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SECOND SERIES

RIGHTS

Robin West

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Edited by

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Ashgate

DARTMOUTH

Aldershot • Burlington USA • Singapore • Sydney

Published by
Dartmouth Publishing Company
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
131 Main Street
Burlington, VT 05401-5600 USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Rights. – (International library of essays in law and legal theory. Second series)
1. Human rights – Philosophy 2. Human rights – Law and legislation 3. Human rights – Social aspects
I. West, Robin, 1954–
323'.01

Library of Congress Cataloging-in-Publication Data
Rights / edited by Robin West.
p. cm. — (International library of essays in law and legal theory. Second series)
Includes bibliographical references.
ISBN 0-7546-2030-1
1. Civil rights—Philosophy. I. West, Robin, 1954– II. Series.

K3240 .R54 2000
323'.01—dc21 00-036310

ISBN 0 7546 2030 1

Printed by Cromwell Press, Trowbridge, Wiltshire.

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Ronald Dworkin (1992), 'Unenumerated Rights: Whether and How *Roe* Should be Overruled', *University of Chicago Law Review*, **59**, pp. 381–432. Copyright © 1992 Ronald Dworkin.

Harvard Journal of Law & Public Policy for the essay: Akhil Reed Amar (1990), 'Forty Acres and a Mule: A Republican Theory of Minimal Entitlements', *Harvard Journal of Law & Public Policy*, **13**, pp. 37–43.

Harvard Law Review for the essay: Robin L. West and Alan M. Dershowitz (1999), 'The Case of the Speluncean Explorers: Revisited', *Harvard Law Review*, **112**, pp. 1891–913. Copyright © 1999 Harvard Law Review Association.

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The Michigan Law Review Association for the essay: Susan Bandes (1990), 'The Negative Constitution: A Critique', *Michigan Law Review*, **88**, pp. 2271–347. Copyright © 1990 Michigan Law Review Association.

Joseph Raz (1995), 'Rights and Politics', *Indiana Law Journal*, **71**, pp. 27–44. Copyright © 1995 Joseph Raz.

Texas Law Review for the essay: Peter Gabel (1984), 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves', *Texas Law Review*, **62**, pp. 1563–99.

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I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
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Introduction: Revitalizing Rights

Rights, according to modern liberal theorists, are based on some aspect of our human nature, and both morally and legally limit what a liberal state might do to us.[1] We are, for example, according to virtually all liberal theorists, by nature, autonomous and rational individuals, equally deserving of dignity and respect, and we therefore have rights to free speech, thought and worship, meaning that the state may not, through law, dictate our thoughts, ideas, spiritual values or individually held visions of the good. Because we are essentially rational creatures, we must be free to determine such visions of the good and spiritual values for ourselves (Dworkin, 1996). We are, to take a very different example asserted by some liberal theorists, the sorts of creature who are made secure against the natural elements, against the aggression of others, and even against the possibility of state tyranny by our ownership of private possessions, and we therefore have a *right* to property: our property cannot be taken from us by the state without compensation and process, even should the state decide to do so for the very best of reasons (Epstein, 1985, 1984). We are also, according to a now well-established line of liberal thought, much enhanced by the enjoyment of a sphere of privacy and intimacy and we therefore have a right not to have our privacy intruded upon by the state without compelling state justification (Richards, 1986). Because our lives are enhanced by privacy, we have a right against states that seek to invade it. To take one final example, according to some liberal rights theories, we are naturally such that we will benefit from a good, consensually struck bargain – we are natural bargainers – and we therefore have a right not to have our free markets unnecessarily overregulated. Finally, although liberals differ on what precisely we are, they agree that *all* of us, universally, share the essential core – if any of us are, then all of us – not just some of us – are sufficiently rational to formulate our own conceptions of the good, made secure through ownership of property, benefit from unregulated trade, and are enriched through the enjoyment of a sphere of privacy and intimacy (Dworkin, 1978, p. 199). We are all of these things by virtue of our *humanity*, not by virtue of caste, class, skin colour, gender, religious affiliation or ethnicity. We therefore have a right not to be subjected to laws that invidiously and irrationally discriminate against some of us, or deprive some of us of these rights, for the benefit of others. We have, in short, a right to enjoy our rights – our rights to property, privacy, free thought and speech or contract – equally.

We have these rights – rights to free speech, rights to the free exercise of our religion, rights to privacy, rights to property and rights to the equal protection of the law – according to liberal theory, for moral reasons. The state should not act in such a way as to interfere with our privacy, property, contract, speech, thought or religion, and it should not do so because of who and what we are: we are creatures whose lives are best lived in, and whose potential is most enhanced by, a state that respects these freedoms. The *justification* for rights, and for the particular rights we have, is, in other words, distinctively moral. The *consequence* of having a right, however, is legal and political. That we have a right entails that the state may not, legally, interfere with

us in those prescribed ways. That we have a right, by definition, means that the state is legally prohibited from acting in a certain way; should the state do so, it will have done something illegal, as well as immoral. A right, to use a common metaphor, is a bridge between the moral and the legal: that we have a right means both that the state should not act against us in a particular way, and that, if it does so, it is acting illegally. Liberal rights are the means by which our natural liberty and equality become not just attributes of our nature, but also the wellspring of political and legal entitlements. They are the means by which, to put it differently, our natural capacities become our political liberties.

Of course, for a liberal right, so understood, to be anything but nonsense on stilts, there must be some mechanism by which rights can be authoritatively identified and then enforced against recalcitrant states. One possible way to do so is through a hierarchy of ascending law, with the highest law codifying our rights, and then somehow controlling and constraining lower law produced by the state. Thus, a liberal state's domestic law might be bound by international law, which in turn could consist, in part, of a catalogue of human rights which no state may violate. Should a state do so, it would be acting illegally: it would be in violation of international law. A second possibility is that a liberal state could establish an independent branch – courts, for example – which could then, through common law adjudication, acknowledge, recognize and enforce rights against errant legislative enactments. In this way courts could recognize and articulate an evolving 'natural law', which in turn could consist of rights loosely grounded in an idealized conception of what and who we are. Historically, a number of liberal states have adopted one or the other or both of these mechanisms for the enforcement of liberal rights.

A third possible way for a liberal state to acknowledge and enforce rights, which combines the hierarchic feature of the international approach and the judicial role of the common law approach, is through the adoption, interpretation and enforcement of a Constitution. Thus, a nation or state's Constitution might enumerate certain rights (or might be read as enumerating certain rights) which the liberal state may not legally invade, and courts might then be charged with the duty of enforcing those rights against the state's or the nation's law-making bodies. This third possible vehicle for the enforcement of liberal rights – through constitutionalism – has received its greatest elaboration in the United States. In the United States, and now in a number of other liberal democracies adopting the US model, liberal rights are widely understood to be enumerated in the national Constitution and then enforced against states that infringe upon them by independent courts, which possess the power to strike the offending state enactments as void. In this Introduction, I will sometimes refer to this model as the liberal–constitutional understanding of rights.

Rights generally, and the liberal–constitutional understanding of rights in particular, have been the subject of intense debate, and in a number of disciplines, during the 200 years since the revolutions they rhetorically inspired. In political theory, conservative theorists of the state, following Edmund Burke, have argued that rights effectively destroy the bonds of community, hierarchy and tradition, and all in the name of a falsely abstracted, over-rational, ideal conception of the individual (Burke, 1790). In jurisprudence, positivist critics, following Jeremy Bentham, have argued that rights obscure the political origin of law, thus frustrating or muting clearheaded criticism, and hence reform, of existing law: by obscuring the line between the 'is' and the 'ought', rights unduly complicate the task of holding acts of power to the light of reason (Bentham, 1995). In constitutional theory, democratic majoritarians and moral sceptics have joined forces to argue that rights do nothing but stymie the will of majorities and their duly

elected representatives (Bork, 1990, pp. 187–241), while 'originalists' add that, unless clearly grounded in the intent of a constitution's drafters, rights violate fundamental principles of the rule of law (ibid., pp. 161–86). In recent decades some economists trained in law (and some lawyers interested in, or trained in, economics) have criticized rights on the basis of their manifest inefficiencies: by definition rights virtually 'trump' utilitarian goals such as efficiency or utility, and if utility or efficiency is the lodestar of value and justice, then rights must either be limited to those that are wealth-maximizing or they are themselves unjust (Posner, 1983a; Dworkin, 1980a; 1980b).[2] None of these debates – what might be called the 'classic rights debates' – shows any signs of abating. The modem economic critique of rights continues to have a substantial effect on the contours of rights scholarship, and the older, even ancient debates – primarily over the philosophical coherence and political legitimacy of rights – are as alive today as they were 200 years ago.

In the last 25 years, however, a quite distinctive line of criticism of the liberal constitutional rights tradition has developed, primarily in the legal academies of the United States, England, Canada and Australia. The authors of this more modern criticism of rights, sometimes called the 'rights critique', argue, in essence, that rights, rights discourse and, very generally, the liberal rights tradition, have failed us, not so much as a matter of jurisprudential coherence, or as a matter of fidelity to history or tradition, or as a matter of democratic integrity – as argued by rights' classic detractors – but, rather, they have failed us as a matter of moral, or utopian, *aspiration*. Overall and in the long run liberal rights have just not been a very good thing. Even when fully recognized by a liberal state – indeed, especially when so recognized – they have not been, to quote one of the critique's primary architects, a victory for the party of humanity (Tushnet, 1984). They have not improved the quality of either individual or community life in those liberal states which recognize them. Rather, rights, when recognized, have inspired at best a false hope and have ideologically served to obscure, rather than illuminate, the contours of a truly moral ideal state. Accordingly, not only rights themselves, but also faith in rights – 'rights-consciousness', 'rights discourse' or, as it is sometimes called, 'rights-talk' – according to the 'rights critics', have not been vehicles for justice. Rights have constituted obstacles – and in a time of global corporatism, they threaten to be ever-growing obstacles – to the creation or maintenance of humanistic, egalitarian, diverse, environmentally healthy and just communities.

The 'rights critique', its label notwithstanding, is not one critique at all but rather, a cluster (or family) of moral criticisms of the idea and history of liberal rights. Nor is it the only critique of rights currently on the philosophical landscape; as noted above, the jurisprudential, political and constitutional debates that liberal rights have engendered over the last 200 years are still very much unresolved. Nevertheless, it is fair to say that the myriad criticisms that are loosely embraced by the umbrella term 'rights critique' of the last 25 years had a distinctive impact on the direction of rights scholarship in the latter part of the twentieth century, particularly in the legal academy where it was born, that sets it apart from these more longstanding debates. First, the rights critique introduced a major and unexamined question into rights scholarship – the aspirational or moral value of rights discourse itself. But, second, the rights critics have often urged, on moral and political grounds, an abandonment rather than a reformation of 'rights-talk', and their guidance has seemingly proven persuasive, at least to some. Rights and rights-talk *have* indeed been abandoned, rather than reformed, by at least some of the very scholars most inclined to take to heart the liberal, progressive or universalist ideals of equality, fraternity

and liberty that animate the rights tradition. For both reasons, the rights critique is an idea – or set of ideas – that has mattered.

The essays in this volume are an exploration of the aspirational strengths and weaknesses of a liberal–constitutional rights culture, many of them either pivotal contributions to the rights critique of the 1970s and 1980s, responses to it or explorations of alternative directions that liberal rights discourse might take in light of it. The essays are divided into four Parts. The essays in Part I by David Luban and Ronald Dworkin introduce the constitutional liberal rights tradition, and then defend it against a recurrent and traditional objection: that unless tied to an explicit constitutional provision, the recognition of a liberal right by a court of law is an essentially lawless act.

All the essays except one in Part II of this volume spell out some of the moral, political or aspirational objections to liberal conceptions of rights that have emerged over the last 30 years. The final essay in that section, 'Rights and Politics' by Joseph Raz identifies two philosophical fallacies in what he characterizes as the standard understanding of liberal constitutional rights: their reliance on universalist, transcendent premises and their individualist character. Although Raz himself does not draw out the connection, if his argument is persuasive, both philosophical fallacies might underlie at least some of the moral or aspirational shortcomings of rights decried by the rights critics.

The essays in Part III, as well as the remainder of this Introduction, defend rights against some of the strands of the rights critique explored in Part II. These essays all suggest, in different ways, that liberal rights don't necessarily display the moral or political shortcomings cited by their critics. Finally, the brief exchange between West and Dershowitz in Part IV debates the moral role of rights in mediating the relations of citizens and states, in the context of a fictional prosecution for an alleged murder, first propounded by Lon Fuller 50 years ago. The first fictional opinion, by West, briefly defends the continuing centrality of rights to a moral conception of the rule of law. The last, and decidedly more sceptical word, is given to Professor Dershowitz.

In the remaining three sections of this Introduction, I assess the cost of the critique itself. I conclude that we should refashion, not abandon, the liberal rights traditions, if we wish to articulate, much less move closer, towards defensible conceptions of the good society.

The Rights Critique

Liberal rights fail, according to the rights critics, in a number of ways, as the essays in Part II of this volume attest, but two particular criticisms are perhaps the most salient, or at least the most recurrent. The first and perhaps most important objection lodged against liberal rights by their critics is basically political. Rights, as liberals insist, limit the power of states to meddle in private spheres of life. However, precisely by virtue of doing so – and whatever the value of doing so – they also thereby create entitlements to the exercise of unchecked power, within those private spheres, by private individuals or entities on others. Within those spheres of insularity, private power is then often used in ways that subordinate or oppress. Put somewhat differently, and, as argued in this volume by Morton Horwitz (Chapter 3) and Mary Becker (Chapter 4), and elsewhere with tremendous force by, among others, Mark Tushnet (1984, pp. 1386–88), Alan Freeman (1978; 1988) and Reva Siegal (1996), individual (or corporate)

rights to the non-interference of the state create economic, racial and sexual spheres of private entitlement and private privilege within which the powerful can exploit the powerless, with no fear of state redress. Within those private spheres such actions are within the ambit of 'individual rights': the state may not intervene. Rights create, in effect, a privilege to exploit others.

Thus, the right to free speech, to take an example, does assure the individual a degree of freedom from state censorship. But, on the other hand, it also assures that those who suffer the consequences of hateful utterances hurled by the rights-empowered will have no hope of redress (Shiffrin, 1994): the right to free speech immobilizes the state from acting. The right to contract, to take another example, assures the individual that a liberal state will not paternalistically alter his or its freely struck bargains. Yet, this freedom of contract also assures that those who suffer the consequences of economic oppression will have little relief from the state: again, contractual freedom stays the state's hand. The 'right of privacy', similarly, implies that the state will not unduly meddle in an individual's intimate affairs but, for the victim of domestic violence, what it means (or has meant) is that the violence inflicted upon her will go unchecked, and that her abuser's power, furthermore, will be imbued with constitutional majesty (Siegel, 1996, pp. 2153–70). The 'right to equal protection', to take a final example, requires that states refrain from legislating on the basis of race or other impermissible characteristics. It also, however, assures that those subjected to multiple and subtle forms of private racial discrimination will have a difficult obstacle to overcome, if seeking relief from the state: the state is precluded, by virtue of the individual right to be free of racially explicit legislation, from acting affirmatively so as to address private racism, just as it is precluded by virtue of the same right from malign forms of discrimination. In all these spheres, rights limit the power of states, and in all these spheres, rights perpetuate social injustice by doing so.

Furthermore, according to their critics, liberal rights promote injustice in this way not because they are susceptible to misuse by machiavellian political actors but, rather, by *structural design*: rights are overwhelmingly, in many liberal states – and virtually by definition in the United States – *negative*. It is, of course, because we have rights *against* the state (and only against the state), rather than rights *to* some particular sort of state action or state intervention, that rights protect the individual against an overreaching state in the manner celebrated by rights advocates. But it is also because of rights' negativity that they necessarily insulate private hierarchies and thereby empower the strong to subordinate the weak. If the state cannot intervene on the side of the weak because of rights possessed by both, the stronger party will be made all the stronger by virtue of even the weaker party's possession of rights, to say nothing of the stronger's. A negative right disempowers the state from pernicious, intermeddling, paternalistic or malign intervention into the private affairs of individual citizens, but by virtue of so doing it also disempowers the state from intervening in the private sphere for the democratically progressive purpose of redistributing power within it. It equalizes the citizen vis-à-vis an overreaching, paternalistic state but, by staying the paternalist' s intervening hand, it subordinates that citizen to his stronger brother.

Thus it is by virtue of the fact that my right to free speech is a *negative* right against the state that it implies the disempowerment of the victim of hate speech. If that right were, instead, a positive right to speak, or a positive right to literacy, or to education, or to information, instead of a right to be free of state intervention into private speech markets, it would be an open question whether or not the right was most endangered by censorial state actors or censorial private actors, and whether the state should act or refrain from acting so as to protect that right.

Similarly, it is by virtue of the fact that the right to privacy is a *negative* right against state meddling that it implies the disempowerment of the victim of domestic assault. If it were, instead, cast as a positive entitlement to the enjoyment of some sphere of privacy, it would similarly be an open question whether or not the right was more endangered by the private, assaultive, intrusive conduct of abusive partners, or by the intervention of public actors, and accordingly whether the state should act or refrain from acting so as to protect it. It is by virtue of the fact that rights of contract and property are viewed as *negative* rights against state intervention that they operate as protectors of free markets, and hence of private material inequality. If they were understood as rights to the enjoyment of some minimal material quality of life, then again it would be open to debate whether the right is best protected by state inaction or state guarantees of jobs, welfare or income that limit rather than insulate labour markets. Finally, it is by virtue of the fact that the right to equal protection is cast as a *negative* right against a certain sort of state irrationality that it has become such a powerful weapon against those who would use the state to rectify the imbalances created by private forms of racism. Were it understood, instead, as a positive right to be free of certain manifestations of racism, it would be an open question whether or not that right is most endangered by private or state action, and whether it is best protected by colour-blind or race-conscious legislation. The rights critics' political case against the liberal rights tradition, in other words, concerns primarily that tradition's insistence that rights by definition *limit*, rather than inform or guide, state action.

Rights, then, whatever good they do, have this negative political externality: they create private spheres of privilege within which the exploitation or subordination of the weak by the strong goes unchecked by the state. Those spheres, and even the subordination that occurs within them, are then cloaked with the mantle of constitutional and moral righteousness. The very utopian universalism of rights and rights-consciousness instills in the privileged the false and panglossian belief that all is morally well and fair with the world, even in the face of glaring and unjustified material inequality, because whatever may be the case with respect to material well-being, the rights that protect those material possessions are universally bestowed (Kairys, 1998, pp. 285–311; Tushnet, 1984, pp. 1386–88). The poor's rights to their meagre belongings are, after all, no less robust than the rights of the wealthy. Even more damaging, however, rights instill in the relatively underprivileged the false sense that their own lack of material well-being is justified by – or at any rate morally offset by – the rights they possess: I may not have much but, by right, you cannot deprive me of what I do have. Protection of the rights of the wealthy to their wealth, I may come to believe, is simply the price paid for the protection of my rights to my belongings against the invasive interests of those who have even less – and so on down the ladder. And they instill in all of us, privileged and underprivileged, the false belief that the rights protected by liberalism are grounded in our nature and hence immutable to change. We come to believe, wrongly, that not only is our inherited world of rights and that to which we by right are entitled a just one, but that it is a necessary and unchangeable one as well. Thus, rights, according to the rights critics, don't just protect, they also disguise private realms of abuse, violence and oppression that are sites of injustice, and they protect it against the very democratic interventions that might redistribute the power within them, or at least ameliorate the more extreme harms occasioned by them. Rights – virtually by definition – permit the strong to subordinate the weak in private and without intervention by the state, and then celebrate that subordination as the exercise of rights. They first politically

protect, and then they ideologically valorize, private subordination and exploitation of the weak by the strong, and all under the umbrella of constitutional authority.

The second failing of the liberal rights tradition, very generally, according to the critics, is *existential*: it goes to how we construct our self-identity. As argued in this volume by communitarians as politically diverse as Michael Sandel (Chapter 8; also 1996; 1997), Peter Gabel (Chapter 5) and MaryAnn Glendon (Chapter 6; also 1991), rights and rights-consciousness render us unduly, and inhumanely, *atomized*. In liberal societies that take rights seriously, individuals are first wrongly described as, but then tragically become, isolated from each other in individualized rights-spun cocoons, increasingly incapable of even approaching each other, much less achieving any meaningful moral or political empathetic connections with fellow citizens. Rights erode, rather than enhance, our feelings of obligations toward our neighbours, co-citizens, and arguably even our intimates and family members. We come to view ourselves, and then increasingly come to be, possessors of individual rights against each other and the state, but with no responsibilities, duties or even commonalities toward or with our larger communities. By overprotecting our individual contractual and property entitlements, and doing so in the name of our nature, they leave us identified with our holdings, rather than each other. As a result, we each become dangerously and tragically unmoored from the communities that could more truly nurture our lives.

This existential cost of rights, like the political cost, is also a function of rights' essential core, rather than a function of their distortion. Rights theorists, according to their critics, have wrongly but emphatically embraced a fundamentally false conception of human nature. We are, each of us, according to rights' architects, self-sufficient, idiosyncratic, autonomous, free-thinking, rational, insular and atomistic. We each have a fundamental 'right to be left alone', for example, because we each want to be left alone, and thrive when left alone. We revel in our idiosyncratic individualism, unencumbered by responsibility, connection, duty, culture or society. This perceived insularity, or atomism, sometimes has tragic costs. First, it is logically tied to rights' negativity: the individual assumed by liberalism is largely unaffected and even unharmed by relative and unequal distributions of private power, because he is more fundamentally unaffected by community itself. He enjoys the freedom negative rights bestow and is simply untouched by their political and existential costs. But, second, that same understanding of individual nature is also tied to liberalism's signature insistence on state neutrality towards competing conceptions of the good life: because we each, individually and idiosyncratically, author our own understanding of the good, the state (or collective) is obviously incapacitated from doing so on our behalf. The resulting insistence on state neutrality towards competing conceptions of the good, as argued in this volume by Sandel (Chapter 8), Chai Feldblum (Chapter 9) and Charles Taylor (Chapter 10), and elsewhere and at greater length by Leon Trakman (1997), renders liberalism, as a politics, peculiarly moot on issues regarding the nature of the good. The result is not only alienated individuals, but also a sterile and unsatisfying reluctance on the part of liberal states to endorse some conceptions of the good – such as a commitment to multiculturalism, preservation of traditions, or the value of marriage as a way of life – over others, even where such a commitment seems clearly in the national interest. This neutrality, itself largely a function of the excessively atomistic view of human nature that drives it, is itself a serious moral failing.

But that understanding of our nature – that understanding of the nature of individual life – according to the rights critics, not only has serious costs, it is also simply not a true one. We are

not insular atoms, sufficient unto ourselves, wanting nothing but to be left alone. Rather, for substantial parts of our lives, we are dependent on the caregiving of others for our very survival, and throughout our lives, we remain interdependent social beings. These basic social and biological facts of life, furthermore, inform not just our self-understanding, but our moral sense as well: we have moral obligations to the weak and to those dependent on us, and we know we have those moral obligations, because we know we have been, and will be, weak and dependent ourselves. We sympathize with others in crisis or in need, and we depend on their sympathetic response when we are in need ourselves. We build community because we are communal creatures who depend on it. It is, therefore, not surprising that the liberal world, justified by a false understanding of who we are, is so apparently morally barren. It is at war with our moral intuitions about the way in which we ought to live, because it is at war with the true conception of our nature that informs our moral sense.

Thus, it is by virtue of liberalism's commitment to a falsely individualistic and falsely insular conception of human nature that the individual possesses relentlessly negative rights of property, privacy and contract, and it is by virtue of those rights that the individual has the dubious and amoral freedom to both keep his wallet in his pocket and avert his gaze and conscience from the panhandler on the street. The understanding of our nature is false and hence the moral freedom posited upon it seems morally false as well. Similarly, it is by virtue of his asserted nature, and then by virtue of his rights justified by that nature, that the liberal individual need not feel or act on civic, moral or religious duties of charity or fraternity. Again, the understanding of our nature is false, so the circle of obligation and responsibility constructed by reference to it is unduly circumscribed. By virtue of his profit-seeking and self-sufficient nature, an employer, whether corporate or individual, has property, privacy and contract rights, which permit him to ignore or deny knowledge of any community of human interest between his employees in his hire and himself. But we are not only profit-seeking entities, and we are not by nature self-sufficient, so the corporate entities and individual rights that we have constructed in the wake of that false depiction seem unsurprisingly amoral. By reference to a false conception of her insularity, liberalism has constructed a right to privacy, from which it follows that a pregnant woman need not acknowledge the gravity of her moral duties towards the human life growing within her. But she is not so insular, and she *is* burdened by moral obligations – the error lies in assuming them away. By virtue of their wrongly assumed and acausal atomism, and the absolute property rights to which it leads, a gun manufacturer need not acknowledge the risk that his firearm poses to others, a polluter need not acknowledge the harms he occasions, nor the tobacco manufacturer the disease wrought by his product and profits. But, again, the acausality is mistaken, we are far more connected to each other than liberalism wants to concede and, consequently, the moral conclusion is unwarranted as well. Very generally, it is by virtue of their insulating negative rights that both individuals and corporations in liberal societies need not acknowledge their debts owed to others, their responsibilities towards them, the chains of causation that unite them, or the common fate in store for them. But it is by reference to the individual's presumed nature that those rights are in turn justified. That conception of our nature is false, and the moral conclusions to which it leads are wrong. The human nature presupposed by the autonomous holder of negative rights, in short, is atomized and individuated to the point of social pathology – but falsely so. That nature is not ours. The panoply of rights constructed upon it may be liberal, but they are profoundly inhuman.

The rights critics, to summarize these threads, are haunted by the spectre of a rights dystopia. In a world defined by rights, we have rights to keep the state out of our lives, but no obligations to help each other. Children are taught the morality of individual rights, and mature into adults who abandon or neglect civic bonds – untutored, as they are, in the moral language of responsibility. Religious fundamentalists use the power of their protected rhetoric underscored by their right to religious freedom to homeschool their children in the lessons of contempt for those who do not share their faith. Patriarchs enjoy rights of familial privacy, and family members have no legitimate expectation that the state will protect them against his abuse. Every individual or corporate employer has the right to profit from the labour of his brother, but no one has the responsibility – and eventually, no one has even the inclination – to share, or reduce, his brother's burden. Every individual has the right to be left alone and takes full advantage of it, and neighbourhoods, communities, states, even families, and civic life in general wither on the vine as a consequence. This does not sound like a world anyone would want or choose to live in. It is, however, increasingly, the world that liberalism has wrought. Rights, according to their critics, are at the very heart of it.

A Critique of the Rights Critique

Why, though, if it is, on the one hand, the negativity of rights and, on the other, a false conception of our human nature that underlie the diseased culture which the rights tradition has created, have the rights critics faulted the idea of a liberal right *itself*? There may be nothing intrinsic in the nature of a right that requires either its negativity, or that it be forever conjoined with a false description of our nature. If so, then the rights critics' conclusion – that we should abandon, rather than reform, rights – is overbroad, even if their substantive premises – that the negativity of rights protects injustice, and that their understanding of human nature is largely false – are warranted. Some of the critics – notably, both Mark Tushnet and Peter Gabel – have made clear their belief that the critique of rights rests on contingent features of national identity, not intrinsic features of liberal rights culture. But these qualifications have apparently gone unheeded, and for the most part have not led to efforts to reform rights-talk in a way that retains its value. As a consequence, those of us at all persuaded by the rights critique may have thrown the baby out with the bathwater. Let me address, first, rights' purported negativity, and then the overdrawn atomistic conception of our nature.

First, with regard to rights and negativity, there is nothing about a right that logically *requires* that it be understood as a constraint on state action, forbidding interference with individual spheres of privacy or liberty, rather than as a state obligation, entitling the individual to some form of state intervention. The notion of a positive right may be disfavoured in contemporary liberal discourse, but it is by no means oxymoronic. Ronald Dworkin, in his seminal, mid-1970s writings on liberal constitutional rights, did indeed focus overwhelmingly on the rights that follow from the moral constraints on liberal states (Dworkin, 1978, pp. vi–xv, 184–205). But he suggested no reason to define rights in such a way, nor does anything in the remainder of his powerful jurisprudential treatment of rights depend on it. A right could as readily be defined as including *both* the individual entitlement that follows from the moral obligations of liberal states, as well as the entitlements that follow from constraints upon them: rights could be defined as the individual entitlements that follow from what states are morally required to