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# Sunstein on Rights

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MAX HOCUTT

In *The Second Bill of Rights* (2004b), Cass Sunstein, distinguished professor of jurisprudence at the University of Chicago, argues that economic security should be made a governmentally protected right, along with the right to own property and speak one's mind.<sup>1</sup> Quoting Franklin Delano Roosevelt's "Second Bill of Rights" and referring to the United Nations Universal Declaration of Human Rights, which it inspired, Sunstein proposes that government should guarantee everybody a rewarding job, decent housing, medical care, maintenance in old age, and other good things. In his view, the desire to assure such benefits to all citizens should become part of our "political culture," if not be written into the Constitution, like the original Bill of Rights. Sunstein disclaims any intention to promote economic equality, but he avers that government provision of basic needs—including not just food, water, and shelter, but also education and gainful occupation—is necessary if all citizens are to be afforded the "decent opportunity" that, he claims, both the left and the right regard as desirable. Like his hero Roosevelt, Sunstein insists that a "decent" standard of living is a prerequisite for "freedom," meaning not freedom from the threat of physical aggression and political oppression, but freedom from want and economic anxiety.

Acknowledging that adding economic security to the usual list of civil rights blurs the line, beloved of believers in limited government, between negative and positive rights, Sunstein contends that this venerable distinction is "tangled in a massive

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1. For an abstract of the book by its author, see Sunstein 2004a. Page numbers given parenthetically in the text of this article refer to the book (Sunstein 2004b). Quotations without page citations come from the online essay (Sunstein 2004a).

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confusion”—namely, a failure to appreciate that all rights need legal protection. “Private property depends on property rights, which do not exist without law. . . . If rich people have a great deal of wealth, it is because the government furnishes a system in which they are entitled to have and keep that wealth.” Given that even property rights cannot exist without government protections, Sunstein argues that the libertarian ideal of economic *laissez faire* is untenable. If he is right, government guarantees of economic security and well-being should become as integral to “America’s principles and understandings” as motherhood, baseball, and apple pie. In short, if X is desirable, Sunstein sees no good reason why government should not provide X. In his view, pragmatic questions of economic efficiency are in order, but philosophical debates about the kinds of rights to be favored are to be ruled out of court as irrelevant distraction from serious issues.

I maintain that Sunstein’s argument rests on a faulty understanding of the distinction between positive and negative rights. Sunstein mischaracterizes that distinction when he says, “Many people believe they support ‘negative rights,’ or rights against government interference, but not ‘positive rights,’ or rights to government help” (197–98). This characterization is wrong. The distinction between negative and positive rights lies not in the presence or absence of government action, but in the distinction between duties *not to do* things and duties *to do* things. Grant that no effective rights exist without protection, and no legal rights exist without legal protections. It does not follow that the case for government guarantees of economic well-being is as compelling as the case for government protections of political rights, much less that government protections of economic rights will enhance liberty.

Because everything here turns on defining rights properly, I must begin by doing so, which will require me to define duties, and before I am through, I will say a little something about the meaning of freedom. Sturdy pragmatism is a good thing, and I am all for it, but sometimes there is no practical alternative to philosophy.

## Sunstein’s Case for Economic Rights: Part I

Before turning to philosophy, however, I fill out Sunstein’s argument a little more fully in order to make clear how it depends on his views about the distinction between negative and positive rights.

Although Sunstein’s characterization of this distinction does not occur until late in his book, the issue makes an appearance right at the beginning in his description of the New Deal, which Roosevelt described as a program to ensure “security,” meaning not security from invasion by foreign enemies or aggression by domestic criminals, but security from want and fear (13). In Roosevelt’s view, which Sunstein endorses, the main opposition to measures to assure this highly metaphorical form of “security” came from advocates of “the myth of *laissez-faire*,” which Sunstein takes to refer to belief that government should leave people alone to enjoy their God-given rights. Quoting the legal realists, Sunstein asserts that no rights, including the “negative”

right to property (28), exist without legal protection. “We can speak as confidently as we like of natural or God-given rights, but . . . legal protection is indispensable to make rights real in the world” (24). “In this sense, the notion of *laissez-faire* stands revealed as a myth” (26). By way of contrast, says Sunstein, Roosevelt’s approach to the question of rights was admirably empirical and experimental; for Roosevelt, rights were merely tools (27).

Who believes in *laissez-faire*? Who *has ever* believed in it? Sunstein does not say, making one suspect that the real myth here may be belief that anyone has ever believed in complete *laissez-faire*. Too busy explaining Roosevelt’s Second Bill of Rights to consider the matter, Sunstein goes on to say that Roosevelt offered economic rights as correctives to economic wrongs (35–60) and meant not to write them into the Constitution, but to encourage legislators to regard them as “constitutive commitments,” or ideals (61–66). Remarking approvingly that “Roosevelt was a public official; not a philosopher” (66), Sunstein alleges that his novel conceptualization of rights was rooted in the hardships of the Great Depression. Thus, Roosevelt reconceived Locke’s right to life as “a right to make a comfortable living” (71).

Declaring that Roosevelt was no egalitarian, Sunstein claims that the motive of the New Deal was not to eradicate inequality, much less to destroy wealth, but to increase freedom, which Roosevelt defined broadly to include freedom from fear and freedom from want (78–84). Quoting Roosevelt’s observation that “Necessitous men are not free men,” Sunstein comments that the statement’s meaning “depends on our conception of freedom” (90), which he seems to think we are free to define as we please—a Humpty-Dumpty attitude toward words.<sup>2</sup>

## Sunstein’s Case for Economic Rights: Part 2

Halfway into his book, Sunstein asks rhetorically why the U.S. Constitution does not include a bill of economic rights along with its bill of political rights. Averring, somewhat questionably, that James Madison, the most influential voice among the Founders, would not have objected to such a bill, Sunstein adds more plausibly that Thomas Jefferson, who was in France, would have approved and that Thomas Paine, the radical populist, would have been wildly enthusiastic (118).

Furthermore, because “[a]s a practical matter, the Constitution means what the Supreme Court says that it means,” a modest shift in the Court’s personnel might have given a bill of economic rights constitutional force without requiring changes in the original document’s wording (108). In fact, as Sunstein emphasizes in a separate chapter on the topic, the Court almost did approve a program of economic rights during the Warren years and was stopped only by Nixon’s appointment of four con-

2. This use of terms seems to me to confuse *liberty* with *capacity*. Talk of freedom from want or fear is metaphorical. Freedom literally so-called is freedom from restriction or restraint. That I am not able to lift five hundred pounds in no way alters the fact that I am at liberty to do so. The issue is too large to take up here. For further discussion, see Hocutt 1975.

servative judges (149–71). Because the Constitution is open to interpretation, which can vary with the political winds, Sunstein declares that there is no real constitutional bulwark to a Second Bill of Rights, nor anything in the political culture that stands immovably in its way (122–26). So why don't we have one (140–42)?

The answer, Sunstein eventually suggests, is confusion about rights. This confusion leads to *laissez faire* thinking, blinding people to the fact that “[t]he most fundamental legal rights are just pragmatic instruments designed to protect important human interests” (178). Asking why anyone would oppose making such rights part of our political culture, he considers two possible objections. One objection is that a bill of economic rights might encourage sloth and related social maladies by authorizing the government to give away what people otherwise would have to work to get (194–97). Sunstein admits, as did Roosevelt, that this problem is a real and serious one, but he thinks, as did Roosevelt, that it is soluble, although his argument is less than reassuring. Another possible objection is that enforcing a bill of economic rights might prove too difficult for the courts. In reply to this objection, Sunstein offers the recent experience of the Supreme Court of South Africa and concludes that it “has provided the most convincing rebuttal yet to the claim that judicial protection of the second bill could not possibly work in practice” (228–29)—a proposition that is logically compatible with the reply that South Africa is not yet a very convincing case.

Beyond these two replies to objections, Sunstein does little more to defend his bill of economic rights than to repeat his conviction that opposition to it is based on failure to acknowledge that even negative political rights require government protection (197–98).

Therefore, I propose now to discuss whether Sunstein's conviction is justified. I argue that it is not, but I attend to a little philosophy before I get there.

## Rights as Correlatives of Duties

My wife has a right to my fidelity, but what does it mean to say so? Once the question is asked, the answer seems obvious: I have a duty to remain faithful to her. In fact, it can be said that her right to my fidelity *consists in* my duty to be faithful; her right and my duty are the same thing looked at from different angles. For another illustration of the same truth, consider that my children have a right to my support. This statement means that I have a duty to support them; their right and my duty are two sides of the same coin. You cannot get either side without the other.

The principle that these examples illustrate, as emphasized by such intellectual luminaries as Jeremy Bentham and John Stuart Mill, is that someone's having a right means that someone else has a duty. Formally,

*X has right R with respect to Y = df. Y has duty D with respect to X.*

I call this relationship *the correlativity of rights with duties*. Described differently, it is the principle that rights and duties go together, like husband and wife or left and

right. More precisely, *no person* has a right unless *some other person* has a duty, and vice versa. Thus, to claim that person X has a right to free medical care, an old-age pension, a college education, or a decent job is to imply that some other person Y has a duty to provide it, protect it, or pay for it.

The correlativity principle is the most salient and important fact about rights. It tells us that to understand rights, we must look to the corresponding duties. If it is said that X has a right to free medical care, we must ask who is obliged to foot the bill. If it is said that X has a right to a well-paying job, a college education, a pension, or a new car, we must ask who will be required to give it to him. Only when these questions have been answered satisfactorily will we begin to understand what it means to ascribe a right to someone. If there are no good answers to these questions or if the answers are unclear, the meaning and the force of the ascription will be in doubt. Thus, the chiropractor on television who says “You have a *right* to feel good!” is not saying anything that has definite and determinate significance. He is merely trying to entice you to use his services.

Some philosophers have disputed the correlativity principle. When Thomas Hobbes said that men in the state of nature—a hypothetical condition without law—have a right to anything they want, including each other’s bodies, he did not mean that everybody in a state of nature has an obligation to surrender his body to any person who wants it. No. According to Hobbes, there are no laws in a state of nature, so there are also no duties. Therefore, everybody in the state of nature has the right to take what he wants or kill whom he wants, although nobody has any duty to let him. Or so Hobbes claimed.

Given Hobbes’s definition of a state of nature, this stunning and paradoxical claim must count as trivially true, but in making it Hobbes was misusing the term *rights*. What he meant could have been stated less misleadingly and more accurately by saying that men in a state of nature are *at liberty* to do whatever they can get away with doing because there is no government to stop them. Because a state of nature is defined as one without government, that statement is true, but it is a long way from saying that everybody has a *right* to do whatever he can *get away* with doing. *That* portentous claim changes the meaning of the word *rights*. To repeat: if Y has no duty with respect to X, then X has no right with respect to Y. Therefore, if nobody in a state of nature has duties, then nobody in a state of nature has rights—at least not in any pregnant, or substantive, sense of the word. The correlativity principle is safe.

The full significance of this principle becomes clear, however, only when we explain what it means to say that someone has a duty. Therefore, let us now take up the task of defining *duty*.

## Duties as Enforceable Performances

Turning the correlativity principle around, we can say that someone has a duty if and only if someone else has a right. Although that statement also is true, it only takes

us in circles. To get somewhere, we need an independent and practical test of duty. I propose the following:

*X has a duty D to do action A = df. Under the applicable rules R,  
X is subject to coercion or compulsion to do A.*

Thus, recurring to our original example, let us ask what it means to say that I have a duty to be faithful to my wife. In practice, it means that, whether I like it or not, I am liable under the applicable rules to censure or punishment—in short, to *sanction*—if I am not faithful.

This duty is both legal and moral. That it is *legal* means that officers of the government enforce it in officially approved ways; that it is *moral* means that ordinary persons enforce it in unofficial ways. Thus, that I have a legal duty to remain faithful means that if I am unfaithful, the courts will award my wife a divorce, take my children, and make me pay alimony; that I have a moral duty to be faithful means that an act of infidelity will cause my wife to leave me, my friends to shun me, or my neighbors to spread unflattering information about me. The principle that this example illustrates holds no matter what the duty: Y has a duty if and only if Y is subject to sanction under some rule, legal or moral, for failure to perform that duty. Subjection to sanction is the practical and empirically discernible meaning of *duty*.

This fact about duties gives force and substance to Sunstein's belief that government protection and encouragement are needed to make anything a right, although he really ought to have limited this claim to *legal* rights. As lawyers say, where there is a right, there is a remedy. Thus, consider my legal right to the minerals on my land. That I have this right means that I have standing to go before a magistrate and request an injunction commanding others to desist from carrying on mining operations, and the police will enforce this injunction if called upon to do so. That the people enjoined have a legal duty to respect this right means that they may not mine my land without risking arrest and a fine. As Sunstein emphasizes, the existence of a legally valid property right depends on the existence of a government practice of protecting property rights by sanctioning people who do not respect them.

In general, *no* effective legal right exists without government protection, and government protection of rights does not exist without government enforcement of the corresponding duties; therefore, *all* legal rights involve government intervention. Sunstein's premise is unimpeachable.

## Moral Rights and Legal Rights

The trouble is that Sunstein's conclusion cannot be made to follow from his premise, for two independent reasons. First, *rights* are not always exhausted by *legal* rights. In addition to legal rights, we can also have *moral* rights, which also require protection,

but not necessarily by government officials. Second, that all rights require protection neither obliterates the distinction between negative and positive rights nor implies that we should adopt a bill of positive rights to go along with the Constitution's bill of negative rights.

To see the first, less-consequential point, imagine that I am not faithful to my wife and do not support my children; and imagine as well that the officers of the law are so lax or corrupt that they neglect to punish me. It may still be the case that my wife and family will shun me. Worse, her burly brothers, or mine, may beat me up and run me out of town. Perhaps my parents will cut me out of their will or deny me access to their home and hearth. In that case, under that hypothesis, my immoral behavior will receive *moral* sanction even if no threat of legal sanction exists. If so, then I have a moral duty even though I lack a legal duty, and the beneficiaries of my duty have a moral right even though that right lacks government protection.

The obvious reply—that such moral sanctions are inherently weak and unreliable and therefore need reinforcement by law—is misplaced in two ways. First, it is just not true that moral sanctions are inherently weaker than legal sanctions. Human communities with effective moralities existed and flourished for hundreds of millennia before government was created less than ten thousand years ago by invading warriors who stayed behind to tax the yields of their farmer subjects more conveniently. Since then, government has been needed for defense against rival invaders, but domestic needs are still better satisfied by voluntary cooperation in the context of traditional morality. Second, where moral sanctions are weak, it is usually because less-effective and reliable governmental efforts have displaced them. In totalitarian societies, such as the Soviet Union, displacement of morality by government coercion caused the almost total corruption and ruin of the populace, which eventually came to the conclusion that no room remained for the restraints of morality given a government that controlled everything. Something of the same mentality is displayed in the highly questionable—indeed, false but often automatic—presumption that where a wrong exists, the best way to correct it is to create a new law.

So, grant that no right exists without a remedy. It does not follow that no right can exist without a *legal* remedy. Yet that condition is what Sunstein, who never considers any alternatives to legal remedies, presumes.

### Natural Rights Are Not at Issue Here

The argument just given does not depend in any way on the disputed doctrine of natural rights—rights supposedly conferred on men by God or Nature, so real even when they lack human protection. The rights I just described as *moral* are not *natural* but *conventional*. Like legal rights, their existence depends on man-made customs or practices, not on divine dictates or laws of nature. Thus, where people have no custom of censuring and punishing adulterous husbands or irresponsible fathers, no moral



duty to remain faithful to one's wife or support one's children exists in my sense of the word. If, moreover, government officials do not enforce these "duties," it will not be clear what is meant by saying that the duties or the corresponding rights exist.

Believers in natural rights, though not Sunstein, will maintain that such rights exist whether or not they are protected, but this claim suffers from a fatal epistemic flaw. Though popular, natural-rights doctrine is rooted not in empirical fact, but in theological faith. Where there is an observable practice of protecting a right, there is an empirical basis for the claim that it exists. Thus, we have a factual basis for believing that citizens of the United States (except for university professors subject to politically correct speech codes) enjoy a right to freedom of speech because that right has constitutional protection, but we have no such basis for claiming that the citizens of communist China possess the same right. On the contrary, the empirical evidence contradicts that claim. Chinese who are so foolish as to criticize their leaders receive not protection but incarceration or execution.

To be sure, someone can always claim that God protects natural rights by punishing in the hereafter people who violate these rights on earth. If this claim is true—and no one can prove that it is not—the leaders of China are in for some hard time later on. The trouble is that we have no empirical reason to believe so here and now. For those who do believe, it is purely a matter of faith, not an inference from observed facts. So this claim is out of order in a discussion that does not depend on accepting as evidence inherently disputable claims to divine revelation.

Some people find evidence for natural rights in laws of nature. Others argue that natural rights are rooted in natural needs, and even Sunstein goes so far as to suggest that natural human needs form the basis of what he calls human rights. Thus, he says in effect, government ought to guarantee all human beings adequate food, decent shelter, and medical care because all human beings need these things. The trouble is that both arguments commit what philosophers call *the naturalistic fallacy*—inferring *ought* from *is*.

This error will not be obvious if we consider just the duty to support one's children, which is clearly rooted in natural instincts. Consider, however, our other stalking horse, the duty to remain faithful to one's wife. Thanks to the sociobiologists, we now have scientific certification of the proposition that monogamy is unnatural, at least for males, whose inclination, as we already knew, is to mate with as many females as possible. Hence, both Saudi sheiks and wild stallions collect harems. Should we conclude, *per impossible*, that every male is entitled to the exclusive possession of a bevy of females? Grant that promiscuity is a man's natural *disposition*, even his natural *need*. One must make a different argument to prove that the possession of multiple wives is also every man's moral or legal right.

Instead of offering such argument, believers have often had recourse to the claim that we know our possession of natural rights by means of rational intuition. Thus, Thomas Jefferson famously proclaimed, "We declare these truths to be self-evident."

The trouble with this declaration is that what seems evident to A may seem absurd to B. The United Nations Universal Declaration of Human Rights declares self-evident the claim that everyone has a natural right to a gainful occupation of his or her choice and to vacations with pay, among other perquisites. Yet it is preposterous to assert that we all are entitled to be rich brain surgeons and to spend a month each winter on luxury yachts in Bermuda. Of course, the United Nations Declaration does not make precisely such a claim, but it certainly implies such a claim. Once you start wishing for things, pie in the sky and money on trees begin to seem reasonable.

The debate about natural rights is ancient and contentious. I do not expect to settle it with these brief remarks. I mention the topic only to point out that rights can exist without legal protection. Provided they have what I call *moral* sanction, they do not also require the sanction of God, Nature, or government.

### Why This Issue Is Not about Words

Sunstein might reply by denying that what I have called *moral rights* are *rights* properly so called; although such an attempt to limit the extension of the word would be both arbitrary and questionable, this fact does not really matter. For the sake of the argument, let us avoid the verbal issue. Give the word *rights* to Sunstein and agree to call a practice a right only if the government protects it. This verbal concession does not affect the substantive point, which is that a practice may enjoy *protection by ordinary citizens* even if it does not benefit from *protection by government officials*.

This point's practical pertinence will be obvious. Grant that the old need money, the sick need medical attention, and the homeless need housing. The question remains: Why must their government provide for this need? Why not their children, friends, or neighbors? Still better, why can't they have arranged it previously through their own foresight and planning? Why must strangers pay its costs under the official duress of a distant and impersonal government that has no direct familiarity with the persons involved and couldn't care less about them? Why can't the costs be assumed instead by the beneficiaries or by those who love them and know their situation? Does their need arise from their own negligence and shortsightedness? If so, why should more prudent and responsible persons have to pick up the bills? Why isn't charity—or benign neglect—sometimes the best response to misfortune and misery?

In short, grant that a need exists. Why must the solution always be to confer more governmentally protected rights (that is, benefits) on some people by imposing more governmentally enforced duties (that is, costs) on others? Is a government program always the best solution? And when government assistance does prove necessary, why shouldn't it be minimal and temporary? Why must it be lavish and permanent? Don't government initiatives sometimes do more harm than good, especially when they are ambitious and extensive? By ignoring these questions, Sunstein begs them. Of course, it is conceivable that in particular cases these questions and a thousand oth-

ers like them have cogent answers. When these answers are forthcoming, a case will have been made for government intervention in whatever matter—housing, medical care, education, employment—is being discussed. The foundation of this case, however, will need to be a great deal more substantial than the bare tautology that where there is a right, there must also be a remedy. Yet Sunstein rests his entire brief on this tautology and on the unexamined but false assumption that an existing need is met best by government.

I cannot take the space here to examine every instance in which this assumption might be thought to apply by an enthusiast for government action, but to see how questionable it is, one has only to examine the financial and political plight of European social democracies, which Sunstein admires. Plagued by massive debt and stagnant economies, these quasi-socialist paradises are living on borrowed time, the cut-rate protections afforded by the U.S. military this past half century, and the surpluses created by such capitalist enterprises as have been left standing and not yet regulated to death. These polities are postponing the inevitable reckoning only by importing so much cheap immigrant labor that the influx of Muslim humanity from the Middle East threatens to overwhelm them, both culturally and politically. Do we in the United States really want to go down that same dead-end road?

## The Real Difference Between Negative and Positive Rights

So much for Sunstein's first error. Here is his second, and greater, mistake. Although all rights require protection, as Sunstein says, the fact remains: positive rights differ from negative rights by imposing weightier and more irksome duties. This difference in weight means that all who advocate adding positive economic rights to our constitutionally protected list of negative political rights incur a heavy burden of proof—a burden that Sunstein in the documents here under discussion does not even acknowledge, much less take on.

To appreciate this burden, let us recur for the moment to John Locke's original trilogy of rights—life, liberty, and property. As Locke saw the matter, our having these rights means only that other people have the purely negative duty of *refraining from interfering with them*. Thus, X's possession of a right to life means that other people have a duty *not* to kill him; X's possession of a right to liberty means that other people have a duty *not* to enslave him; and X's possession of a right to property means that other people have a duty *not* to take his houses, lands, or chattel by force, fraud, or stealth. In short, X's having a right means that other people have a duty to refrain from violating it; nothing else. In this sense, Locke's was a scheme of purely *negative* rights. So is the scheme of rights set out in the U.S. Constitution. For example, the right to freedom of speech is a right *not* to be prevented from saying what one thinks; the right to freedom of religion is the right *not* to be stopped from worshiping as one chooses; and so on.

In such a scheme of rights, people are called on not to do things, but rather to refrain from doing things, and the government's most important job is to see that

they behave accordingly. In Locke's view, therefore, the government's main, if not its only, duty is to protect the lives and property of its citizens from the predations of other people, domestic and foreign. Government has no duty to sustain its citizens' lives by feeding and housing them, educating them, or giving them jobs—all at public expense. Still less does government have a duty to pay for everyone's medical care or to provide everyone with an old-age pension.

Government's duties and citizens' duties change radically under the scheme Sunstein proposes. In that scheme, which is a recipe for a regulative and redistributionist state, Locke's right to *life* is transformed into a right to a *living*—to be provided by the government to all who are either unable or unwilling to provide it for themselves. If you are homeless, the government is to give you housing; if hungry, food; if unemployed, work; if uneducated, schooling; and so on. Sunstein does say that these benefits are to be denied to able-bodied slackers and opportunistic free riders, but he does not say how that restriction will be enforced, and it is not obvious that it *can* be enforced, especially now that alcoholism and drug addiction have become “disabilities” that qualify people for governmental assistance. With such expansive ideas of necessity afoot, how is the government to decide who is and who is not sufficiently able in both mind and body to be compelled to work or allowed to go hungry and get cold? Where is the line to be drawn? More begged questions.

Locke certainly would have agreed that every person has a defeasable *moral* right to aid from members of his own family, and perhaps from his friends and neighbors; in Locke's reading, however, other people's main obligation is simply to leave you alone to lead your own life and to seek your own happiness as you see fit without their interference, much less the grudging assistance coerced from them by an intrusive government. Although Locke might also have agreed that each of us has a moral obligation as a Christian to provide such positive help as he can to all of God's children, including even distant strangers, he would have regarded this obligation as one of charity, not civility. In his view, you should have no duty as a citizen to dedicate your life, liberty, or property to the welfare and happiness of those unrelated to you by blood or common interest; and he would have regarded as intolerably tyrannical and oppressive any government, however well intentioned, that arrogated to itself the task of imposing such duties on you in order to grant the correlative rights to others.

Locke held, in short, that the government's function is to make its citizens safe and free; it is then up to them to make themselves and each other prosperous. Under that dispensation, good government protects its citizens from the predations and aggression of other people, both foreign and domestic; government ceases to be good and becomes evil, however, if it tries to protect its citizens from their own folly, improvidence, or bad luck by compelling people who have been more prudent, more industrious, or luckier to share their hard-earned wealth or to contribute their skill and labor to the welfare of people less fortunate, less energetic, or less talented.

Clearly Sunstein disagrees. He thinks it acceptable in theory to soak “the rich” for the benefit of “the poor,” which in practice necessarily means taking wealth from

the middle class in order to give it to those who possess less.<sup>3</sup> For the sake of the argument, we may grant that Sunstein is right to approve of this redistribution and Locke wrong to disapprove of it. My point is that it is absurd to pretend that the issue between them is a slight one. Yet Sunstein implies just such a cavalier presumption when he argues that an elaborate and extensive scheme of positive economic rights raises no special problems.<sup>4</sup>

### Why the Social Contract Was Limited to Negative Rights

In thus trying to blur the line between negative and positive rights, Sunstein overlooks a truth that was obvious to seventeenth-century proponents of the idea of a *social contract*. Hobbes, Locke, and other friends of the idea could understand why rational men would voluntarily sign an agreement to refrain from killing each other, from trying to enslave each other, or from taking each other's property—and would accept a government that enforces the provisions of this covenant. As Hobbes took the trouble to explain, the alternative to such mutually beneficial restraint is anarchy and lives that are “nasty, brutish, and short.” All of that seemed obvious. By contrast, it was not clear to these same seventeenth-century thinkers that rational human beings might be persuaded to surrender to any government the power to seize their property and compel them to work or risk their lives for the benefit of others who had no consanguinity with them. Contract theorists understood the appeal that a paternalistic government might have to its prospective beneficiaries, but they also understood that such a meddling if well-intentioned government would be stoutly resented and might be resisted violently by those who had to bear the costs of providing its largesse.<sup>5</sup>

As should now be clear, the difference between negative and positive rights was never thought to be that the latter rights require government action, as Sunstein proposes. It would be closer to the truth to say that Locke and others thought positive economic rights differ by *not* requiring government protection because they are more naturally and willingly provided by their beneficiaries or by kinfolk, close friends, and the charitable. Positive rights differ from negative rights in that (1) they impose more burdensome and onerous duties, and (2) their protection is less essential to maintenance of public order.

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3. Although rich people individually have more wealth than do members of the middle class, the collective wealth of the latter, much larger group is greater. Even if the wealth of the truly rich were confiscated, it would pay only once for the program that Sunstein envisages. Then the bills would have to be passed on to an increasingly large proportion of the middle class or to the next generation. For a discussion of the general point, see Jouvenel 1951. For a particular illustration, consider the fiscal disaster facing the Social Security system, a Roosevelt creation, in the United States; or think of the ever-expanding costs of Medicare.

4. Sunstein does acknowledge that his program presents problems of enforcement and “justiciability”; citing the recent experience of South Africa, of all places, however, he confidently declares that these problems are soluble (215–20).

5. The great exception was Rousseau (see Hocutt 2003).

For illustrations of both points, consider the following. A positive duty to support and feed another man's children is more irksome than a negative duty not to kill the same children or not to take food out of their mouths; and because people are naturally motivated to feed their own progeny, compelling them to do so is less essential to the social order than an injunction against murder and theft. Similarly, a positive duty to share my house with you, become your slave, or give you part of my wages would be considerably more irksome than a negative duty to refrain from taking your house, enslaving you, or stealing your wages; and because people are naturally motivated to make the efforts needed to provide themselves with shelter and food, compelling them do so is less necessary for the maintenance of society.

It might be replied that the burdens of positive duties are recompensed by the positive rights that everybody expects to enjoy in exchange. Thus, a requirement that X contribute to Y's education, medical care, or old-age pension is repaid by requiring Z to contribute to a similar benefit for X. It might also be said that because the rich benefit more than the destitute from government protections of property, it is only fair that the latter benefit from taxing the former. In short, it might be claimed that a scheme of governmentally protected rights has all the benefits of a system of insurance whose costs are distributed among its subscribers.

The trouble with this claim is that Sunstein is proposing not merely that the rich be taxed enough to compensate the government for serving as the guardian of their greater property. No fair-minded person can object to that proposal. Nor is Sunstein proposing merely that government provide its subjects with a safety net against penury or other extreme hardship. That, too, virtually everybody may find acceptable. Still less is Sunstein proposing an insurance scheme to which people choose to subscribe or not. Sunstein is recommending a system of government coercion to expropriate the earnings of the talented, the hard-working, and the fortunate for redistribution to the untalented, the indigent, the irresponsible, and the unlucky.

Many people may see nothing wrong with soaking the rich to benefit the rest. They may even regard such a policy as morally praiseworthy. I do not. In my view, the ultimate cost of such a policy is not monetary but political. To implement it would be to surrender to government the right to seize the property, restrict the liberty, and diminish the lives of some people in order to promise economic security to others. Understood aright, then, what Sunstein is advocating is not *adding* a Second Bill of Rights to the first, but *replacing* the Constitution's tried and true bill of political rights with a highly dubious bill of economic rights—a trade that entails too great a cost, it seems to me.

## Conclusion

People love to claim rights for themselves, especially when the rights they claim seem costless or their costs can be imposed on other people; and intellectuals, who will not have to pay the bills or perform the labor, love to reinforce such rights claims, either because they expect to share them or because advocating them for others is a cheap

way to accrue moral credit for good deeds. Thus, Sunstein argues for a bill of economic rights almost entirely on the ground that good food, good housing, and the like are not only desirable but essential for what he regards as a “decent” way of life.

As even Sunstein acknowledges, however, rights are not costless. To claim a right for yourself or a second person is to claim that some third person has an enforceable duty to provide it, protect it, or pay for it; and although rights are always good things to have, duties, especially positive duties, are generally irksome, especially when enforced by a meddlesome government. Government’s protections of life, liberty, and property seem essential, hence tolerable, but such negative and political rights impose on others only the duty to refrain from murder, slavery, and theft, and they demand from government only the enforcement of such restraints. By contrast, positive economic rights impose irksome and less-tolerable duties on those who must provide them, pay for them, and protect them.

A scheme of positive rights specifically requires some people to contribute labor or wealth to the well-being of people they do not love and may not think worthy. Thus, government has to be licensed to take liberty and property from some people in order to give it to others, creating resentment and possible reaction. Therefore, to add a Second Bill of Rights to the first would be to enact the most enormous and dangerous of political and economic changes. Such a change might conceivably be justifiable (though I have my doubts), but it cannot be justified merely by denying its enormity or by attacking such straw men as the truly mythical doctrine of *laissez-faire*.

Sunstein has not clarified the relevant issues; on the contrary, he has obscured them. Some of his colleagues at the University of Chicago have brought greater clarity to these same questions—among them the economists Milton Friedman and Gary Becker, who, along with others, have shown time and again that more people fare better in a productive market economy than under a redistributive but economically stultifying welfare state. Also among Sunstein’s colleagues is the law professor Richard Epstein, who has argued convincingly that a simple scheme of negative rights works better in a complex world than does the ambitious program of rules and regulations that Sunstein’s program would require (see Epstein 1995).

These men deal with too great a range of issues to be discussed in an article of the present restricted scope, however. My purpose has been more modest: to refute the claim that Sunstein’s colleagues prefer limited government because they are confused about the difference between negative and positive rights.<sup>6</sup> If confusion exists on this score, it is all on Sunstein’s side.

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6. Thanks to my colleague James Otteson.

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# Confusing Rights

## *A Reply to Hocutt*

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CASS R. SUNSTEIN

**O**n January 11, 1944, Franklin Delano Roosevelt delivered one of the most influential speeches of the twentieth century. With victory in World War II on the horizon, he contended that “the one supreme objective for the future,” the objective for all nations, was captured “in one word: Security.” This term meant “not only physical security which provides safety from attacks by aggressors,” but also “economic security, social security, moral security.” Building on this claim, Roosevelt contended that the United States had come to accept “a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.” This Second Bill of Rights would include, among other things, the right to a good education; the right to freedom from unfair competition and domination by monopolies; the right to a decent home; the right to adequate medical care; the right to adequate protection from the fears associated with old age, sickness, accident, and unemployment; and the right to a useful and remunerative job.

The influence of Roosevelt’s speech can be seen in its impact on the Universal Declaration of Human Rights, which includes the rights he championed. The same influence appears in dozens of the world’s constitutions, which borrow directly from Roosevelt’s Second Bill of Rights. Even the interim Constitution of Iraq, written with a great deal of American influence, shows Roosevelt’s influence, boldly proclaiming that “the individual has the right to security, education, health care, and social security.”

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In *The Second Bill of Rights: FDR's Constitutional Vision and Why We Need It More Than Ever* (New York: Basic, 2004), my first goal was to recover a lost part of U.S. history—to trace the origins of social and economic rights in American culture and to understand the historical background that led Roosevelt to propose his Second Bill. Too often, Americans (and Europeans) see the United States as committed to a form of individualism that is incompatible with rights of the sort that Roosevelt championed. Simply as a matter of history, this understanding is a blunder; one of America's greatest presidents sought those rights precisely in the name of individualism. Indeed, he saw those rights as a supplement to and compatible with what he described as the “sacred possessive rights” of property and freedom of contract, which preceded them.

In recovering Roosevelt's Second Bill, I had two other goals. I wanted to give a sympathetic account of the early-twentieth-century American attack on the distinction between negative and positive rights—an attack that found its way into the White House. Over a period of years, many people argued that the so-called negative rights, including the right to private property and the right to freedom of contract, depended for their existence on law, legal institutions, and aggressive government. Without government protection of property, people cannot enjoy property in the way that a capitalist society requires. In this sense, property is itself a positive right, and so too is contractual liberty. It is all very well to say that people should be able to make contracts as they choose (subject to the limitations of the criminal law), but without a legal system to enforce contractual agreements, contractual liberty is often meaningless. Those who made these arguments did not mean to attack capitalism, to which they were committed, but they thought that legal rights should be accepted, or not, after an inquiry into their functions in promoting human well-being. That inquiry should not be clouded by the effort, a conceptual disaster from the legal point of view, to distinguish negative rights from positive rights.

In my view, Roosevelt's Second Bill was made possible in part by claims of this kind. As early as 1932, Roosevelt proposed “an economic declaration of rights, an economic constitutional order,” that would recognize that “every man has a right to live,” which entailed “a right to make a comfortable living.” In making this argument, Roosevelt stressed that even “[Thomas] Jefferson realized that the exercise of the property rights might so interfere with the rights of the individual that the government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism but to protect it.” The key point here is that “property rights could not exist” without government, which makes such rights real in the world. Note in this regard that government intervention—in Roosevelt's view—is necessary to protect individualism rather than to destroy it.

Roosevelt did not believe that the Constitution should be amended to include the Second Bill of Rights. He was generally skeptical about both constitutional change and federal courts. He thought that the Second Bill should be seen as akin to the Declaration of Independence—as a statement of basic commitments to which the citizenry and its representatives would look in deciding on its basic obligations.

I am grateful to Max Hocutt for his courteous and careful treatment of my argument. Before I get to the central point, let me offer a few clarifications. Hocutt is correct to say that people can have moral rights that lack legal backing. My friends have a right to be treated with respect, but that right is not legally enforceable. Hocutt is also correct to say that moral sanctions for rights violations can be at least as strong as legal ones. My argument is not meant to take a stand on the question of moral rights, so it is not entirely clear what Hocutt seeks to accomplish by his emphasis on the existence of legally unenforceable moral rights. Does he mean to say that people might have a moral right to, say, education and housing without also having a legal right to these goods? Does he mean to say that their moral rights should be satisfied by private charity and entrepreneurship rather than by government?

If so, Roosevelt's only objection (and mine) is intensely pragmatic: private steps are most unlikely to do what needs to be done. In U.S. history, and in other nations' histories, private actions have never come close to providing people with decent opportunities and minimal security. In Roosevelt's words, "Government has a final responsibility for the well-being of its citizenship. If private co-operative endeavor fails to provide work for willing hands and relief for the unfortunate, those suffering hardship from no fault of their own have a right to call upon the Government for aid; and a government worthy of its name must make fitting response." In my view, Roosevelt was right.

Of course, this point is not meant as a criticism of voluntary private efforts to help or of government efforts to enlist moral suasion and economic incentives in the interest of relieving human suffering. Those who believe in the Second Bill of Rights should be entirely content if private efforts greatly reduce the need for governmental help. (Incidentally, Hocutt is wrong to say that I admire European social democracies; I don't.) For the future, it would be best to emphasize Roosevelt's goals, but also to seek less-rigid, more market-friendly and incentive-based methods for achieving those goals. Consider, for example, the earned income tax credit, which is far better than the minimum wage as a method for responding to the problems that the working poor face. A great deal of creativity—on the left, right, and center—has already been devoted to market-friendly methods of assisting those in need; we need many more such efforts.

Hocutt's principal objection, however, lies elsewhere. He believes that positive rights do indeed differ from negative rights in the sense that the former impose "weightier and more irksome duties." This "difference in weight," in his view, imposes a heavy burden of justification on "all who advocate adding positive economic rights to our constitutionally protected list of negative political rights." Hocutt emphasizes here what he sees as Locke's view that rights to life, liberty, and property reflect a purely negative duty, to the effect that other people must refrain from interfering with them. Hence, "Locke's was a scheme of purely negative rights," as is "the scheme of rights set out in the U.S. Constitution."

In this view, "people are called on not to do things, but rather to refrain from doing things, and the government's most important job is to see that they behave accordingly." Also according to Hocutt, Locke was a social-contract theorist who saw

a central truth, which is “that positive rights differ from negative rights in that (1) they impose more burdensome and onerous duties, and (2) their protection is less essential to the maintenance of public order.” Thus, it is “more irksome” to be asked to feed another man’s children than to be told not to take food out of their mouths; it is similarly more irksome to share my house with you than to be told to refrain from taking your house. Hocutt concludes that the real trouble with positive rights is that they legitimate “a system of government coercion to expropriate the earnings of the talented, the hard-working, and the fortunate for redistribution to the untalented, the indigent, the irresponsible, and the unlucky.”

This argument seems to me deeply puzzling. To see why, let us begin with the U.S. Constitution. It is simply not correct to say that our founding document creates “purely negative rights” in the sense of a duty of noninterference. The Sixth and Seventh Amendments create a right to a jury trial, which transparently requires government to create and taxpayers to fund an expensive (and sometimes irksome) apparatus, affirmatively requiring citizens and taxpayers to act, not simply to refrain from acting. Article I, section 10, forbids any state from enacting a “Law impairing the Obligation of Contracts.” This provision does not require the government or ordinary citizens to refrain from acting. It requires governments to ensure the availability of a court system that is ready and able to enforce contractual agreements. It also requires ordinary citizens to comply with their contractual obligations. (We can define that duty as an obligation to “refrain” from violating other people’s rights, but is it really helpful to adopt that definition?) Or consider the Fifth Amendment’s prohibition on the “taking” of private property except for “public use” and with just compensation. If the government abolished the trespass laws, in whole or in part, it would be violating the Fifth Amendment, which requires government to protect property rights, not to refrain from acting.

Hocutt asserts that “freedom of speech is a right *not* to be prevented from saying what one thinks,” but he offers an incomplete account of constitutional law. Freedom of speech also entails a right to the existence and free availability of public parks and streets, which must be open for expressive activity at taxpayer expense (subject to restrictions of reasonable time, place, and manner). In numerous places, the government is under an affirmative duty to safeguard rights.

Perhaps Hocutt will respond that many (not all) of these examples merely require government to ensure that some people do not interfere with other people—that government is merely protecting our rights to immunity from interference by others. If he makes that response, we should notice right away that he is acknowledging one of my central points, which is that government is under a positive duty to protect certain rights. He should not be embarrassed by that acknowledgment. But there is a much deeper problem. What exactly are the (prelegal) rights that government must affirmatively protect from private interference? Hocutt’s major answer seems to be that those rights, which he calls negative, do not impose “weightier and more irksome duties.”

But this answer is more puzzling still. How do we know whether a duty is weighty and irksome? Is this matter an empirical question? If it is, Hocutt's judgment is difficult to defend. If you are wealthy, it is not very irksome to be told that you must give twenty dollars each month to the relief of poverty or to feed someone else's child. If you are homeless, it is extremely irksome to be told that you cannot use someone else's house. Hocutt wants to accept the more conventional civil and political rights and to reject a right to decent opportunity and minimal security (which Roosevelt favored), but the ideas of "irksomeness" and "weight" do not come close to justifying Hocutt's preferences.

Hocutt does have another argument. He thinks that protection of the Second Bill of Rights "is less essential to the maintenance of public order." This also appears to be an empirical claim, and Hocutt does not say enough to defend it. Is the right to a jury trial more essential to the maintenance of public order than the right to education? Is the right to medical care less essential to the maintenance of public order than the "public-use" requirement of the Fifth Amendment? What definition of "public order" will enable us to answer these questions? Still, grant Hocutt his premise and suppose, for example, that the right to freedom from unreasonable searches and seizures does in fact contribute more to the maintenance of public order than the right to a decent home. So what? It would be perfectly plausible to say that government should protect the latter right as best it can, even though public order is less jeopardized by violation of this right than by violations of other rights.

I suspect that Hocutt's position has nothing to do with irksomeness or with maintenance of public order. Nor is it at all helpful to say that he is concerned with protecting rights of noninterference. What counts as "noninterference" depends on our antecedent theory of entitlement. If people have a right to food and housing, then the failure to provide food and housing is "interference." If people have a right to property, then takings of land count as "interference." What is Hocutt's theory of entitlement? Clearly he thinks that the conventional rights are real and that Roosevelt's are not—that Roosevelt was actually proposing to violate rights, properly understood, by calling for expropriation and by "surrender[ing] to government the right to seize the property, restrict the liberty, and diminish the lives of some people in order to promise economic security to others." This issue, I think, is the heart of the matter. Here, however, Hocutt is left with an assertion, not an argument. If government protects the rights to an education and to freedom from monopoly and unfair competition, whose property is being unacceptably "seized"? If government takes steps to ensure that everyone has adequate medical care or decent food and clothing, why must those steps involve an unacceptable seizure of property or restriction of liberty? Hocutt must believe that people have some kind of moral or prepolitical right to the holdings that they currently have, but he has said nothing to establish the existence of such a right.

These claims should not be misunderstood. Roosevelt rejected socialism, and he was no social democrat. He was firmly committed to capitalist institutions; moreover, he was committed to experimentation. He knew that those who seek economic equality will end up with neither equality nor prosperity. His plea for a Second Bill of Rights was a commitment to ends, not means. Market-friendly approaches, relying heavily on the private sphere, are to be welcomed if they work. Like Roosevelt, I do not favor judicial enforcement of the Second Bill of Rights, certainly not for the United States. To defend any set of policy initiatives, it is necessary to examine their consequences, including their incentive effects. When I argue that all rights are positive, I mean only to say that in order for rights to be realized, government's presence, not its abstinence, is required. Those who purport to reject "government interference" depend on it every day of every year.

These claims are not incompatible with the view that the rights to private property and freedom of contract are extremely important or that they have some special moral status. We can accept the Second Bill of Rights on various grounds without questioning a wide range of reasonable views about the foundations of moral and political rights. But we must reject the suggestion that people have some kind of moral entitlement to whatever holdings they have now. Roosevelt was right to find that view preposterous. The sooner we are rid of it, the better.