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RIGHTS, CAPABILITIES, AND THE GOOD SOCIETY

Robin West*

INTRODUCTION

What is a "good society," as opposed to a just one, and what is demanded of the state by the demand of "goodness" in a good society? Must a state in a good society ensure for its citizens the minimal material preconditions of a decent life? Is it obligated to do so? Many of course, think not, but of those who think there is such an obligation, there are a variety of reasons, or arguments proffered, as to why. One "civic republican" argument, revitalized over the last fifteen years by Michael Sandel,¹ is basically instrumental. A state, in a good society, might be obligated to ensure for its citizens some minimal level of material goods, but if so, it is required to do so in order to instill some threshold level of civic virtue: in a good society, citizens must be able to be free and equal participants in the collective project of self rule, and if some threshold level of material well-being is necessary for that participation, then the state is obligated to provide it.²

A quite different and perhaps more basic sort of response, held by scores of liberal, progressive, and radical legal theorists over the last century, as well as innumerable political activists and state actors, might be called a "welfarist" conception—the state, in a good society, is directly, not just instrumentally, obligated to ensure that all citizens enjoy some minimal threshold level of material well-being, or welfare, or met needs, or access to primary goods.³ They must enjoy this minimal threshold, furthermore, *not* because such a threshold is necessary to the exercise of the various civic virtues required of them

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1. See Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996) [hereinafter Sandel, *Democracy's Discontent*].

2. *Id.* at 124-28, 329-38.

3. See, e.g., Frank I. Michelman, *Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973) [hereinafter, Michelman, *Constitutional Welfare Rights*]; Frank I. Michelman, *The Supreme Court 1968 Term-Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) [hereinafter Michelman, *On Protecting the Poor*]. The welfarist conception is heavily indebted to John Rawls' early work, particularly *A Theory of Justice* (1971).

if they are to participate as free and equals in a liberal state, nor for any other instrumental reason.⁴ More basically, the state must ensure some minimal level of well-being because such a threshold is necessary if citizens are to live fully human lives and have the dignity to which their humanity entitles them.⁵ Many citizens of even prosperous democratic states cannot possibly enjoy such a minimal threshold, furthermore, without some state involvement in the distribution of resources, particularly with the inequalities that persist and threaten to worsen today.⁶ States are required, by justice and goodness both, to treat citizens with dignity, and with equal dignity at that. Therefore, welfarists conclude, the state is obligated to do whatever it takes to provide that minimal level of well-being to each of its citizens.⁷

In a number of books and articles over the last ten years, Martha Nussbaum and Amartya Sen have carved out a third position, which, they argue, is in greater accord with liberal commitments to individual autonomy, and particularly the autonomous right of individuals to determine their own conceptions of the good.⁸ The state, Nussbaum and Sen argue, as a matter of goodness and justice both, must not ensure minimal welfare directly—that would indeed be unduly paternalistic, illiberal, and in important respects, impossible: a state cannot ensure, say, a healthy, long life for each citizen.⁹ Rather, a decent and liberal state in a good society must ensure that citizens achieve and enjoy certain fundamental human *capabilities* (thereby leaving to the citizens the choice whether or not to avail themselves of those capabilities)—including the capability to live a safe, well-nourished, productive, educated, social, and politically and culturally participatory life of normal length.¹⁰ Thus, to be “fully human,” Nussbaum argues, and to be possessed of the full dignity that one’s humanity implies, just *is* to enjoy this minimal threshold level of capability.¹¹ If they are to have fully human lives, citizens must have access to, and the capability to attain, non-alienating, non-discriminatory and non-humiliating work.¹² They must have, or have the capability to acquire, various welfare goods such as decent health

4. See e.g., Sandel, *Democracy’s Discontent*, *supra* note 1, at 330-32.

5. See e.g., Michelman, *On Protecting the Poor*, *supra* note 3, at 13-14.

6. *Id.* at 13-15.

7. *Id.*

8. See Martha Nussbaum, *Women and Human Development* 11-15, 111-61 (2000) [hereinafter *Nussbaum, Women and Human Development*]; Amartya Sen, *Rights as Goals, in Equality and Discrimination: Essays in Freedom and Justice* 14-19 (Stephen Guest & Alan Milne eds., 1985).

9. Nussbaum, *Women and Human Development*, *supra* note 8, at 51-60, 81; Sen, *supra* note 8, at 15-16.

10. Nussbaum, *Women and Human Development*, *supra* note 8, at 75-83; Sen, *supra* note 8, at 16.

11. Nussbaum, *Women and Human Development*, *supra* note 8, at 75-83.

12. *Id.*

care, adequate food, shelter, and clothing.¹³ They must have a good and liberal education, a safe upbringing, protection against physical and sexual assault, and security in their intimate and affiliative associations. Citizens must have access to the material preconditions of these capabilities, if they are to have the ability to live fully human lives.¹⁴

Furthermore, Nussbaum argues, for many or even all of us, these preconditions cannot be met without considerable state and community assistance, or more pointedly, without considerable state-run redistribution and regulation.¹⁵ These are not preconditions readily satisfied in either a state of nature or a minimally regulated social order. A good society, therefore, Nussbaum concludes, *and* a liberal, just society, is one in which the state is not just permitted, but is obligated to ensure, on behalf of its citizens, that these material preconditions of our fundamental human capabilities are met.¹⁶ All states, particularly liberal states, ought to regard their obligation to secure the preconditions of basic human capabilities as fundamental and as required by justice.¹⁷ Liberal states should regard their obligation to secure the minimal material preconditions of the basic human capabilities to be a basic *constitutional* duty.¹⁸

I do not want to take issue with the basic welfarist version of the good society thesis, or with Nussbaum's more liberal, antipaternalist, "capabilities-based" (rather than primary goods-based) approach. Rather, I assume the welfarist thesis, and for reasons that I think will become clear, I take Nussbaum's "capabilities" approach to be its best account. In this essay, I want instead to re-open what some might regard as a stale question: whether individual, constitutional rights, as they have been understood by liberal theorists, and as they have been employed and are now employed in various constitutional liberal democracies, might be a vehicle for securing those state obligations. Briefly, if justice and goodness require that liberal states have an obligation to secure the minimal preconditions of our fundamentally human capabilities, as Nussbaum argues, and also require that states respect citizens' rights, as countless liberals assert, then doesn't it follow that citizens in liberal states have a right to enjoy those capabilities, and a right to a state obligated to commit itself to ensuring them? More to the point, does it not follow that welfare or capabilities advocates should be arguing as much?

In the last twenty-five years, a sort of conventional wisdom has emerged, at least in the legal academy, that the answer to both of

13. *Id.*; Sen, *supra* note 8, at 15-16.

14. Nussbaum, Women and Human Development, *supra* note 8, at 86-87.

15. *Id.* at 54-55, 91.

16. *Id.* at 74-75, 89-90.

17. *Id.*

18. *Id.* at 74.

these questions must be "no." According to Amartya Sen himself,¹⁹ some liberal rights theorists,²⁰ scores of "rights critics" from the critical legal studies movement,²¹ and a handful of Sandelian critics of liberal proceduralism who are committed to some version of a welfarist conception of the good society,²² liberal rights, for better or for worse, but virtually by definition, are all obstacles to, rather than a possible vehicle for, any welfarist effort—even Nussbaum's liberalized, capabilities-based version. There is good reason for this remarkably widespread consensus. Liberal-constitutional rights, as they are now conventionally understood and authoritatively interpreted, at least in the United States, do not obligate the state to ensure anything resembling what welfarist "good society" advocates envision, whether put in terms of primary goods, civic virtue, or fundamental human capabilities—or at least, they have never been construed that way.

Worse, liberal constitutional rights, as they are sometimes authoritatively interpreted in this country and others, actually *limit* the state's authority to take action to secure the material preconditions of the good society. According to some strands of liberal rights theory as construed by at least some United States constitutional and legal theorists, individual rights on the one hand, and the state's obligation to ensure the minimal material preconditions of either well-being, civic virtue, or capabilities on the other, do not support one another but rather inevitably collide. And individual rights trump state's obligations. Essentially and inevitably then, liberal rights undercut, rather than support, efforts to even conceive, much less achieve, an obligatory state role to secure general well-being. As liberal rights expand, any state role, including any

19. See Sen, *supra* note 8, at 11, 19. Nussbaum is more ambivalent. Although she has addressed the relationship between capabilities approaches to liberalism and human rights, and has elsewhere described the obligation of states to provide for minimal capabilities as "constitutional," she does not directly argue that citizens in liberal states have a constitutional right to the minimal material conditions of fundamental human capabilities. See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *Fordham L. Rev.* 273, 287-88 (1997); see also Nussbaum, *Women and Human Development*, *supra* note 8, at 97-101.

20. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 295 (1985).

21. For a sampling of the voluminous literature criticizing rights on these and related grounds, see, e.g., Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 *U. Chi. L. Rev.* 453, 454 (1992); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *Tex. L. Rev.* 1563, 1595-97 (1984); Morton J. Horwitz, *Rights*, 23 *Harv. C.R.-C.L. L. Rev.* 393, 402-04 (1988); Mark Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1386-92 (1984).

22. William A. Galston, *Political Economy and the Politics of Virtue: U.S. Public Philosophy at Century's End*, in *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* 63, 74-77 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998).

obligatory role, contracts. This result would hold were well-being defined in terms of capabilities rather than basic human goods or civic virtue. The good society, and the state's obligation to ensure that citizens have access to the minimal capabilities necessary to participate in it, must then be both conceived and achieved by recourse to some means other than rights.

In Part I this essay explores and then criticizes the two major arguments behind the conventional wisdom that rights undermine efforts to secure a state role in ensuring the material preconditions for a good society, and therefore, the material preconditions for the development of those human capabilities essential to a fully human life. I conclude in this part that this understanding of rights is mistaken.

In Part II, I urge that the pragmatic argument put forward by rights critics and some welfare advocates for forgoing rights-talk and rights-rhetoric also fails: there are very real costs, both in theory and in law, in deciding to forgo putting the case for the state's obligation to provide minimal material goods in terms of rights.

In Part III, I briefly describe two core rights that a refashioned liberal state, understood as a vehicle for protecting not just the liberty but also the capabilities of citizens, should recognize: first, a right to be protected against private violence, and second, a right of caregivers to give care to dependents without incurring the risk of severe impoverishment or subordination—a right, to use the provocative phrase coined by the philosopher Eva Kittay, to *doulia*.²³ Both rights, I think, are directly entailed by the state's obligation to provide the minimal preconditions for the development of those fundamental human capabilities that are themselves essential to a fully human life. Both rights however, could be and should be conceived in the most traditionally liberal terms. The first such right—the right to protection against private violence—although now disfavored in United States rights discourse, seems fully authorized by both the liberal tradition and the American Constitution itself. The second right for which I will argue—the right to provide care to dependents—has no similar basis of support in either liberal theory or American constitutionalism. It is not incompatible with either, however, and is at least arguably required by the deepest commitments of both. The right to protection and the right to care are rights that can be framed in liberal terms, and both rights would go a long way toward securing for individual citizens the minimal preconditions of a good society.

23. Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* 70 (1999).

I. NEGATIVE RIGHTS AND THE GOOD SOCIETY

A. *Liberal Rights*

Liberal, constitutional rights, according to their legions of critics and numerous rights theorists, undercut any state obligation to secure the preconditions for the fundamental human capabilities for two basic and interconnected reasons. The first is political. The good society, as envisioned by virtually all "good society" theorists, requires substantial state intervention into various "private" spheres, and substantial redistribution of the goods, resources, and power found in those spheres.²⁴ Liberal rights, as defended and constructed by contemporary constitutional theorists and jurists both, limit the power of states to do precisely that.²⁵ Were a state to go about the task of ensuring the material preconditions of a good life for all, or, in the Nussbaumian version of the same idea, ensuring the preconditions for the capabilities which are themselves requisite to a "fully human life," it would have to break down the walls of insularity that liberal rights, both in theory and to a considerable degree in practice, protect. To secure the minimal preconditions of the good society for all of us, the state would have to violate the *rights* we hold as individuals—rights of liberty, property, contract, and privacy. Indeed, not only do we lack a "right" to a state obligated to ensure minimal preconditions of a good society—whether the "good society" is as envisioned by Karl Marx, John Dewey, Michael Sandel, Frank Michelman, William Forbath, or Martha Nussbaum—but if anything, we have a right to a state that does not *attempt* to ensure that the material preconditions of a good society are met. Rights protect us against the paternalistic state that might otherwise regard the "good society" as its business.

Furthermore, rights deter the creation of a state interested in good society ambitions by structural design, not because they are misused by Machiavellian political actors. In many liberal states, and virtually by definition in the United States, rights are overwhelmingly negative. We have whatever rights we have, against the state, and against the

24. Most famously, of course, Rawls argued that liberal states are obligated to redistribute toward equality up to the point where remaining inequalities benefit the least well off. John Rawls, *A Theory of Justice* 100-02 (1971); *see also* Nussbaum, *Women and Human Development*, *supra* note 8, at 55, 91-95, 105 (comparing redistributive measures in India and the United States); Sandel, *Democracy's Discontent*, *supra* note 1, at 255-56 (discussing Franklin D. Roosevelt's tax proposals of 1935); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1, 8 (1999) (reviewing the legal arguments regarding redistributive rights and remedies); Michelman, *Constitutional Welfare Rights*, *supra* note 3, at 966 (discussing "specific welfare guaranty"); Michelman, *On Protecting the Poor*, *supra* note 3, at 9 (discussing "minimum welfare").

25. *See, e.g.*, Epstein, *supra* note 20, at 337-38; Robert Nozick, *Anarchy, State, and Utopia* 26-53 (1974). *See generally*, Horwitz, *supra* note 21 (discussing the concept of constitutional rights as developed by the courts since the 1930s).

state's actions, and against the state's actors; we do not have rights that positively obligate the state to do something. We do not have rights that require, rather than forbid, the state to take some action. 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 their negativity that rights preclude the state from taking any role in securing to citizens the material preconditions of the good society.

Negative rights thus disempower the state from pernicious, intermeddling, paternalistic, or malign intervention into the private affairs of individual citizens. By virtue of so doing, however, negative rights also disempower the state from intervening into the private sphere for the democratically progressive purpose of redistributing power or resources within it. Negative rights elevate or empower the citizen relative to an overreaching, paternalistic state. Yet by staying the paternalist's intervening hand, negative rights both subordinate that citizen to his stronger brother—thereby entrenching private inequalities—and disable the state from securing, on behalf of weaker citizens, the material preconditions to developing the capabilities necessary to a fully human life. Good society theorists, rights critics, and a number of liberal rights theorists, have all concluded from this argument that rights, as conceived and employed in at least United States liberal and constitutional jurisprudence, are fundamentally at odds with any purported state obligation to ensure the material preconditions of a good society. If this conclusion is correct, then it obviously holds for a capabilities approach to welfarism as well. If so, the state's obligation to promote conditions that secure the minimal capabilities essential to a fully human life, even if such an obligation exists, would have to be secured by some means other than individual rights.

But is this analysis correct? Perhaps not: the conclusion seems overbroad on three counts. First, 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 state intervention in the name of welfare, capabilities, or basic goods. The notion of a positive right may be disfavored in contemporary liberal discourse, but it is by no means oxymoronic. Ronald Dworkin, in his seminal, mid-seventies writings on liberal constitutional rights, did focus—indeed overwhelmingly—upon rights that follow from the moral constraints on liberal states.²⁶ But he suggested no reason to

26. Ronald Dworkin, *Taking Rights Seriously* vii-xv, 184-205 (1977) [hereinafter Dworkin, *Taking Rights Seriously*].

define rights in such a way, and at any rate, nothing in the remainder of his powerful jurisprudential treatment of rights depends on it. A right could readily be defined as including *both* the individual entitlement that follows from the moral *obligations* of liberal states and the entitlement that follows from constraints upon the states. In other words, rights could be defined as the individual entitlements that follow from what states are morally required to do *and* what liberal states are morally prohibited from doing.²⁷ Doing so, furthermore, would seem to be consistent with the robust Kantian moral imperative that, according to both Dworkin and Nussbaum, underlies liberalism: that every individual must be accorded equal dignity, equal concern, and equal respect.²⁸ To accord all individuals dignity, concern, and respect, sometimes requires the state to refrain from acting, and sometimes requires it to act.

The connection, in other words, between the liberal idea of rights and the constraint of negativity is contingent, not inherently logical. Thus, rights have at different times and for different subcultures in American history, been widely understood as positive rather than negative in character. To conceive of rights as either positive or negative, depending upon contingent political necessity, would be consistent with those perhaps forgotten parts of our histories.²⁹ It would also be consistent with common usage in much of the rest of the world. Any number of liberal states, as Mary Ann Glendon and others have amply demonstrated, recognize positive rights, although not always in conjunction with the entailment of judicial enforcement and remedies for their breach.³⁰ Nevertheless, the rights so recognized have political meaning and impact, and more to the point, the societies that recognize them do not noticeably sacrifice their liberality by doing so. Again, the connection between rights and negativity inheres in American history. It does not follow from the nature of a right itself.

Second, a recognition that rights might sometimes be positive entitlements to state action, as well as, at other times, negative entitlements to be free of state action, is *truer* to the philosophical liberal classics that animate the liberal tradition than the insistence of liberal constitutional rights theorists on the essential negativity of rights. Let me start with Thomas Hobbes. Hobbes regarded the positive *obligation* of the state to protect individuals against private

27. Dworkin suggests as much. *See id.* at 193.

28. *See id.* at 180-83, 272-78; Nussbaum, *Women and Human Development*, *supra* note 8, at 73.

29. *See, e.g.*, Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv. J.L. & Pub. Pol'y 37, 39 (1990); Elizabeth B. Clark, *Religion, Rights, and Difference in the Early Woman's Rights Movement*, 3 Wis. Women's L.J. 29, 46-53 (1987); Forbath, *supra* note 24, at 4-5.

30. *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. Chi. L. Rev. 519, 521, 523-30 (1992).

violence as being at the heart of the social contract. The individual's right to that protection was the only "right" created by the transition from nature into civil society. Otherwise, the Hobbesian Leviathan can do what it wishes and the individual citizen must submit—the Hobbesian citizen does indeed lack negative rights. This is *not so*, however, with respect to the state's duty to protect the individual against private violence: there, the state is bound to act affirmatively, and the individual is fully entitled to a positive right. This positive right of the citizen to the state's affirmative action was by no means a peripheral feature of Hobbes' jurisprudence. Rather, the bargain struck—the individual relinquishes self help, *in exchange for* the state's obligation to protect him from violence—was, for Hobbes, the *raison d'être* of the state's existence. The Leviathan's protection of the individual against the private violence of others is the *quid pro quo* for the individual's relinquishment of his right to self-help available to him in the state of nature.³¹ The individual, in other words, is just as contractually entitled to receive that protection as the state is obligated to provide it—in short, the citizen has a right to it. The state's obligation to protect the citizen against private violence and the citizen's continuing right to receive it, in Hobbes' view, was foundational and inalienable. If we take Hobbes seriously, the individual has a right to the state's protection against the violence or aggression of other private parties—for Hobbes, this was, to borrow a phrase from Steven Heyman's important article on this point, the "first duty of government."³²

If we again take Hobbes seriously, the right to that protection is positive in character. The state is required to do something—to protect the individual—not just to refrain from doing something. If Hobbes was right about this, which I think he was, and if this very positive right to protection against private violence is central, rather than peripheral, to the metaphoric "social contract" so fundamental to liberalism, then the distinctively modern claim that liberal rights are *essentially* negative—whether insisted by rights proponents, rights critics, Fourth Circuit or Seventh Circuit Judges, or Supreme Court Justices—is mistaken, and even perverse. At least according to Thomas Hobbes, the core, foundational right to which the liberal state owes its existence is indisputably positive in character.

And what of Locke? As Epstein and other property rights advocates rightly insist,³³ Locke substantially modified the Hobbesian picture. For Locke, but not for Hobbes, the individual brings to the civil state rights of property bestowed by nature, which have the effect

31. Thomas Hobbes, *Leviathan* 165 (J.M. Dent & Sons Ltd. 1928) (1651).

32. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *Duke L.J.* 507, 508 (1991).

33. Epstein, *supra* note 20, at 7-10.

of significantly limiting state sovereignty.³⁴ The tying of modern liberalism to these "negative rights" that bar the state from acting in various impermissible ways stems from Locke's writings, roughly in the way Epstein describes.³⁵ But Locke at no point *repudiated* the Hobbesian positive right of the citizen to state protection against private violence. In fact, he expressly endorsed and expanded it. For Locke, the citizen has the right to expect and demand more from the state than just protection against violence, he also has the right to expect governance in accordance with rules, and indifferent and impartial adjudication.³⁶ At no point, though, does Locke urge that the core, Hobbesian, positive right to the protection of the state should be displaced with a set of negative rights limiting state power. He urged, rather, that the relation of state and citizen be construed as constituted by both. The individual gives up natural powers of dominion, punishment, and adjudication, while the state acquires the power to administer these functions, but only toward proper ends.³⁷ The citizen, from a Lockean perspective and a Hobbesian perspective, has rights, logically positive in character, to a state that acts in ways conducive to his safety, not just negative rights to insist on restraints.

Other prominent liberal theorists have also quite explicitly embraced the joint claims that the state has positive obligations and the individual has positive rights, and have expanded the list well beyond the Hobbesian positive right to protection against private violence. John Stuart Mill and John Dewey both insisted upon what we would today recognize as liberal welfare rights to the minimal preconditions of a good life, broadly construed. According to Mill and Dewey, the individual has rights the liberal state must recognize and act on, not only to safety and food and shelter, but also to meaningful work, a decent and liberal education, and participation in society's political, civic, and cultural life.³⁸ Even Isaiah Berlin, perhaps the harshest twentieth century critic of positive rights, stated in his celebrated essay on the topic that his fears of overintrusive states did not go so far as to obliterate the state's positive obligation to ensure, and the individual's positive right to receive, a threshold level of minimal well-being.³⁹ Indeed, there may be *no* important *classical* liberal theorist either of "rights" or of states, prior to the libertarian interventions of Robert Nozick and his followers that insists on the tie

34. *Id.* at 7-15.

35. *See id.*

36. John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* §§ 128-31 (Henry Regnery Co. 1949) (1690).

37. *Id.*

38. *See* John Dewey, *Liberalism and Social Action* (Capricorn Books 1963) (1935); John Stuart Mill, *Utilitarianism*, in *Utilitarianism, Liberty and Representative Government* 66-67 (E.P. Dutton & Co. 1950) (1863).

39. Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 123-24, 164-65, 169 (1969).

between rights and negativity that has become such an entrenched part of the contemporary American constitutional mindset.

Third, the negativity of rights is neither required nor justified by the American Constitution, as a number of constitutional theorists and historians have now shown.⁴⁰ This is a large debate beyond the scope of this symposium, but two points are worth quickly noting here. The first is logical. The widely shared conviction that "the American Constitution is one of negative rights only" seems to rest largely on the mistaken assumption that because the Constitution's Bill of Rights addresses States, and not private actors, it therefore only consists of negative rights.⁴¹ The state action requirement, in other words, is said to preclude not only the possibility that the Constitution reaches private actors as well as state actors, but also that the Constitution cannot reach state *inaction* as well as state action. But this inference is unwarranted. Regardless of whether the Constitution contains a "state action" requirement that limits the Constitution's reach to state actors, it does not follow from such a requirement that the rights contained are necessarily negative in character. A positive right, no less than a negative right, would be directed at states and not private actors. The difference between them is that a positive right would condemn as unconstitutional state *inaction* rather than state action, not that it would extend the Constitution's reach to private actors. The difference between positive and negative rights, in other words, is *not* that the former would impose constitutional constraints on private actors.

And finally, both the history and the plain language support rather than undercut the existence—even the prominence—of positive rights in the Constitution. The plain language of the text of the Fourteenth Amendment contemplates state *inaction* rather than action as its main target. The first sentence of Section 1 declares that "No State shall *deny*" various entitlements. It may be unfortunate that the drafters chose to use a double negative, but the meaning is not obscure. If *no* state is allowed to deny, then all states must provide. And what states must provide, again according to the clause's plain text, is protection of the law—and equal protection at that. Historically, the Amendment's insistence that states must provide protection of the law was the result, in part, of the inaction of the states to protect both the safety and civil rights of freed slaves.⁴² The Fourteenth Amendment,

40. Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2308-27 (1990); Heyman, *supra* note 32, at 526.

41. The clearest explication of this mistaken conception is found in Judge Posner's decision in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The opinion states, "The Constitution is a charter of negative liberties; it tells the state to let people alone." *Id.* Tribe makes the same criticism of this view as is found in this essay. Laurence H. Tribe, *Constitutional Choices* 247 (1985).

42. See Jacobus TenBroek, *Equal Under Law* 57-58 (First Collier Books 1965) (1951).

in short, plainly provides for positive individual rights and explicit state obligations both.

B. *Rights' Atomism*

The second major way in which rights undercut efforts to secure a state obligation to ensure the minimal material preconditions of those human capabilities themselves requisite to the enjoyment of a fully human life, according to our major rights critics and good society theorists, is *existential*: it goes to how rights envision and then construct our self-identity. Rights and rights-consciousness render us unduly atomized. In liberal societies that take rights seriously, individuals are described as, and 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 empathic connections with fellow citizens.⁴³ No less than their negativity, rights' atomism also undercuts attempts to secure the material preconditions for the basic human capabilities in three ways.

First, for there to be a state obligation to provide for minimal capabilities requisite to a fully human life, at least in a democratic state in which state actors, and hence the "state" itself, are some subset of citizens, there must exist the political *will* for it. That will, in turn, requires some degree of communal solidarity among citizens. Rights, however, disincline us to even regard each other, much less assume responsibility for each others' welfare. Rights erode rather than enhance our feelings of obligation toward our neighbors, co-citizens, and arguably even our intimates and family members. Rights leave us identified with our possessions, rather than with each other. For that reason alone, they seriously undercut the empathic solidarity necessary to sustain a democratic case for a state obligation to provide for the well-being of others.

Second, at least some of the material preconditions of human capabilities which a good state is obligated to provide are those preconditions for our capability for social affiliation or connection with others, and mutual and moral responsibility for each others' well being.⁴⁴ To live a fully human life, according to Nussbaum and others, *means* in part to have the capability to live responsibly and safely with

43. See Sandel, *Democracy's Discontent*, *supra* note 1, at 16-17; Gabel, *supra* note 21, at 1572-76; Glendon, *supra* note 30, at 520-23; Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 Fordham L. Rev. 1, 4-6 (1997) [hereinafter, Sandel, *Constitution of the Procedural Republic*]; Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 523-25 (1989) [hereinafter Sandel, *Moral Argument and Liberal Toleration*].

44. Nussbaum, *Women and Human Development*, *supra* note 8, at 79.

and for others, at work, at home, and in the community.⁴⁵ The capability for doing just that, then, is part of what a just state is obligated to ensure, if the state is obligated to ensure the minimal material preconditions of a good society. The atomism that is at the core of liberal understandings of rights, however, implies at most an atomistic individual in need of rights of isolation, of privacy, and of individuation; not rights that might stem from a frank recognition of our social or relational nature. In terms of capabilities, current rights rhetoric implies that the capability for autonomy is the core capability in need of protection through rights, to the virtual exclusion of relational capabilities. Because of the power of modern individualistic rights rhetoric, we not only lack "relational rights" that might bolster our social capabilities, but we become disinclined to even envision or argue for them. In an atomistic rights culture, we come to view ourselves, and then increasingly come to be, possessors of individual rights against each other and the state. We are not only without any responsibilities toward others, but also without any rights to ensure that we have the capabilities to safely exercise those responsibilities toward others. As a result, we come to identify our "rights"—our most precious political entitlements, and hence our political identity—as rights to individuate and distance or sever ourselves from, rather than rights to safely connect or relate to, our families, intimates, communities, or co-citizens.

Third, for the state to have an obligation to ensure the minimal preconditions for the development of fundamental human capabilities themselves essential to a fully human life, the state obviously cannot be entirely "neutral" toward competing conceptions of the good life. It must, rather, be committed to a vision of the good as defined by those human capabilities, and obligated to achieve it. But the same atomistic understanding of individual nature that drives liberalism's commitment to individualistic rights also is behind its signature insistence on state neutrality toward competing conceptions of the good life. Because we each individually and idiosyncratically author our own understanding of the good—the state, or the community, or the collective, is obviously incapacitated from doing so on our behalf.⁴⁶ The resulting insistence on state neutrality toward competing conceptions of the good renders liberalism, as a politics, peculiarly moot on issues regarding the nature of the good society and incapacitated in the task of bringing it to fruition. The result is not only alienated individuals, but also a sterile reluctance on the part of

45. *Id.*

46. Sandel draws out the implications of this connection most clearly. See Sandel, *Democracy's Discontent*, *supra* note 1, at 25-54; Michael Sandel, *A Reply to Critics*, in *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* 319, 319-23 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) [hereinafter Sandel, *A Reply to Critics*].

liberal states to endorse some conceptions of the good over others, even where such a commitment seems warranted and in the national interest. More fundamentally, it leaves the liberal state with no role to play, even in theory, in the creation of a good society. The individual has a "right" not to the material preconditions of a good life, but to a state fundamentally disinterested in committing itself to that project. For this existential, identity-based reason as well, then, rights critics and welfarists have concluded that "rights-talk" is a part of the problem rather than part of the solution. Rights construct us in such a way as to guarantee our disinterest or hostility toward any state obligation to ensure the good society, and the "we" that is disinterested or hostile to such a project is the "we" that would have to be charged with the duty to carry it out. If this conclusion is right, then it surely holds for welfarist approaches that center capabilities, rather than primary goods or virtue, as that which triggers and defines the state's obligation.

But is it right? This existential argument also seems overbroad. There is even less reason to think that rights, in order to be liberal rights, must be based on a falsely atomistic account of our nature than to think that rights, in order to be liberal rights, must be invariably negative. Rights, in the liberal tradition, are justified by and emanate from some conception of our human nature,⁴⁷ but there is nothing in the rights tradition per se that obligates it to honor a *false* conception of our nature. Indeed, although classical liberals undoubtedly highlighted our autonomy and our individuality, the centrality of the "right to be left alone" to the rights tradition, and the neurotic understanding of our atomistic nature on which such a right rests, is a late nineteenth and early twentieth century invention. Such a view is not "central" to liberalism and not required by the logic of rights; it is

47. See generally Dworkin, *Taking Rights Seriously*, *supra* note 26 (arguing that rights derive from membership in the human community and the concept of political equality). A serious regard for rights, Dworkin argues, rests on "the vague but powerful idea of human dignity. . . [which] supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust." *Id.* at 198. H.L.A. Hart and others have noted that Dworkin does not specify a sufficiently thick view of human nature to sustain a strong case for any particular set of rights, thus distinguishing him from classical liberal rights theorists such as Mill. See H.L.A. Hart, *Between Utility and Rights*, in Ronald Dworkin and *Contemporary Jurisprudence* 214, 218 (Marshall Cohen ed., 1983). Nevertheless, Dworkin directly rests his defense of the idea of rights itself on an appeal to a conception of human life, which he himself labels "Kantian," and from which the basic rights to equal concern and respect are directly derived. Dworkin, *Taking Rights Seriously*, *supra* note 26, at 198-99. For further examples of rights arguments that rely to varying degrees on specified accounts of human nature, see, e.g., Laurence H. Tribe, *American Constitutional Law* 1302-08 (2d ed. 1988); Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 *Law & Contemp. Probs.*, 83 Summer 1980; David A. J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L.J.* 957, 964-72 (1979).

central to liberal states, only to the extent that the state, the Constitution, or the tradition that defines the content of the rights we actually have, designate it as such. Rights could as readily be grounded in a view of our nature that respects our individuality and also gives full recognition to our social nature: our extended periods of biological dependence on caregivers, the resulting dependence of those caregivers on the support of others, our obligations to our communities and neighborhoods, our civic and charitable duties, and our responsibilities to engage in civic life. In short, neither negativity nor atomism are necessary features of the rights tradition.

II. THE COSTS OF ABANDONING RIGHTS

So—why insist that they are? And what are the costs of doing so? Some of the earliest and harshest critics of rights, particularly from the critical legal studies movement, at various points conceded or insisted upon the possibility of precisely the reformulation that I am suggesting above.⁴⁸ Nevertheless, those same rights critics have urged abandonment, not a reformulation, of rights and rights discourse. The reason given for that urged abandonment, for the most part, has been largely strategic or pragmatic, rather than theoretical or visionary. It has also had quite an impact. Welfarist theorists have seemingly turned their backs on rights as a possible vehicle for achieving (or even articulating) the state obligations that they think are owed.

The argument roughly is this: rights, according to the most far-reaching critics, are (almost) invariably negative,⁴⁹ and (almost) inevitably tied to a falsely insular conception of individual nature.⁵⁰ They are also (almost) infinitely malleable, or indeterminate, and accordingly easily co-opted, or subject to capture.⁵¹ For both reasons, while they may from time to time guarantee a measure of individual freedom, they also—and (almost) inexorably—are co-opted by larger forces and reformulated, so as to frustrate rather than promote the good society. However they are initially conceived, and with whatever good intentions and progressive motivations, rights end up insulating inequalities, disabling the state from redistributive regulatory governance, benefitting the privileged, giving false hope and a false sense of security to the subordinated, teaching complicity in one's own disempowerment, and holding out the possibility of small progressive steps forward only toward the end of co-opting their beneficiaries, and ultimately securing large steps back. There is nothing to gain and quite a bit to lose by even envisioning a

48. Gabel, Tushnet, and Horwitz all insisted on the contingency rather than the necessity of rights' negativity and atomism. See Gabel, *supra* note 21, at 1586-90; Horwitz, *supra* note 21, at 404-06; Tushnet, *supra* note 21, at 1379-80.

49. See Horwitz, *supra* note 21, at 399-400; Tushnet, *supra* note 21, at 1386-94.

50. Gabel, *supra* note 21, at 1566-71.

51. Horwitz, *supra* note 21, at 396-99; Tushnet, *supra* note 21, at 1371-84.

progressive or positive alternative rights agenda, much less striving to put one in place. The idea that we might profit from a reformulation of rights as positive and honoring our social rather than asocial nature, is worse than a harmless utopian chimera; it is a dangerous delusion. If put in practice, it promises at most a pointless diversion of resources. At worst, it promises continuing liberal complicity in the work of injustice. It will leave us farther from, not closer to, a good society, and farther from, not closer to, a state obligated to commit itself to that end.

This is not a groundless worry. There is plenty in our recent and not so recent history that explains the rights critics' most extreme forms of rights skepticism. The rhetoric from the last great American rights revolution—the civil rights movements of the fifties and sixties—has indeed become the shell of the reactionary anti-affirmative action movement of the eighties, nineties and aughts. The reproductive rights movement of the mid and late twentieth century has similarly become nothing but a bare commodificationist right to purchase an abortion, rather than a positive entitlement to exercise meaningful autonomy or choice in one's reproductive life.⁵² Negative rights of free speech—fervently sought after by dissenters as a way to protect the interests and liberties of persecuted pacifists, anarchists, and communists at mid-century—have become, at the turn of the century, the vehicle by which advertisers manipulate public desire with impunity, and corporate wealth maintains its headlock on the levers of political decision-making.⁵³ The peculiarly American so-called "right to bear arms," intended to protect the rights of colonial citizens against a centralized, distant military force, has become instead the means by which citizens terrorize each other, reducing the state to such cartoonish sub-minimalism that the right threatens to return us all to the very Hobbesian state of nature from which the Leviathan promised deliverance. The rights critics have, in essence, urged us to internalize the moral of these examples, and inoculate ourselves against future delusions. This is the way of all rights movements, hopes, and ambitions. There is no articulable right that will not eventually, and sooner more likely than later, become the vehicle for reactionary politics. The entrenchment of the status quo achieved by such a discourse is never worth whatever momentary gain might be had through an expansion of rights.

52. Others have criticized *Roe* on these grounds. See Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and the Law* 99-101 (1987); Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* 46-48 (1996); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1308-24 (1991).

53. See generally, Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993) (suggesting a reassessment of the guarantee of free speech in light of current trends and developments).

There are, however, costs in abandoning rights, rather than joining the debate regarding their substance. The first is rhetorical. It concerns the nature of moral, aspirational discourse, and the relative power or impoverishment of the rhetoric with which such discourse is articulated. When architects of the good society disown rights, they distance themselves from a tradition that has been unduly attentive to individualistic needs for property, contract, and privacy, and insufficiently attentive to human and social needs for safe intimacy, civic participation, meaningful work, or basic welfare goods. But they also distance themselves from a discourse that whatever its historic shortcomings is *also* explicitly utopian, moralistic, and imperativist. The rights tradition directs states and state actors to attend to what we might universally share, and to focus on the utopian aspirations we might universally hold, and then to bring that vision to earth. Rights are morally grounded imperatives, not a list of suggestions for good governance. It is a language that requires lawmakers to think in terms of what we morally ought to do and be. Good society advocates should not loosely turn their backs on a discourse which has historically been the means by which we marry our moral beliefs about governance to ethical imperativism. There aren't all that many ways by which critics, citizens, or even legislators can make the point that moral judgment rather than *realpolitik* ought to—and must—guide the business of politics. It is not so clear that the abandonment, rather than reform, of one such language—whatever may be its flaws—is a wise strategy for good society advocates, or will prove to be a benefit for the party of humanity.

The second cost of abandoning rights is borne by the state of normative legal scholarship. When good society theorists who are also lawyers heed the critics' call to abandon rights talk, the development, through scholarship, of alternative directions legal doctrine could take toward the realization of that good society, bears the mark of that abandonment. To a considerable degree we can already trace the effects of that retreat. We still lack a credible, broad-based, coherent jurisprudence of welfare rights, Frank Michelman's herculean efforts of twenty-five years ago notwithstanding.⁵⁴ We might lack this jurisprudence, in part, because those who might otherwise have been inclined to contribute to that jurisprudence have been convinced not only of the futility of the project, but also of its counterproductivity. We lack a credible jurisprudence of education rights, and it is at least possible that we lack it, in part, due to that same skepticism. We lack a jurisprudence of dignitary rights, labor rights, and environmental rights—and, as I will discuss in a little more detail, *doulia* rights, or rights to provide

54. Michelman, *Constitutional Welfare Rights*, *supra* note 3; Michelman, *On Protecting the Poor*, *supra* note 3.

care. We lack them in part because those who might produce the scholarship have become convinced that rights and rights talk cannot be productively turned to the work of achieving or even conceiving a good society, and might even undercut it. Obviously, other factors as well have played a role—a hostile Supreme Court is only the most obvious. Additionally, the turn among some leftist scholars to an explicitly antinormative, skeptical postmodernism has also fueled a late-century retreat from visionary, utopian scholarship, including rights scholarship that might aim to carve out a constitutional argument for a state obligation to secure the minimal preconditions of a good society. Nevertheless, the explicit disavowal of rights by both rights critics and good society advocates is a part of that story, as well as reflective of it.

Third, there is a doctrinal cost paid when lawyers, and not just social theorists, abandon rather than seek to reform rights and rights talk. The abandonment of rights discourse by those committed to constructing a good society through law, goes some way toward rendering the rights critique a self-fulfilling prophecy. When lawyers forgo the task of creating a positive rights jurisprudence, they also forgo the opportunity to assert a credible counterweight, *within* doctrine and within rights-structured doctrinal discourse, to the assertion of negative rights which do indeed undercut the good society, and in precisely the ways urged by the critics. With no credible counterweight, when a negative right of the sort the rights critics lament *is* asserted, it is typically met not with a positive right that might counter it, but instead with a claimed “policy” to be weighed against it. But rights, as both their proponents and critics know, trump policy; that is their function. If we had what we currently do not have—a developed jurisprudence of positive and relational rights, constructed around the ideal of the good society—then a negative, individualist right might alternatively, or additionally, be met in the courts of law and in the courts of public opinion, with the claim that it conflicts with a positive one. Conflicting rights, as Dworkin reminds us, do not “trump” each other; rather, conflicting rights must be read in such a way as to reduce the conflict. Proponents of the good society have been dissuaded, in part by the rights critique itself, from developing the jurisprudence that might counter the rights decried by that critique.

Let me illustrate with one example. In Texas two years ago, a federal district court held that a man’s constitutional right to bear arms was unconstitutionally abridged by a federal law that forbade domestic violence offenders from owning firearms.⁵⁵ The judge accordingly struck down the law as unconstitutional. In that case, the state attempted, unsuccessfully, to meet the defendant’s claimed

55. *United States v. Emerson*, 46 F. Supp. 2d 598, 610-11 (N.D. Tex. 1999).

assertion of the negative right to bear arms by arguing that the Second Amendment right on which the defendant rested his case does not exist.⁵⁶ The court rejected the argument that if the right does exist, it should be balanced, weighed against, or limited by, a policy favoring public safety.⁵⁷ But policy arguments do not win against asserted rights. They are not supposed to. The very logic of a right—that it must be protected even in the face of sound policies that conflict with it—virtually assures as much. Again, rights, by definition, trump policy. It is inherent in rights that they do so. In this case, once the court accepted the dubious premise that there exists an individual right to bear arms, there could be no effective rejoinder.

Alternatively, if there had existed a developed understanding of positive rights to which the state might have turned, the negative right to bear arms asserted in the Texas case could have been met not simply with a policy favoring disarmament of violent domestic abusers, but with a claimed *right*. After making the sound and central claim that no such Second Amendment right exists, the state could have proceeded to urge that even if the right to bear arms exists, it must be understood in such a way as not to conflict with our more fundamental positive right to a liberal state that is obligated to protect us against private violence. Such a right, had it been asserted, could not be trumped by a conflicting right. The judge would have been forced to reconcile, in a principled way, the asserted right to bear arms with the civil right to be protected by the state against private violence. How the court would have achieved that reconciliation is an open question; the claim that the negative right to bear arms would have to be limited so as to accommodate the positive right to be protected against a known threat of violence from an identified offender with a history of abuse, may or may not have proven persuasive. It likely would not have proven persuasive to the judge that wrote the majority opinion—although it may have captured the legal imagination of a judge writing in dissent. My point here is only that the rights critique—along with a host of other factors—dissuades us from the need to build the case for the constitutional rejoinder. That alone is a cost.

It is not hard to imagine other examples. Property owners and, increasingly, courts argue that environmental regulations that impact the value of privately held property unconstitutionally restrict the property owners' various negative rights of property. Such a claim, one might think, ought ideally to be met with a robust argument that we have a positive right to a state that protects our wilderness, air, water, and public health. Instead, it is typically met by a plea that the property owner's multiple and conceded negative rights to own

56. *Id.* at 600.

57. *Id.* at 609-10.

property free of state regulation ought to be balanced against environmental policy. But again, in a rights versus policy debate, the right will trump. The consequence, for environmentalism, of abandoning the attempt to construct a positive jurisprudence of environmental *rights*, is clearly not good. In a similar vein, the claim that a landlord's contract and property rights are infringed by laws requiring him to rent to couples regardless of sexual orientation, is met only by the hope that the court will in its discretion come to view such non-discrimination laws as protecting compelling state interests, rather than by a strongly asserted positive right to shelter, unburdened by litmus tests of moral propriety. The claim that a propagandist's hate speech is unconstitutionally infringed by a speech regulation, or that broadcasters' news coverage is unconstitutionally infringed by broadcast regulations, is met by asserted policies protecting interests in freedom from harm or fairness, rather than with the claim that liberalism ought properly honor not only our negative rights to be free of censorship, but also our positive rights to a political dialogue unpolluted by hate or profit. In short, without a tradition of positive rights on which to draw, we meet constitutional claims of negative speech rights, property rights, contract rights, and gun rights with exhortations of policy—exhortations which sometimes are but more often aren't heard, and when they are heard, are then readily trumped. But that these cases are all posed as, and understood as, asserted rights on the one hand, and policies on the other, does not bode well for the regulatory state. Again—rights, by definition, trump policy. Negative rights, unchecked by positive rights that might counter them, threaten to reduce that regulatory state to the vanishing point. Such a reduction would hardly be a victory for the party of humanity. More pointedly, a regulatory state reduced to the vanishing point is clearly not one that is obligated to secure minimal preconditions of a fully human life.

Lastly, the failure to articulate a positive rights jurisprudence that includes a state's obligation to ensure the minimal preconditions of the good society has resulted in the lack of a meaningful counterweight, not only within rights discourse, but also to counter the balancing of costs and benefits that now dominates ordinary, or non-rights-based, legal analysis. As a result, legal analysis, across the map, is now driven in toto *either* by the logic of negative rights, or in the absence of rights, by an economic calculus that funnels all values into monetary equivalents, assigning some to the cost and some to the benefit side of the ledger, and then balancing the one against the other, according victory to whichever comes out on top. The failure to enrich the rights tradition with a positive rights jurisprudence and a defensible conception of our social nature has thus facilitated the ascendancy of an economic method of legal analysis that relentlessly asserts the comparability, fungibility, and commensurability of all

values, translates values into dollar terms, and leads to the ease of trading off one against the other. The cost of health is balanced against lost profits, the value of future life is measured against present dollars, the cost of suffering against the cost of prevention, the monetary benefits of speech against the cost of permitting it, the cost of sexual harassment against the benefits of non-intervention. This cost-benefit analysis has widely recognized and well-known pitfalls: it relies on real or shadow market values that are themselves reflective of little but the forces of profit; it ferociously solidifies and legitimates the status quo by ignoring the effects of given distributions on felt entitlements; it discriminates between us by valuing our lives differently on the basis of our projected or actual incomes; it creates a wealth-based mentality that measures all, including goodness, truth and justice, by reference to profit. But for all of its problems—for all of its well-known absurdities—cost-benefit analysis now dominates legal analysis. It does so primarily for the absence of credible normative alternatives.

Here again, this is a loss felt not only in theory but in doctrine as well. As Lisa Heinzerling demonstrates, costs of environmental protection to individuals and corporations, for example, are balanced against the benefits to individuals, where these benefits of health and well-being are then measured by projected incomes, and then discounted by various factors, such as the proximity to us of the lives in question, in terms of either time or distance. Rather than present a rights-based challenge to this entire normative apparatus, advocates of environmental regulation instead debate the amounts, challenge the discount rates, or question various economic assumptions behind the economic models. What we do not hear, even from committed environmentalists, is a principled moral and legal argument that we are entitled by right—meaning *regardless of cost*—to some degree of state-protected environmental health. Accident victims and their advocates similarly tally their costs in lottery-styled torts cases, rather than assert a right to health care to which we are entitled, as a matter of right. Sexually harassed workers or their advocates debate the subtleties of the value of a harassment free environment as implied by their employment contracts, rather than assert a right to dignified labor. Our legal system, as well as our discourse, has been thoroughly transformed by cost-benefit econometrics, and without a rights discourse to offset, trump, or challenge it, there is little relief in sight. By eschewing rights and rights talk, we have arguably engendered a more efficient state. But we have not noticeably moved any closer to achieving, or conceiving, the good society.

III. TOWARD A JURISPRUDENCE OF POSITIVE AND RELATIONAL RIGHTS

What might be worth considering, in light of the costs of the rights critique, is the possibility of revitalizing the rights tradition, rather than abandoning it altogether. Doing so may advance the end of constructing liberal rights that protect and guarantee, not just individual autonomy, but also fundamental capabilities. What might a liberal state look like, if it employed positive and relational rights, as well as negative and individualist rights, and conceived of those rights as directed toward the protection of both capabilities and autonomy?

There would no doubt be many similarities. As Nussbaum and others have argued, a state committed to ensuring material preconditions of the good society would also be committed to ensuring many of the negative rights now understood as essential to a liberal state.⁵⁸ The major difference would lie in what additional rights would be regarded as being in the "core," and in the nature of the penumbral rights that might be inferred from that core. Our current liberal state, structured by negative and atomistic rights, and committed to securing the minimal preconditions of participation not in a good society, but in a free society, has in its core, rights of autonomy, contract and property. These are all now interpreted, variously, so as to ward off the danger of an overly zealous state. By contrast, a liberal state similarly structured by rights, but committed to securing the minimal preconditions of capabilities as well as autonomy, would explicitly recognize additional fundamental rights, including welfare rights and rights to work, currently unrecognized or underrecognized by liberal states overly committed to the atomism and negativity of rights. It would also recognize two rights currently underrecognized by liberal states and undertheorized by welfare advocates. Both of these core rights are highlighted rather than marginalized by the "fundamental capabilities" approach of Nussbaum and Sen.

The first right, I would call a right to security against private violence. The rationale of this right is essentially Hobbesian, and laid out above. As Hobbes claimed, our nature is such that the state must monopolize the tools and instruments of violence if our lives are to be relatively secure. Security against private violence is the core, material precondition of our capability for living safely and free of fear, and hence of meaningfully participating in a good life or good society. In terms of modern utopianists, we cannot lead "fully human lives" without such a right. In Hobbesian terms, we would not have a

58. Nussbaum, *Women and Human Development*, *supra* note 8, at 111-66.

state without it—it is the right for which we relinquish natural freedoms. The state therefore has an obligation—a first duty—to protect citizens against private violence and aggression, including private sexual violence and aggression. It has that obligation, or first duty, because such an obligation is necessary to the creation of a good society. Again, we cannot lead “fully human” lives otherwise.

A liberal state that fails to provide such protection violates the individual's right to that protection, as well as the state's “first duty” to provide it.⁵⁹ What might follow from the existence of such a right? A state that failed to criminalize, or failed to enforce existing laws that criminalize, domestic violence, for example, or marital rape, or violence against lesbians and gay men, or people of color, would violate those citizens' right to protection, and not just equal protection, of the law. Likewise, a state that turned its police force on its citizenry, rather than employed it in their protection, would violate positive rights to protection as well as a negative right to be free from unwarranted state intrusion. These would be clear, unequivocal violations of the citizen's most fundamental right and the state's most fundamental duty. Less blatant, and even unintentional or neglectful failures to protect citizens from violence, however, might also violate such a right. A failure, for example, to enact adequate gun control legislation so as to ensure the safety of school children, women, or urban residents, might constitute a failure to provide for the safety of citizens, and hence violate their rights to protection of the law. A consistent pattern of punishing violence against a group of citizens more leniently than the same crimes committed against another more favored group might also constitute such a violation, as Randall Kennedy argued some time ago.⁶⁰

What might be the penumbral rights implied by the recognition of a core positive right to protection against private violence? It would depend on the rationale of the core right itself. Three possibilities come to mind. First, if we have a positive right to protection against private violence because of our natural vulnerability to the violent propensities of others, and the calamitous consequences of that vulnerability, then we might also want to recognize that we have a positive right to the state's protection against other sorts of natural “violence” with equally calamitous results. We might, for example, have a positive right to be protected against natural disaster, misfortune, or even disfavor and bad luck, if the consequences of that disfavor are brutal. This might sensibly be regarded as the “welfarist” interpretation of the right to security.

59. See Heyman, *supra* note 32, at 530-45.

60. See Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1421-29 (1988).

Alternatively, we might reason that we recognize a positive right to security, or protection against the violence of others, not because of the calamitous potential consequences of our vulnerability to that violence, but because of the potentially subordinating, and hence inegalitarian, consequences of that vulnerability. Unchecked private violence leads to unchecked private political hierarchies and also leads to domination and acquiescence in those spheres in which the violence goes unchecked by the state. A security right against unchecked private violence, then, might imply not just a right to assistance in the event of natural disaster, but a different set of "penumbral rights" to be protected against extreme forms of private aggression, whether or not that aggression takes the form of physical violence. We may, for example, have a positive right to be protected against the harmful effects of a polluted environment, or an unregulated and dangerous product, or exploitative employers. We might think of this as the "antisubordinationist" interpretation of the security right.

And third, we might reason that we have a positive right to security against private violence because of a yet more fundamental right to security against extreme deprivation or impoverishment that threatens fundamental human capabilities, regardless of whether that vulnerability can be attributed to either undue private aggression or natural disaster. If we have a right to protection against violence not because we have egalitarian rights not to be subordinated, and not because we have a natural right to community assistance in the event of natural disaster, but because we have a right to a fully human life free of fear and anxiety brought on by conditions of deprivation, then we might impliedly also have a right to be freed of these non-subordinating but no less damaging sorts of vulnerabilities. This would be the most far-reaching penumbral interpretation of the right to security, and might be called the "capabilities-based" interpretation. We have a right to security, in this view, because we have a right to live the "fully human" life such security in part ensures. A liberalism grounded in a "first right" to protection against private violence, so understood, in other words, might support the existence of penumbral rights to protection against other sorts of vulnerabilities—and hence, at the outer reaches, rights to whatever is minimally necessary to attain those capabilities in turn essential to a fully human life. Obviously, such rights would entail state obligations to act, rather than simply refrain from acting.

The second core right that might be recognized in a liberal tradition unwedded to atomism can be called a "right to provide care," or as the philosopher Eva Kittay refers to it, a right to *doulia*.⁶¹ This right is currently undertheorized in the welfarist literature. We do not, contrary to Hobbesian myth, spring upon this earth mushroom style,

61. See Kittay, *supra* note 23, at 132.

as fully formed, autonomous adults. Rather, all of us enjoy or suffer an extended period of absolute dependency upon caregivers, and most of us, as adults, enjoy or suffer (or both) an even longer period during which we bestow care upon infants and children dependent upon us, and eventually upon aging parents in similar need. The ability to give care to dependent others, and the ability to receive such care as a dependent other, is at least as fundamental to a "fully human life" as is the ability to rest secure against threats of private violence or subordination. As a species, we are not just interdependent creatures, we are also, for substantial periods, fully dependent upon others, and others are, for substantial periods, fully dependent upon us. Those simple facts of our human existence, to a considerable degree, mark our species, define and constitute our moral sense, and form the basis for our social nature.

As a consequence, when we are infants and children, and likewise when we are sick or aged, we desperately need, not the rights of autonomy and independence so central to classical liberalism, but a regime that protects us in our dependent state, and protects those upon whom we are dependent as well. And, when we are acting as caregivers, we need not rights that falsely presuppose our autonomy and independence, but rights that frankly acknowledge our relational reality. When infants, children, or aging parents are dependent upon us, we are dependent upon others for support and sustenance.⁶² People who are providing care to dependents are themselves in need of assistance from others, and caregivers will eventually become, again, dependents in need of care themselves. That circle of mutual need, caregiving, dependency, and assistance is as much a part of our social contract as is the individual's relinquishment of rights to self-defense in exchange for a right to protection against violence. A rights tradition that forthrightly acknowledged the natural reality of our inescapable dependence on each other—to say nothing of our social nature—would give pride of place to "relational rights" that would protect the caregiver, and hence the care bestowed in dependency relationships.

Needless to say, perhaps, such relational rights are nowhere mentioned in various constitutional documents, nor are they well-grounded in liberal theory. But they ought to be. We have the rights we have in liberal, democratic societies, at least according to widely shared conventional wisdom, for essentially one (or more) of three basic reasons. First, we construct or recognize rights when, for some reason, the sphere of life, service, freedom, activity, or identity that is protected by the right, and so necessary to flourishing, might nevertheless be systematically undervalued, underappreciated, or underprotected by standard political or economic processes, even in a

62. For a sustained argument to this effect, see generally *id.*, at 132-46.

liberal democracy. Second, at least sometimes in the United States and elsewhere, we construct rights when we have reason to believe that a particular practice or activity, if unchecked, will have a severe and adverse effect on a subgroup that has historically been subordinated. And lastly, here and elsewhere, at least on occasion, we construct rights to underscore our most fundamental and most shared intergenerational values. The panoply of rights we protect expresses our self understanding, and more specifically, it expresses a self-understanding meant to endure even in times of the value's political neglect.

Does this widely shared, and I think, uncontroversial understanding of the various rationales for rights suggest a basis for a right to give care, and a right to the *doulia* needed to support it? I think so. First, we have very good reason to think that standard political and economic tools will not generate market or political protections for this labor, or for those who provide it. Caregivers do not, as a rule, willy-nilly abandon infants or dependents, take a better opportunity as it arises, or go on strike, even under very harsh conditions. Caregivers, virtually by definition, are emotionally and ethically committed to perform the work without interruption once it is undertaken. That emotional and ethical attachment of caregiver and cared-for that results from caregiving labor strongly suggests that the work will be less supported than it should be in both democratic political systems and market economies. Caregivers have all of the vulnerability, but none of the autonomy, which comes from the "at will" employment status they share with other vulnerable employees. There is no political will or need to support caregiving labor and no organizational ability to confront that lack of will with some set of non-negotiable "caregivers' demands," so long as caregivers continue to provide the services regardless, enduring either impoverishment or dependency as the cost of doing so. We therefore have good reason to believe that familial and economic institutions, if unchecked, will continue to undercompensate caregiving labor, and that women will be adversely impacted, as a group, by that practice. For this unexceptional reason, familiar to liberal theorists, we need rights of care to protect caregivers against the pendulum swings of public support and neglect of their work.

Likewise, we need rights of care to protect women from the inequalitarian consequences of that neglect, just as we need rights of nondiscrimination to protect potential employees from the adverse consequences of irrational racism. It is increasingly clear that some such panoply of relational rights is necessary if women, who have traditionally assumed the work of unassisted caregiving with no correlative state obligation to protect them in that work, and who have suffered either the risk of impoverishment or subordination by virtue of doing so, are to enjoy any measure of equality in an

otherwise liberal and autonomy-protecting society. In a related point, such rights are necessary if caregivers, whether men or women, are to enjoy the rights of autonomy promised them by conventional liberalism.

Lastly, we need a right of care and a right to supported caregiving labor to better express our self-understanding as a species for whom caregiving is a central life activity. Clearly, our nature is such that we thrive when cared for. As a species, our period of infantile need is extended over time, as is our period of caregiving labor. We flourish both individually and communally when decent care is provided, and we suffer when it is not. The better the care, the more the cared-for will thrive, and the more likely they will mature to become liberal and equal citizens who can themselves provide care as well as fulfill responsibilities of citizenship in a liberal society. And, the more demanding and consuming is the care, the harder it is to provide without support.

But most fundamentally, liberalism ought to recognize such rights because such rights are necessary to a good and liberal society, virtually regardless of how that society is defined. Those who give care to dependents over extended periods of time need material security against need, if that care is to be of high quality. One cannot see to the needs of an infant or an elderly parent and engage in wage-earning labor at the same time; caregiving labor, by its nature, renders the caregiver less autonomous. Falsely assuming that we can, is ultimately as disastrous and self-destructive as falsely assuming that grown people will naturally and peacefully cohabit in the state of nature. An artificial, socially constructed, civil Leviathan has proven necessary to protect us against the second false illusion—the illusion of our own invulnerability and natural sociability. A similarly artificial, socially constructed, civil network of support ought to be created to protect us against the first—the illusion of our natural independence. A right to give care without risking severe impoverishment or subordination, grounded in our nature, and protective of the caregiver's security, safety and material well-being when she relinquishes her independence so as to care for the needs of dependent others, should be a part of that social construction.

Thus, all three rationales for rights—the dysfunction of political and economic processes for protecting caregiving labor; the inegalitarian consequences for an historically subordinated group of not doing so; and our self-understanding that caregiving is important work—point in the direction of care and *doulia* rights. Whether we are presently in a “constitutional moment” which might support the creation of such a right is of course an open question. We may now be in a period when the jurisprudential will to support caregiving labor in any way other than through traditional family structures is at an all time low. But we are also in a political period when the need for such a right has

become clear to many people who historically have had no sense of it whatsoever: men, who are actually *doing* caregiving labor, and are consequently experiencing some of the risks of that work. Women and men who are caring for dependents know they need support, and they also know that complete economic dependency upon a marital partner in an unequal economic relationship is not a viable long term solution to the problem. A right to support for caregiving labor might then express that quite fundamental shift in our collective and social self-understanding.

What might be the practical consequences of such a right? Mothers or fathers caring for infants, and adult children caring for aging parents, protected by rights to care, might be possessed both of penumbral negative rights, recognized "inside the courts," against unwise state action that endangers caregiving, caregivers, and the cared-for, such as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,⁶³ and positive rights, "outside the courts," to state action that supports care-giving labor, such as an expanded version of the Family and Medical Leave Act.⁶⁴ Of course, such a right would be subject to interpretation, change, and re-interpretation in light of changing politics and circumstances, no less than are rights of privacy or speech. And, such a right, or rights, would share in the risks and pitfalls of rights generally, as exposed by rights critics. A "right to care" could be subject to capture in ways both imaginable and unimaginable. Or it may be subject (I think) more importantly, to trivialization—the right could well become, and in short order, nothing but a commodificationist right to hire a nanny of one's free choosing, or a right to be a nanny and set one's own low wage and bad working conditions unimpeded by meddlesome and paternalistic labor regulations.

Nevertheless, we shouldn't dismiss the upside potential out of hand. A "right to care" would share in the rhetorical power of rights discourse. Acknowledgment or insistence upon the existence of such a right would honor the centrality of caregiving labor to social life. Neither would it require a herculean effort to locate such a right in our constitutional history. The substantive due process clause, before it became, post-*Eisenstadt v. Baird*,⁶⁵ the source of individual, negative rights to contraception and abortion, did prominently include "a right to parent"⁶⁶—a right which, particularly if modernized and coupled with our current recognition of the constitutional status of norms of

63. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C. and 42 U.S.C.).

64. 29 U.S.C. § 2601 (1994).

65. 405 U.S. 438 (1972).

66. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

gender equality—could easily be viewed as “penumbral” to a more fundamental right to give care. As a practical matter, as mentioned, such a right casts doubt on not just the wisdom but also the constitutionality of legislation like the mid 1990s welfare reform act,⁶⁷ and such a right, were we to recognize it, gives needed dimensions of both universality and moral imperative to political demands for greater support of vulnerable caregivers. Just as important, a “right to care,” if recognized, would go a long way toward aligning the idea of rights with a conception of our nature that acknowledges our natural dependencies as well as our social responsibilities toward others, rather than a conception of our nature that insists falsely and dangerously on our self-sufficiency.

CONCLUSION: RIGHTS, CAPABILITIES, LIBERALISM AND THE MATERIAL PRECONDITIONS OF THE GOOD SOCIETY

Even if successful, of course, this imaginative reconstruction of rights from negative to positive and from atomistic to relational does not establish that any of these welfarist rights to enjoy basic capabilities actually *exist*. A right—whether to anti-subordination, to give care, to dignified labor, to a living wage, to welfare—must also be found in the language, logic or history of a state or a nation’s constitution. Rights we actually have, rather than rights we could have, must, to use Dworkin’s suggestive phrase, confront the brute facts of our legal history.⁶⁸ Constitutions may or may not explicitly provide for positive rights, and constitutions that do not do so may or may not be read so as to implicitly endorse them. There is, of course, a great deal of scholarship in constitutional democracies debating the interpretive limits and possibilities of particular constitutional provisions. Much of that debate, furthermore, goes to the possibility of locating either positive or relational rights or both within a document that seemingly only provides for negative and atomistic rights.

Nevertheless, one obstacle to the recognition of positive and relational rights within both liberal constitutional discourse and welfarist theory, stems not from brute fact of constitutional law and history, but rather from the widely held conviction that the notion of a positive right or a relational right is somehow oxymoronic—that rights *by definition* constrain states from certain acts, rather than requiring of them certain acts, and that rights by definition valorize individualism and denigrate dependency. These are circular claims that ought to be laid to rest, both for the sake of liberalism, and its

67. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. 2105.

68. Ronald Dworkin, *Law’s Empire* 255-56 (1986); *see also* Dworkin, *Taking Rights Seriously*, *supra* note 26, at 81-149 (arguing that although a judge may not invent rights, existing rights should be interpreted from an activist perspective).

apparently forsaken humanistic core, and for welfarism, at least a welfarism that has any legal bite.

Let me start with liberalism. If rights exist, and if as liberals generally contend, they are justified by reference to our human nature, then they surely direct as well as constrain states: states must act as well as refrain from acting if they are to provide for civic liberty, equality, well-being, and the "full human lives" of citizens.⁶⁹ The liberal tradition, generously read, requires states to protect our individualistic capacity for free thought and our desire to master our own fate, and it requires states to do so by refraining from paternalistic intrusion. It also, however, generously read, as Nussbaum has argued, requires states to protect our capabilities: our capability for self rule, for safe intimacy, for a healthy and long life, and for productive work, and it requires states to do so because these capabilities, among others, are essential for us to lead fully human lives. The rights needed to provide that protection are distinctively positive. If they are at the heart of liberalism, then the widely held belief that liberalism can at most embrace a negative understanding of rights is mistaken.

Second, if committed to a full and true conception of our social as well as autonomous nature, rather than a truncated one that denies the former and valorizes the latter, liberal rights and hence liberalism itself could be aligned with the work of fashioning a social fabric that protects us in our cross-generational web of dependencies, rather than one that blithely ignores them. Our capacity for caring over extended periods of time for those who are dependent upon us is at least as central to our human identity as our capacity for free thought, our propensity to bargain through contracts, or the security we gain through our possessions. The nature and quality of the care we bestow upon those who are dependent upon us mark our species, and as a set of practices, generates an ethical way of being in the world that is at least as integral both to a well-led individual life and to the well-being of our communities, as is our individualized capacity for autonomous conviction or independent action.⁷⁰ A liberalism that embraced at its core a right to give care without incurring unjustified vulnerability—a liberalism that would marry, so to speak, a recognition of the importance of caregiving labor to the well-being of the species with the robustness of the liberal rights tradition—would thereby acknowledge a relational and communitarian world substantially different from the overly atomized individualistic hell currently decried by liberalism's critics. A liberal society defined in part by its recognition of rights to care, and a liberal culture that took

69. See also Cass R. Sunstein & Stephen Holmes, *The Cost of Rights: Why Liberty Depends on Taxes* 54-58 (1999) ("Protection 'against' government is therefore unthinkable without protection 'by' government.").

70. Carol Gilligan, *In a Different Voice* 64-105 (1982).

the care to embellish its assumptions, would enrich, not undermine, the egalitarianism and individualism of citizens that the liberal rights tradition, to its credit, has always sought to foster. It would also further, rather than hinder, attempts to construct a good society, and it would do so by obligating the state to fulfill the material preconditions of at least this one quite basic human capability.

And finally, what do good society advocates have to gain by articulating the basis for the state's obligation to ensure the minimal preconditions of the good society in the liberal terms of citizens' rights? Most important, if proponents of a welfarist version of the good society were to revitalize and refashion rights rather than abandon them, they won't risk losing either the utopian universalism, or the imperativism, that the liberal rights tradition has long lent to political and legal practices. The language of rights connects politics with not just the hope, but the demand, that law both can and should structure a decent social world: rights are justified demands against a state, not just a catalog of ideas of good governance. How we conceive of that "decent social world" is clearly a political question, and in a conservative and libertarian time, the language of rights will reflect those politics—the rights we have or recognize will always reflect the dominant political discourse, and our dominant political discourse now is both conservative and libertarian. But it does not follow that rights have a necessary connection to those or any other set of political ideals; nor does it mean that those who envision a different political ideal than the reigning one should abandon it. Rights, whatever their content, are premised on the grandly egalitarian assumption that we have a shared nature, from which universal norms follow. If proponents of the good society give up on rights, they will have given up on one way of envisioning our fate in a way that honors that humanity.

There are, of course, many ways to think of and envision ideals, and it is true that political actors, no less than legal actors, can articulate visions, and urge political action on behalf of them, in language that makes no reference to our rights. It is not the case that without rights talk, good society theorists—whether welfarists or civic virtueists or capabilities advocates—are automatically reduced to the realpolitik of costs, benefits, preferences, markets, and sites of power and influence. There are other ways—alternatives to rights and efficiency both—to think about what a good society ought to be and what the state in a good society ought to do. Nevertheless, rights are and have been one way of asserting claims about what society ought to be, and what the state ought to do, and what the state must do, with respect to our laws, on behalf of all humanity.⁷¹ When proponents of the good society

71. See Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. Am. His. 1017, 1024-25 (1987).

turn their backs on rights, they relinquish one way of insisting that moral judgment, moral choice, and moral vision—and not just interests, preferences, votes, power, and money—guide political and legal action. They turn their backs on a path—not the only path, but a path—for transforming those universalistic utopian ideals of the good society into political realities.