any way to object to state intrusion!' They are just missing the point!

In the Western democracies, rights 'exist' in the sense that there are legal rules limiting what people can do to one another and limiting the executive and the legislature. The critique of rights recognizes the reality of rule-making, rule-following, and rule-enforcing behavior. It is about faith in the rational procedures through which legislators, adjudicators, or enforcers elaborate gaps, conflicts, and ambiguities in the 'text' of inside or outside rights.

There is nothing in the critique that might suggest a reduction in the rights of citizens vis-à-vis their governments. Having lost one's faith in rights discourse is perfectly consistent with, indeed often associated with, a passionate belief in radical expansion of citizen rights against the state. Moreover, loss of faith is consistent with advocacy of greatly increased tenant rights in dealings with landlords, as well as with the reverse, just as it is consistent with favoring more or less government control over abortion decisions. It is not about the question of how we ought to define rights but rather about how we should *feel about the discourse in which we claim them*.

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CASS SUNSTEIN, RIGHTS AND THEIR CRITICS

70 Notre Dame L. Rev. 727 (1995), at 730

[This article, though written with respect to ongoing debate about rights in the United States, bears also on the international discourse of rights. The author begins with six different categories of charges against rights (categories A-F), drawn from judicial opinions and from such critics (none of whom would individually employ the same six categories) as Professors Mary Ann Glendon and Duncan Kennedy. Category A refers to the social foundations of rights, and to the view of critics that the rhetoric of rights, typically cast in individualistic terms, obscures the point that rights are essentially social and collective in character. Indeed, they depend on collective institutions and communal support. This confusion, critics say, makes it difficult to draw lines between 'rights that are desirable from the social point of view and rights that are not'. The article turns to the second category:]

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. 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 realistically soluble by simple formulas.

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', 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'. Rights, of course, take the form of general propositions. For this reason they are said to be indeterminate and thus unhelpful.

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 requires 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. 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.

D. Excessive Individualism

A different objection is that rights are unduly individualistic and associated with highly undesirable characteristics, including selfishness and indifference to others. Rights miss the 'dimension of sociality'; 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. 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 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'.

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. Some people think that the historical function of rights has been to insulate current practice from legitimate democratic oversight...

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. 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.

[The author then turns to clarification of some conceptual issues raised by the criticism, and concludes that the critique, while embodying some limited and important truths, 'does not by any means support a general challenge to rights.' Sunstein starts by noting the position advanced by many rights advocates that rights refer to important human interests 'that operate as "trumps", in the sense that they cannot be compromised by reference to collective policies or goals.' He doubts that this conception is 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 justification of special weight. Above all, rights exclude certain otherwise admissible reasons for action. 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 right 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. . . . Rights are collectively conferred and designed to promote collective interests. They are protected by social institutions for social reasons. If such cases, rights may in a sense operate against the collectivity once they are conferred; governments 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).

...

[Sunstein turns his attention to what he describes as 'truths and partial truths' in the 'highly eclectic' views of the critics of rights. He observes:]

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 abstractedly, 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.

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. 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 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.

...

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.

The two problems can be brought together if we attend to a familiar conceptual confusion. 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.

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 qua 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. So too, the right to associational freedom is hardly individualistic. It is meant precisely to protect collective action and sociality.

... 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 conditions 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 people's wealth', 'to preserve and protect socialist property', to 'work conscientiously', and 'to concern themselves with the upbringing of children'. 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).

KARL KLARE, LEGAL THEORY AND DEMOCRATIC RECONSTRUCTION

25 U. of Brit. Colum. L. Rev. 69 (1991), at 97

[The author here discusses the appropriate place of 'rights' in the formal legal structures and guarantees and in the legal-political discourse of the postcommunist states of Central-East Europe. He concludes that 'it seems obvious that postcommunist law should be founded upon an explicit charter of human rights guarantees. How could there be any doubt of the central place of rights in democratic legal reconstruction?' Nonetheless, Klare notes, recent debates among Western legal scholars have developed a serious 'critique of rights', and he undertakes to summarize 'some of the major lines of criticism advanced by the rights skeptics'. The following excerpts deal with two aspects of this critique and Klare's responses thereto.]

A second branch of rights skepticism concerns the efficacy and limitations of the rights tradition in relationship to social change. [T]he skeptics call attention to certain self-imposed limitations internal to rights discourse stemming from its embrace of the public/private distinction. Rights thinking has predominantly concerned the relationship between the individual and the state. As traditionally understood, the human rights project is to erect barriers between the individual and the state, so as to protect human autonomy and self-determination from being violated or crushed by governmental power.

Unquestionably, a just society requires such protections, but human freedom can also be invaded or denied by nongovernmental forms of power, by domination in the so-called 'private sphere'. Human dignity is denied by *de jure* racial segregation, but it is also denied by employers who discriminate on the basis of race. Laws barring adult homosexuals from privately and consensually expressing their sexuality deny freedom and autonomy, but so, too, do homophobic social practices such as housing discrimination and gay bashing. The expression of dissent can be inhibited by the cost of media access as well as by abuses of state power. Rights charters almost invariably concern restrictions on state power and therefore leave intact many forms of 'private' domination, including hierarchies of class, race, gender and sexual preference. The skeptics argue that the vision of freedom embodied in the rights tradition is for this reason partial and incomplete.

Given the injustices committed by the Stalinist regimes, it is understandable that the first priority of postcommunist lawyers is to guard against the abuse of state power Granting this, the argument goes, to realize freedom in all aspects of life, to establish arrangements in all social contexts that will be committed to human dignity, self-realization and equality, requires a deep transformation, in both East and West, not only of governmental but also of non-state institutions and practices that are left untouched by conventional human rights doctrine. A strong version of rights skepticism suggests that the fixation on the individual/state relationship in the rights tradition actually diverts intellectual and political resources from other, needed approaches to social justice.

Here again, it is conceivable that rights discourse can be transformed to accommodate these criticisms; that we can articulate a panoply of self-determination rights in social and economic life. . . .

This brings us to a third aspect of contemporary rights skepticism, the so-called 'indeterminacy critique'. In its strongest versions, rights discourse purports to supply a political criteria for evaluating institutions and practices and for resolving social conflict. The very power of a claim of right is that it is founded upon universal values, that it transcends all particular understandings of appropriate social organization. A successful rights claimant trumps majoritarian sentiment regarding the good life. . . .

... The initial problem is that many of the most important rights concepts are formulated at an exceedingly high level of abstraction. Because human rights concepts tend to be very elastic and open-ended, they are capable of being given a wide range of meanings, including inconsistent meanings. Take freedom of speech, for example. One meaning is the right to dissent and to criticize the powers that

be. Yet the right to free speech can also be given quite a different meaning, as, e.g., in the American cases barring government from trying to prevent the distortion of the electoral process by corporate campaign contributions. In the former interpretation, free speech permits individuals to unfreeze hierarchy and open up political debate, whereas in the latter case, the right to free speech is mobilized to reinforce domination by entrenched power. Or, take the right to privacy, the right to be left alone by government with regard to certain intimate matters. For most feminists, this connotes a right to choice about reproduction and abortion. But the right to privacy regarding intimate personal matters has long had a less savory invocation as a justification for why courts should not intervene to prevent or punish domestic violence. An interesting aspect of rights-fixated political cultures, such as we have in the United States, is that anybody and everybody can and does formulate their political claims in rights terms.

Thus, rights concepts are sufficiently elastic so that they can mean different things to different people. People who seek to reinforce hierarchy and perpetuate domination can speak the language of rights, often with sincerity. But there is an even deeper problem. Even those who would consistently invoke rights in the service of self-determination, autonomy and equality find that rights concepts are internally contradictory. That is because, like all of legal discourse, rights theory is an arena of conflicting conceptions of justice and human freedom. For example, democratic thinking, particularly within the liberal tradition, contains conceptions of rights as freedom of action and also of rights as guarantors of security. It contains conceptions of rights as protection from state power and also of rights to invoke state power to protect the individual from powerful private groups. Proponents of democracy have advanced conceptions of rights to freedom of association and also conceptions of rights of excluded minorities to insist on membership in important groups. Rights theories contain conceptions of equality as identical treatment of those similarly situated and also theories of equality as protection for those not similarly situated. Human rights discourse holds that its claims are universal yet also embodies a belief in the right of all peoples to cultural autonomy and self-determination.

Thus, choices must be made in elaborating any structure of human rights guarantees, just as in the course of specifying market structures, and the choices bear socially and politically significant consequences.

The problem is that rights discourse itself does not provide neutral decision procedures with which to make such choices.

... My point here is that, by itself, rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right. In order to resolve rights conflicts, it is necessary to step outside the discourse. One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions of and intuitions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts.

If the processes of concretizing rights concepts and of resolving rights conflicts

extend beyond the traditional discourse of rights onto the terrain of social theory and political philosophy, it follows that rights rhetoric must be politicized in order to serve as a foundation for legal reconstruction. ... Surely it is insufficient to think of human rights practice in terms of obtaining the correct list of rights and then enacting them into a code. Rather, postcommunist lawyers must think of rights discourse and rights charters as relatively open media in which to advance visions of socially desirable institutions and practices. That is, the rights foundation of legal reconstruction is an invitation to make political philosophy, not only in promulgating the initial charters, but at every step along the way of articulating and interpreting rights concepts and filling them with concrete legal and institutional meaning. But this revised, 'politicized' conception of human rights discourse and practice in postcommunist legal reconstruction sits uneasily with the idea of an autonomous rule of law that is ostensibly the basis of the whole enterprise.

NOTE

A number of different understandings about rights—their nature, content and consequences—appear in the readings in Chapters 3 and 4. Consider the following lists, setting forth in the left column assertions or understandings about rights that typify much (not all) rights discourse within liberal societies, in opposition to a list in the right column of very different understandings, some of which inform the discussion about cultural relativism in Section B of this chapter, and some of which are related to utilitarian or policy-oriented argument.

inalienable	as opposed to	socially constructed, given and taken
absolute		contingent
universal		particular, culturally specific
eternal, ahistorical		time bound, historicist
rights based on equal		rights based on utility, power
human dignity		

QUESTIONS

1. How damaging to a rights-oriented international movement are the criticisms about rights discourse and argument that are developed (and in some cases, responded to) in the preceding articles? To which of them is the UDHR or the covenants and treaties examined in Chapters 3 and 4 most vulnerable?
2. Kennedy and Klare both stress that, at a given point, rights-based assertions give out and a claimant or judge or other decision-maker must resort to (Kennedy) 'open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability'. Klare stresses that choices must be made in elaborating