

All Rights Are Affirmative

BRIAN E. BUTLER

Abstract: Popular images of rights almost always emphasize their protective qualities. But who is really protected? In this paper it is argued that contemporary rights talk, because of faulty underlying assumptions, systematically favors prejudice and big property interests. Further, once the mistaken assumptions are surrendered, and it is realized that all rights are affirmative, a less systematically misleading debate can be created within the realm of rights discourse.

JOHN STUART Mill in *Utilitarianism* wrote that "People feel obliged to argue that the state does more for the rich than for the poor, as a justification for its taking more from them, though this is in reality not true, for the rich would be far better able to protect themselves, in the absence of law or government, than the poor, and indeed would probably be successful in converting the poor into their slaves" (p. 57). This statement has a natural air of plausibility about it. Rights are thought of as an important tool that helps protect the weak or unpopular, the minority of any type, from the majority. Given the truth of this description certainly the less powerful would gain more from state protection of rights than the more powerful. Analogously, such an argument would imply that those who are discriminated against on the basis of race must gain more from enforcement of rights than the prejudiced.

Images of rights offered by popular culture reinforce this picture. Discourse on civil rights almost always highlights the benevolent nature of rights. And if the benevolent nature of rights is not an explicitly made issue then it is just assumed to be true. All rights come to have a positive connotation due to a halo effect from the results (actual or assumed) of the Civil Rights movement. This assumption of the justness of all rights talk is reflected in much of the philosophical literature on rights. Probably the most influential theorist of rights alive today, Ronald Dworkin (pp. 190-93), characterizes rights as *essentially* counter-majoritarian (that is, a right checks the tyranny of the majority) and anti-utilitarian (a right checks the sacrifice of an individual or group to the "greatest good" for the society). Rights are, under this picture, strong protection for the individual against group pressures. If a right protects the individual from the tyranny of the majority and utilitarian pressures then rights are *always* pro minority and anti-majority. That this is what Dworkin argues is shown most clearly in his description of "rights as trump" (Dworkin: xi). This theory emphasizes that it is when the majority's interests are checked that rights do their real work.

The idea that civil rights are and have been important for racial minorities in the face of societal prejudice is surely correct. The history of the Civil Rights movement in the United States stands as a symbol of hope for a less prejudiced and more just America. It would be absurd and really inhumane to argue that rights-based discourse has not been very important in the creation and real or potential

realization of a less prejudiced society. But is this picture the whole story—or even the story we should be telling?

I believe that this popular and philosophically supported image of rights, if taken to be a complete image, is so distorted and one-sided as to be seriously misleading. Even worse, it is misleading in a manner that might be most damaging for those that require and justly deserve the most governmental protection. Look back to Mill's characterization of the respective positions of the "poor" and the "rich." According to him the government *creates* rights for the poor, in the absence of which the rich would probably convert the poor into slaves. This implies that the rights of the poor are active or "affirmative" rights created and enforced somewhat artificially by the government. More to the point, the rich people's riches are seen as natural. The claim is clearly that government is more in service of the poor than of the rich. The rich are described as being rich in a pre-political and non-governmental manner. Therefore, according to Mill, without governmental protection the rich would still be rich and be able to enforce their will upon the poor. Riches are seen as largely natural or pre-political in a way that rights for the poor are not. This description, of course, fits standard liberal theory quite well. But this very same description does not accord very well with the actual state of affairs in modern society.

Such a description of governmental purpose might have had some theoretical or empirical plausibility when the richest were also the most armed or the best organized warriors. If the world were organized on the manner of the Ponderosa, and private guns were the enforcement mechanism, the poor might need governmental help or be slaves to the ranch owners. In other words, if the costs of protecting riches are borne by the rich then it might plausibly be argued that wealth is pre-political. But today wealth is anything but natural, and the costs of protecting such wealth are borne by the state. The richest people in today's economy are those that own the most intellectual property—such as copyrights in computer software and patents in medical technology. Try to imagine these rich people, try to imagine the worth of this type of property, without the active protection of the government. Not only is such property only protected through governmental action, such property is affirmatively created by governmental design. Clearly most if not all wealth in the modern world is a creation of government, an artificial product, and is protected actively by government.

An important example of the creation of such wealth is the Sonny Bono Copyright Extension Act (Pub. L. No. 105-298, 112 Stat. 2827 [October 27, 1998]). This very recent act extended copyright ownership to creations that were going to become common domain (and would be by now). In effect, early copyrighted works that were going to be common social property, usable at will by any individual to produce products, were grasped from society at large and placed in the hands of the previous owners by a governmental act of active and redistributive law making. This is clear corporate affirmative action. The right to property was affirmed in a new and radically longer way for entrenched owners like Disney and eliminated for the rest of us. The act was justified as bringing the United States copyright laws in line with international standards, but this is not

correct. For instance, in "works made for hire," the type of copyright most relevant to the corporate context, the copyright protection period in the United States is at least 25 years longer than those allowed in Europe (and many countries in Europe don't recognize such a category at all; see Gifford: 393). Clearly, the U.S. laws protect corporate copyrights (which are actually governmentally enforced monopoly rights) much longer than the international standards. Therefore other reasons are necessary to explain the length and strength of copyright protection in the U.S. (see Jessica Litman, for a damning critique of the process by which copyright laws are designed and implemented as well as the huge ideological change that has occurred in this area of law recently).

It is only because we are analyzing such an act from an assumed naturalist base line (or we are not aware of the act, which is even more worrisome) that we are not all upset about this loss of what were our collective property rights. It is really remarkable that this culture-wide loss of property rights in favor of a few corporations elicited so little in the way of public complaint. The public should be outraged at this clear tax of socially owned property for payment to corporate interests. Lack of public response shows that even in the face of such blatantly artificial and governmentally created property rights as those of modern intellectual property the naturalistic base line remains unquestioned, and Mill's assumptions are still alive.

What this example brings out, I hope, is the manner in which Mill's distinction between rights of the poor as governmentally created, and the property rights of the rich as natural and somewhat pre-political is really intellectually bankrupt and yet ever-present. In actuality it is much more correct to say that *the rights of the rich as well as the poor are created and protected by the government*. The rich and powerful rest upon artificial or affirmative rights as much as, if not more than, the poor do. The conclusion: there is no natural base line position, no natural allocation of rights, that doesn't include the active use of governmental power, that is, the use of governmental action. The right to own property and have it protected from others and the right to be protected from property owners are equally artificial and equally contingent upon governmental enforcement. That one area appears natural or pre-political and another area appears artificial and political in nature is just due to blindness on our part of the governmental action that the apparently "natural" rights such as property really entail. That such a blindness can have significant effects upon political expectations should be obvious.

This mistaken belief in the pre-political or non-affirmative aspect of some rights and the distorting effect of such a belief is clearly shown in the Supreme Court's doctrine of "State Action." The State Action doctrine was created by the Court in order to limit the reach of the Fourteenth and Fifteenth Amendments. Those amendments were intended to protect former slaves and guarantee them due process, equal protection of the law and their right to vote. In the *Civil Rights Cases* (109 U.S. 3 1883) the Supreme Court held that the Fourteenth Amendment only applies to action directly authorized or sanctioned by state law. The Civil Rights Act of 1875 guaranteed all persons "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances,

ALL RIGHTS ARE AFFIRMATIVE

on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The Supreme Court found the act unconstitutional. Justice Bradley, writing for the Court, argued that the act did not aim to correct state activity but instead aimed at regulating the private acts of individuals unsupported by any state authority. Because the Court could not find in such "private" acts sufficient state action to constitute a constitutional wrong the act was ruled invalid. With this "state action" move the courts of various states were subsequently able to sustain such blatantly racist activities as all white primaries. The Court in *Grovey v. Townsend* (295 U.S. 45 [1935]) held that such activities were not state action. In effect, the choice of who could be voted for was held not related enough to the state to infringe upon the votes of those excluded. In *Moose Lodge v. Irvis* (1972), the Supreme Court, in a Rehnquist opinion, also held that private clubs were not directly related to or authorized by state action even though the club in question was issued a liquor license and such licenses were restricted in number, thereby limiting access to regulated products by restricting access to the club along racial lines. Need it be pointed out that the property rights that the club's physical existence rested upon were state created and enforced?

The Civil Rights movement weakened the defensive power of the state action doctrine a little. For instance, in the *Sit-In Cases* (e.g. *Bell v. Maryland*, 378 U.S. 226 [1964]) the arrests and convictions of African-Americans that refused to leave segregated areas in restaurants were overturned by the Supreme Court because the owners used government police to enforce the segregation. The Court found state action present because the owners had required the help of state employees in order to enforce their racially discriminatory policies. And in *Reitman v. Mulkey* (387 U.S. 369 [1967]) the court held that an amendment to the California Constitution prohibiting governmental interference with a person's "right" to discriminate along racial lines when selling or renting a house was an instance of state action. But these cases were anomalies, and ever since they were decided the Court has been eroding their impact by describing state action more narrowly and forcing the litigant to show a close nexus between the action and government. It is a legitimate question as to whether or not the Rehnquist/Scalia/Thomas Court would find state action in the nominally private act of renting one's apartment or selling of one's house even if done along blatantly racial lines.

The Rehnquist Court has, indeed, used the state action doctrine to actually limit protection to racial minorities. In *City of Boerne v. Flores* (521 U.S. 507 [1997]) the Court invalidated a Congressional Act (the Religious Freedom Restoration Act) that protected religious rituals from state laws unless the state could provide a compelling reason for truncating the religious practice. Congress had passed the law to protect the ritual use of peyote in Native American ceremonies. It has used the same doctrine to eliminate laws which gave other minority groups rights as well. In *Kimel v. Florida Board of Regents* (528 U.S. 62 [2000]) the Supreme Court struck down a law passed by Congress that was aimed

ALL RIGHTS ARE AFFIRMATIVE

at forbidding age discrimination by the states. The only accurate way to describe such a result is that the employer's right to discriminate due to age considerations was found to be constitutionally protected while the right to be protected from such discrimination is unconstitutional. Once again, the cases show that rights are not protecting minorities but, on the contrary, that big property interests are being served. Finally (well not really finally, because in *Board of Trustees of the University of Alabama v. Garrett* [U.S. {2001}, the Court struck down a portion of the Americans with Disabilities Act with much the same type of reasoning), in *United States v. Morrison* (529 U.S. 598 [2000]), the Court held unconstitutional a right to sue attackers that Congress had provided for victims of gender-motivated violence. The Court held on the precedent of the *Civil Rights Cases* that such a right would reach purely private conduct. But this should be seen as absurd when gender relationships, the family as we know it, and the right to discriminate on the basis of gender are largely the result of governmentally created rights and entitlements.

Today the agreed upon test for state action has three aspects: (1) whether an activity is an activity traditionally exclusively reserved to the state (a "public function"); (2) whether the government is so significantly involved with the private actor as to make the government responsible for the private conduct (but pervasive regulation and/or government financial support is not enough to satisfy this aspect); or (3) whether the government may be said to have approved or authorized the challenged conduct sufficiently to be responsible for it (this requirement is increasingly held to be a need to find a state "command"). But such a test is not very clear as to its meaning. For instance, in *Rendell-Baker v. Kohn* (457 U.S. 830 [1982]) a school that relied upon over 90 percent public funds was held to be not so significantly involved with government for its activities to constitute state action.

I hope it is very easy to see how this test, and the state action doctrine itself, rests upon a fallacious type of reasoning exactly parallel to that of John Stuart Mill's. Both Mill and the Supreme Court treat some rights as pre-political or private, as natural base lines that need not be questioned, and other rights as politically created or affirmative. After making this illegitimate—because descriptively inaccurate—move they then place a high burden of proof upon the side they find to be politically "active." The assumed natural base line of the pre-political is allowed, on the other hand, to function without argument. This unquestioned base line frames the whole debate in a way that systematically favors some rights, and therefore some rights holders, to the detriment of others. Because there really are no such natural or pre-political rights (at least in the manner they are assumed within contemporary debate) such an assumption wrongfully distorts the debate. And because in this culture there seems to be an assumption that property rights are not active or affirmatively created rights they are given a free ride by the Court and by the public.

So what does this all have to do with civil rights in general? First, a more critical look at how rights are described would show that much rights discourse is not inherently progressive or pro-minority at all. States rights, property rights, rights to free association (which means many times the right to exclude along racial

lines) have all been used to obstruct more fair and equitable social arrangements. A less one-sided picture of rights discourse would allow the debate to go on without the presupposition that rights are essentially or even normally protective of the poor, weak, powerless, the victims of prejudice, etc. It might be seen that governmentally created rights very often, probably more often, protect the rich, powerful and prejudiced to the detriment of others. A less one-sided picture of the nature and uses of rights might help ensure a more critical stance towards the current uses of rights discourse. In *The Cost of Rights* (pp. 37–43), Stephen Holmes and Cass Sunstein make similar arguments about the social nature of rights talk. I am largely sympathetic to their arguments. On the other hand I see a problem with using “cost” terminology over “affirmation” vocabulary. Adopting costs as the evaluation tool privileges economic discourse much too highly. It also runs the risk of making the critique too parochial. Why is “cost” thought to be such a neutral term? I believe that the necessity of affirmation of any right—no matter how apparently natural—is a much more universal and obvious point to start from.

Second, seeing the state-created aspect of wealth highlights how wrongly framed much of the debate on civil rights has been. The unconscious naturalism that is used to shift the burden of proof to those who argue for less entrenched and more socially visible rights against others resting upon rights thought more natural allows the debate to be carried on in a way that systematically favors the traditional (though not pre-political) hierarchical and prejudicial social structure. If it is seen that the rights that are thought pre-political are really a product of state action, are really affirmatively created by government, then the debate will not be so unfairly and incorrectly one-sided. Both sides in the debate will have to offer reasons for the adoption of their image of rights. Only then will the use of the term affirmative action be properly understood. It will be just a plain descriptive statement to say that *all rights are affirmative*. Without naturalistic base line assumptions attached to some rights the question will become which set of rights should be affirmed as the most just, and how. It may be that given such a question conscious and unconscious prejudices would have fewer places to hide. At the very least prejudices will not be hidden behind a patina of natural and pre-political right.

A doctrine of rights that doesn't rest upon naturalistic base line assumptions is a position that is admittedly less certain and more complex. Such a position sees rights talk not as an end in itself, but rather as a discourse that throws us back upon the issue of what type of society we really want to build. Such an image of rights might diffuse some of the power associated with the raising of a rights claim. On the other hand, if rights claims are actually functioning as described in this essay, then just such a loss of power may help reframe the debate in way that doesn't place one side in such a pre-prejudiced starting position.

Cases Cited

Bell v. Maryland, 378 U.S. 226 (1964).
City of Boerne v. Flores, 521 U.S. 507 (1997).

The Civil Rights Cases, 109 U.S. 3 (1883).
Grovey v. Townsend, 295 U.S. 45 (1935).
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).
Moose Lodge v. Irvis, 407 U.S. 163 (1972).
Morrison (United States v.), 529 U.S. 598 (2000).
Reitman v. Mulkey, 387 U.S. 369 (1967).
Rendall-Baker v. Kohn, 457 U.S. 830 (1982).

Law Cited

The Sonny Bono Copyright Term Extension Act. Public Law No. 105-298, 112 Statute 2827 (October 27, 1998).

Works Cited

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.
 Holmes, Stephen and Cass R. Sunstein. *The Cost of Rights*. New York: W.W. Norton, 1999.
 Gifford, Christina N. “The Sonny Bono Copyright Term Extension Act.” *University of Memphis Law Review* 30 (2000): 363-408.
 Litman, Jessica. *Digital Copyright*. Amherst: Prometheus Books, 2001.
 Mill, John Stuart. *Utilitarianism*. Indianapolis: Hackett, 1979.