# Book Reviews

**RIGHTS AND RESPONSIBILITIES.** By Leon Trakman[1] and Sean Gatien.[2] University of Toronto Press. 1999. Pp. 286. $24.95.

*Evan Tsen Lee*[3]

There is a widespread perception that America is obsessed with rights. Leftists and conservatives both decry a culture whose first instinct in solving any social problem is the assertion of a right.[4] Left academics lament the system's reliance on the concept of rights to protect or advance the social and economic welfare of the oppressed.[5] The assertion of rights, they say, is "alienating."[6] Social conservatives want America to turn to the nuclear family, the church, and the local school board as means of settling disagreements about values.[7] Both Left and Right call for revitalizing a strong form of community; never mind that each's vision of community may be the other's worst nightmare.[8]

But rights discourse is proving remarkably resistant to criticism from both sides. It runs deep in our legal culture, and nei-

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1. Bora Laskin National Fellow and Professor of Law, Dalhousie Law School.
2. Research Associate, Dalhousie University.
3. Professor of Law, University of California, Hastings College of the Law.
4. See, e.g., Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991).
5. See, e.g., Mark Tushnet, *An Essay on Rights,* 62 Tex. L. Rev. 1363 (1984).
6. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves,* 62 Tex. L. Rev. 1563, 1566-69 (1984).
7. See, e.g., Morton M. Kondracke, *Bush Will Fight 'Culture Wars'—But 'Positively,'* Roll Call (Oct. 21, 1999), available in LEXIS, News Library, Roll Call File (Governor George W. Bush advocating the bolstering of the role of schools, parents, and churches in inculcating values); *Candidate-by-Candidate Look at Personal Beliefs, Comments,* USA Today (Sept. 10, 1999), available in LEXIS, News Library, USA Today File (former Vice-President Dan Quayle arguing that schools should strengthen "character education" programs, starting with the Ten Commandments).
8. Contrast Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (U. Notre Dame Press, 2d ed. 1984) (advocating an Aristotelian approach that rests heavily on tradition) with Michael Walzer, *Justice Here and Now,* in Frank S. Lucash, ed., *Justice and Equality Here and Now* 136-150 (Cornell U. Press, 1986) (advocating programs requiring mass redistribution of wealth and political control).

ther side wants to forego its pet claims (rights to life, property and bear arms on the Right; rights to equality, reproductive freedom, and government entitlements on the Left). There is also the problem of what would replace the liberal, individual-centered, state. To enforce community solidarity, we must have some kind of consensus about fundamental values, which would seem difficult to achieve in a nation of a quarter billion people descended from dozens of starkly different cultures. Then there are problems of implementation. America's public and private sectors are both largely predicated on the supposed incorrigibility of individual and group self-interest. Replacing the infrastructure and language of the liberal, pluralist state would be a daunting task indeed.

In *Rights and Responsibilities*, Leon Trakman and Sean Gatien announce from the start that they are not out to trash liberalism or its rights discourse.[9] (p. xii) Rather, they seek to create some balance between individual freedoms and community interests.[10] (p. 20) Too often, they say, individual rightholders are permitted to exercise their freedoms in a manner destructive of community interests—for example, by strip mining or clear cutting forests. When by chance another party can assert a countervailing legal right, the court may actually stop the first rightholder from acting in such a destructive manner. But if no such countervailing right exists, the courts are powerless to stop the destruction.

So existing rights jurisprudence is deficient because it falls short of protecting vital community interests against individual rightholders' destructive acts. There aren't sufficient *external* impediments to the exercise of rights—such as countervailing rights—to guard these vital community assets. What we need, say Trakman and Gatien, are *internal* restrictions on the exercise of rights. Such internal restrictions would not be dependent on the inclination or ability of others to come forward and demonstrate countervailing rights. They would, as popular saying has it, come with the territory. Trakman and Gatien call these internal restrictions "responsibilities" and explain the concept as follows:

9. The authors state, "[our] aim is to enrich liberalism, not undermine it." (p. xii)

10. The authors criticize both Michael Sandel's communitarianism and John Rawls's liberalism on the ground that "[b]oth fail to balance important individual and social values by insisting upon the priority of either the right or the good." (p. 20)

> If the prima facie right is not overridden by *external* limits, but is shown to have a sufficiently probable and proximate impact that is detrimental to sufficiently important interests, then an *internal* limit or responsibility is imposed upon the exercise of rights that limits or nullifies these effects. For example, if the exercise of a mining right gives rise to pollution, that right is subject to *internal* limits that restrict it and, in extreme cases, prohibit its exercise.[11] (p. 65)

To take one of Trakman and Gatien's more specific examples, let us suppose that an oil company wishes to explore for oil on land that it owns. Further suppose that Native peoples claim that the exploration will disrupt or destroy their traditional or historical preservation and use of the land. To the degree that the Native peoples cannot assert their own legal rights against the proposed exploration, the courts must determine whether the oil company nonetheless owes certain responsibilities to the Native peoples, such as consulting with them, ascertaining the precise impact of the exploration on their way of life, and perhaps modifying the exploration to minimize such disruption or to compensate them for it. (pp. 195-96)

It is not clear where Trakman and Gatien find theoretical justification for the recognition and enforcement of such internal limits on the exercise of rights. The reader is left to think that the justification is simple fairness. "If an individual right serves as a trump over the interests of others . . . then that individual incurs a responsibility toward those others." (p. 13) The authors also seem to suggest that the justification for recognizing responsibilities is the need to maintain a balance between individual and community interests. Trakman and Gatien compare their approach to that of equity jurisprudence. "This new equity," they say, "transcends limitations in the law by superseding all-or-nothing choices between harsh common-law remedies and equitable interests that neuter rights." (pp. 62-63) Indeed, Trakman and Gatien go so far as to claim that, by imposing responsibilities on the exercise of individual rights, liberty itself is enhanced: "The benefit in protecting *both* individual *and* shared interests is the enhancement of liberty *and* of the common good."[12] (p. 63) So their justification for enforcing responsibilities appears both deontological and consequentialist—fairness demands it, and it improves everyone's lot to boot.

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11. Emphasis in original.
12. Emphasis in original. Footnote omitted.

Another claim that Trakman and Gatien make for their "transformative approach" to rights is that it avoids the error of establishing an *ex ante* priority of individual right over social good. "We orient justice around the *ex post* balancing of the interests of individuals and communities," (p. 40) Trakman and Gatien explain. "Responsibilities are determined *ex post* in light of affected interests of both individuals and communities, not on the basis of an a priori ranking of first-order individual rights above second-order cultural interests." (p. 79) The authors do not say whether *ex post* really means *ad hoc*—one suspects that it does—nor do they venture any guesses about whether such a system would provide adequate notice to protect the reliance interests of rightholders.

Trakman and Gatien's most insistent claim, however, is that their proposal would reconstitute rather than overthrow the liberal conception of rights.[13] Subjecting rights to enforceable responsibilities does not repudiate liberalism or the notion of rights. It expands liberalism to make it more inclusive. It does not reject individual autonomy, but only the insistence that individual autonomy be accorded a preferred position in relation to community interests. Trakman and Gatien portray their liberalism as a balanced liberalism.

Their approach should have enormous popular appeal. Who would gainsay the old aphorism that "with rights come responsibilities"? It is only common morality that those who wield power over others should do so in a considerate and responsible manner. Indeed, one can make a strong case that those who have the power to alter the conditions of others' lives stand in a moral fiduciary relationship with those others.

But it is one thing to say that one's legal rights are qualified by moral responsibilities; it is quite another to say that they are encumbered by *legally enforceable* responsibilities. Once we cross over from moral suasion to legal enforceability, it is difficult to see how Trakman and Gatien's notion of a "responsibility" differs in any useful respect from either the narrowing of existing rights or the creation of new countervailing rights.

Consider hate speech. Trakman and Gatien conclude that neo-Nazis or the KKK had a right to march in Skokie, Illinois (where many Jews, including Holocaust survivors, lived). (pp.

13. See, e.g., p. 68 ("Modifying the structure of rights to encompass the wider interests of others, as proposed above, continues to preserve liberal values.").

115-16) But they stress that the KKK had a responsibility to submit to regulations governing orderly conduct, which presumably means not inciting a riot. If the argument were that the KKK had a *moral* responsibility not to bait the locals, then Trakman and Gatien truly would be saying something that cannot entirely be captured by the language of legal rights. The moral constraint on the KKK is qualitatively different than any legal constraint. But their argument is that the KKK has a *legally enforceable* responsibility not to engage in incendiary behavior. How is that any different from saying either that the KKK has no legal right to engage in incendiary behavior, or that the locals have a right not to be baited that way? If there is any difference, Trakman and Gatien do not explain it.

For the same reason, it is unclear why Trakman and Gatien think that their distinction between "internal" and "external" restraints has any significance. They claim that external restraints do not always get the job done, as in the protection of important Native and aboriginal interests. The law simply does not recognize enough legal rights on the part of Native and aboriginal tribes. So Trakman and Gatien say that we ought to recognize responsibilities—internal restraints on property rightholders—to protect these interests. Yet they never explain why courts[14] would be inclined to see the situation differently once they view matters through the lens of internal responsibilities instead of through the lens of external rights. The problem here seems political rather than jurisprudential. If courts don't have the political will or legitimate authority to create countervailing rights to protect Native and aboriginal interests in sacred burial grounds or fishing waters, what gives them the political will or legal authority to recognize legal responsibilities that have precisely the same effect—that is, to defeat the rights of property holders? Giving the players different names cannot change their capabilities.

This is a serious flaw. For the jurisprudential thread that holds this book together is the assertion that the distinct concept of "responsibilities" adds something to—indeed, rescues—rights discourse. Without that thread, the second half of the book reads much like a collection of position papers on hate speech, abortion, Native rights, and international environmental protec-

14. All their arguments seem addressed to courts rather than legislatures, agencies, or the general electorate.

tion.[15] It becomes a manifesto for substantive centrism[16] on the major divisive social issues of our time, as well as a call for greater respect of Native, aboriginal, and environmental interests. On the merits, these positions are certainly plausible. But a jurisprudentially "transformative" approach to rights? No.

Indeed, one must question the sincerity of the authors' claimed desire to reform rights jurisprudence rather than to destroy it.[17] Time and again Trakman and Gatien insist that the recognition of legally enforceable "responsibilities" would not defeat the notion of rights. On the surface, this claim looks correct: saying that one must exercise his right of free speech responsibly is hardly tantamount to saying that he has no right of free speech. The problem with this analysis is that it lumps discrete activities together. Trakman and Gatien say that the KKK may march in Skokie, but they must do so in a responsible manner, meaning that they may not bait Jews with epithets. Thus they characterize their position as preserving rights while introducing responsibilities, rather than as negating rights. But this misdescribes their position. Under their solution, the KKK retains the right to march, but it has no right to hurl racist epithets while doing so. It is true that Trakman and Gatien are preserving one right, but it is equally true that they are denying another. As a matter of free speech doctrine, it is eminently sensible to say that the KKK ought have no right to bait Jews for the purpose of provoking a riot, and therefore that the municipality of Skokie ought to have the power to prohibit such incitement. But one who holds this position ought to admit that he or she is denying the KKK the right to engage in a particular activity and not simply requiring them to engage in some other activity "responsibly."

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15. The authors draw on their previous works in three of these four areas. See generally Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 Ohio St. L. J. 899 (1995); Leon E. Trakman and Sean Gatien, *Abortion Rights: Taking Responsibilities More Seriously Than Dworkin*, 48 S.M.U. L. Rev. 585 (1995); Leon E. Trakman, *Native Cultures in a Rights Empire: Ending the Dominion*, 45 Buffalo L. Rev. 189 (1997).

16. On abortion, for example, the authors conclude that women should not enjoy "unqualified reproductive autonomy," nor should fetuses enjoy "unconditional rights to life." They characterize this as a "mediated discourse . . . unlikely to appease steadfast pro-lifers and unfailing pro-choicers." (p. 163)

17. The authors never let slip anything that makes them sound like true liberals, but they do occasionally say things that make them sound like unreconstructed communitarians. See, e.g., p. 19 ("Our own keepers to be sure, we are also the keepers of our brothers and sisters, neighbours and strangers, parents and children.").

All this follows from our conventional understanding of rights. As Ronald Dworkin has put it, a right is an individual "trump" over types of governmental justifications that may be urged on the community's behalf.[18] That is to say, a right functions much as would a thumb on the scales. Different interests have different trumping power.[19] Some interests, such as the right to drive on public roads, have modest trumping power, and accordingly have been qualified in many respects. Others, such as the interest in not being tortured, approach absolute trumping power. To the degree that the individual interest is held to trump social interests, we say it is protected by a "right." When and to the degree that the trump disappears, so does the right.

Trakman and Gatien either do not understand or accept this essential trumping quality of a right. Their confusion is laid bare in their critique of Charles Taylor's essay on multiculturalism:

> The problem with Taylor's approach is that it retains liberal, exclusionary priorities. Despite the legal value that he accords cultural interests, he treats individual interests as first-order rights and cultural interests as second-order *rights*. He also structures cultural interests a priori so that individual rights always trump cultural *rights*. As a result, Taylor's right to cultural recognition is subservient to the prior right of individuals to be autonomous from *that* culture.
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> Taylor's approach is only limitedly justifiable. It *is* justifiable for individual rights to trump cultural interests *in some cases*. But it is *not* justifiable to hold that this is necessarily so *in all cases*.[20] (pp. 78-79)

Put to one side the fact that Charles Taylor is hardly a poster boy for atomistic liberalism.[21] In this passage, Trakman and Gatien refuse to accept the conventional use of the term "rights" to denote trumping power, instead urging that we reconceptualize rights so as to make their weight contextual and contingent. My point is simply that, to the degree "rights" are shorn of their trumping power, they become mere "interests" subject to ordi-

18. Ronald Dworkin, *Rights as Trumps*, in Jeremy Waldron, ed., *Theories of Rights* 153 (Oxford U. Press, 1984) ("Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.") (footnote omitted). I concede that my critique depends on Dworkin's concept of rights making sense.

19. Id. at 92.

20. Emphasis in original. Footnote omitted.

21. Taylor's communitarian bent is made clear in Charles Taylor, *The Nature and Scope of Distributive Justice*, in Frank S. Lucash, ed., *Justice and Equality: Here and Now* at 34-67 (cited in note 8).

nary weighing in the decisional process. Of course we can reconceptualize "rights" in this fashion if we want—but we are then left with nothing other than non-deferential balancing of all interests, whether belonging to individuals or groups. This is not a new idea.

Let us place this discussion back in the concrete free speech situation. When the courts hold that the KKK's interest in marching trumps the social interest in being free of public celebrations of hatred and intolerance, we say that the KKK has a "right" to march. When the courts hold that the KKK's interest in inciting riots does not trump the social interest in public safety, we say that the KKK has no right to incite riots. Trakman and Gatien hold just this position—that the KKK's interest in inciting riots does not trump social interests. They can call it a responsibility or anything else they like, but if they deny the trump, they deny the right. Granted, Trakman and Gatien are not attempting to eliminate all rights. They would leave many intact. But for every "responsibility" the courts enforce, a right is denied. It is disingenuous to suggest, as the authors do, that imposing responsibilities makes everybody a winner.[22] (p. 63)

Many on both the Left and Right preach that individuals must demonstrate greater responsibility to society. The interest pluralism of the New Deal and the Warren Court's enshrinement of individual rights have left us in a relatively atomistic, often alienating world. Scholars have debated this issue intensely for decades and undoubtedly will continue to do so. Trakman and Gatien deserve praise for taking this jurisprudential debate seriously. They could have written a book simply venting frustration about the loneliness of modern liberal society and extolling the romantic virtues of community. They did not. They wrote a book that tackles the theoretical problem at the level of intellectual sophistication that it demands. In the end, however, their "transformational" strategy of recognizing "responsibilities" is unsatisfying. If we are to make greater concessions to social interests by scaling back individual rights or by recognizing countervailing group rights, we should do so forthrightly. We should not mask the sacrifices with mystifying terminology or claim that "everybody wins" when in fact someone will always lose.

22. The authors state, "[t]he benefit in protecting *both* individual *and* shared interests is the enhancement of liberty *and* of the common good." (p. 63) (emphasis in original) (footnote omitted).